



USAID | **UKRAINE**
FROM THE AMERICAN PEOPLE

CORRUPTION RISKS IN RECENT REFORMS TO THE UKRAINIAN JUDICIARY

Contract No. AID-OAA-I-13-00032, **Task Order No.** AID-121-TO-16-00003

Nove Pravosuddya Justice Sector Reform Program (New Justice)

Contracting Officer's Representative: Oleksandr Piskun, Democracy Project Management Specialist, Office of Democracy and Governance

Development Objective 1: More Participatory, Transparent and Accountable Government Processes

Author: Dr. Victoria Jennett, Judicial Reform Expert

Submitted by:
Chemonics International Inc.

September, 2017

DISCLAIMER

The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development (USAID) or the United States Government.

TABLE OF CONTENTS

| | |
|---|----|
| Acronyms | 4 |
| Introduction | 5 |
| Recommendations..... | 5 |
| Judicial corruption | 10 |
| What is judicial corruption? | 10 |
| How judicial corruption manifests itself in Ukraine | 11 |
| The 2016 reforms to tackle judicial corruption in Ukraine | 12 |
| 1. Protecting judicial independence in Ukraine | 13 |
| 2. Judicial self-governance in Ukraine..... | 14 |
| 3. Selecting and appointing judges in Ukraine | 16 |
| General Comments | 16 |
| Overview of the system for selecting and appointing judges in Ukraine..... | 16 |
| Appealing decisions made in the selection process | 17 |
| The selection process for 120 judges for the Supreme Court..... | 18 |
| 4. Training of judges in Ukraine | 23 |
| 5. Supervising the assets, interests and ethical behaviour of judges in Ukraine..... | 23 |
| Conflict of interest laws in Ukraine | 23 |
| Identifying judges' conflicts of interests..... | 24 |
| Supervising judges' assets and behaviour: the role of the NACP, HQCJ and HCJ..... | 25 |
| Ethics advice and training for judges in Ukraine..... | 26 |
| Gifts | 27 |
| 6. Sanctioning poor conduct of judges through disciplinary proceedings in Ukraine | 27 |
| General remarks | 27 |
| Disciplinary grounds..... | 29 |
| Disciplinary proceedings..... | 29 |
| Anonymous complaints and whistleblowers | 31 |
| Judicial immunity | 31 |
| 7. Evaluating the performance of courts and judges in Ukraine..... | 32 |
| Performance evaluations of courts..... | 32 |
| Individual evaluations of judges..... | 33 |
| 8. Court case management system in Ukraine..... | 34 |
| Case allocation | 34 |
| Transparency of judicial decision-making | 36 |
| 9. Establishing a specialized Anti-Corruption Court in Ukraine | 36 |
| Annex 1: Table of overview of the risks of judicial corruption in Ukraine | 38 |

ACRONYMS

| | |
|-------|---|
| CoE | Council of Europe |
| ConJ | Congress of Judges |
| CoJ | Council of Judges |
| CC | Criminal Code |
| HCJ | High Council of Justice |
| HQCJ | High Qualification Council of Judges |
| IMF | International Monetary Fund |
| LJSJ | Law on the Judiciary and Status of Judges |
| LHCJ | Law on the High Council of Justice |
| LPC | Law on the Prevention of Corruption |
| MoJ | Ministry of Justice |
| NABU | National Anti-Corruption Bureau |
| NACP | National Agency on Corruption Prevention |
| NSJ | National School of Judges |
| OSCE | Organisation for Security Cooperation in Europe |
| PIC | Public integrity Council |
| SAPO | Special Anti-Corruption Prosecutor's Office |
| SJA | State Judicial Administration |
| UNCAC | United Nations Convention Against Corruption |

INTRODUCTION

The primary objective of this study is to assess the effectiveness of the 2016 judicial reforms in Ukraine in promoting integrity and in preventing and tackling corrupt conduct within the judiciary. To do this, the study identifies corruption risks in nine (9) areas of the judiciary that may enable judicial corruption and other poor judicial conduct, and threaten the integrity and effectiveness of the judiciary in Ukraine.

The focus is on weak institutional mechanisms in the judiciary that make judicial officials less likely to perform their duties in the public interest, or that enable external actors in political organs, the legal community, the private sector, civil society and the wider justice sector to exert undue influence on judicial decision-making. Institutional weaknesses include gaps and flaws in mechanisms to prevent corruption and strengthen integrity, such as in selection, training, assessment and appointment procedures, as well as weaknesses in mechanisms to mitigate corruption, such as inspection, disciplinary and sanctioning mechanisms.

The study does not set out to uncover or quantify instances of corruption in the judiciary. Rather it describes the forms that corruption and poor conduct in the Ukrainian judiciary may take, and seeks to locate the gaps and vulnerabilities in the system where they may occur. The table in Annex I sets out an overview of the types of corruption or forms of poor judicial conduct that may affect processes, bodies and the independence of the Ukrainian judiciary, and describes some of the indicators or results that point to the presence or likelihood that those types of corruption or forms of poor conduct will occur.

One remarkable feature of the 2016 reforms is the opportunity for greater public scrutiny of the governance processes of the Ukrainian judiciary. However, greater openness and publicity of judicial governance processes does not necessarily correlate with greater transparency of how decisions are made within the system. For example, civil society groups may now, through the Public Integrity Council, assist in the selection of judges, and YouTube viewers may watch judges being interviewed for judicial positions to the Supreme Court, but judges themselves do not have the possibility to make an appeal to fully review the merits of decisions to terminate their applications for judicial positions. The behind-the-scenes decision-making is not always transparent, even if the media and civil society observe and participate in those decisions.

The aspects of the Ukrainian judiciary examined in this study are assessed against international standards on judicial independence, integrity, accountability and efficacy that are referenced in footnotes throughout the study and include reports and opinions of the Council of Europe bodies, the Consultative Council of European Judges and the European Commission for Democracy through Law, better known as the Venice Commission; the OSCE Kyiv Recommendations as well as the implementation documents of the United Nations Convention Against Corruption and the Bangalore Principles of Judicial Conduct.

RECOMMENDATIONS

1: The Ministry of Justice, as well as judiciary governing bodies with competence to draft subordinate legislation, should ensure they have an adequate methodology to ‘corruption proof’ statutes and subordinate legislation.

2: The ongoing different procedures for vetting judges should, in line with the Venice Commission recommendation, be ‘limited in time and should be carried out swiftly and effectively’.

- 3: Consideration should be given to amending or removing article 375 of the Criminal Code, to prevent its abuse by prosecutors against judges.
- 4: Judges should use the complaints system provided by Article 73 of the Law on the High Council of Justice to protect judicial independence, whereby the High Council of Justice investigates ‘statements of judges concerning the interference in the functioning of a judge regarding the administration of justice’, and, where the HCJ finds an interference in judicial functions, ‘files motions to the respective authorities or officials on identifying and holding liable...persons who committed acts or a lack of action which are [a] breach of the guarantees of the judicial independence...’
- 5: Security measures must be taken to protect courthouses and judges.
- 6: The effect of the changes to the HCJ’s composition and its role in the administration of the judiciary should be monitored, given the corruption risks of its members comprising of a majority of judges, elected by their peers. NGO scrutiny of the operation of the HCJ’s decision-making chambers for evidence of cronyism, undue leniency towards peers or other poor judicial conduct should be supported.
- 7: The Law on the Judiciary and Status of Judges should be streamlined to clearly set out the process for recruiting, selecting and appointing judges, with subordinate legislation such as Regulations used to detail particular procedures.
- 8: Consideration should be given to integrating the work of the High Qualification Commission of Judges with the HCJ, to minimize the number of institutions involved in selecting judges and reduce the risk that corruption of the process, including interference with the process, occurs. However, that consideration should also take into account the current effectiveness of the work of the HQCJ and whether that may be jeopardized by merger with another judicial body.
- 9: Candidates for judicial appointments should be entitled to appeal all decisions made by the HQCJ and the HCJ in consideration of their applications on substantive as well as procedural grounds.
- 10: The HQCJ should work with international partners to evaluate the efficiency and effectiveness of the first ‘qualifications evaluation’ procedure for candidates for positions as Supreme Court justices.
- 11: The LJSJ and subordinate legislation that regulates judicial evaluations, in particular evaluations of ‘moral and psychological’ factors as well as work and personal experience of the candidate, should explicitly state that evaluations are to be conducted in accordance with the legal provisions which protect human rights and freedoms.
- 12: Membership of the Public Integrity Council should be subject to clearly defined rules that reflect the diversity of civil society, and conflict of interest mechanisms should be strengthened beyond that of individual members’ obligation to recuse themselves from assessing candidates in particular cases.
- 13: PIC internal procedures should be drafted to oblige the PIC to present to candidates for judicial positions the evidence they have collected on candidates’ professional ethics and integrity, before decisions are made to include the evidence in ‘information’ or ‘conclusions’ that are presented to the HQCJ.
- 14: The PIC should have the same rights of access to closed, or fee-paying, state registers as the HQCJ.
- 15: The PIC should be adequately staffed and resourced to carry out verification of information about candidates for judicial positions. Procedures by which the PIC carries out its mandate should be drafted and publicly available.

- 16: The LJSJ, and subordinate legislation that regulates the work of the PIC in carrying out judicial evaluations, should explicitly state that evaluations are to be conducted in accordance with the legal provisions which protect human rights and freedoms.
- 17: Evaluations by lecturers at the National School of Judges should be limited to comments on results of tests and progress during training and should not purport to evaluate the performance of a judge during court proceedings.
- 18: The appointment of judges should be completely de-politicized, however where it is decided that there should be a role for the President it should be ceremonial only.
- 19: The HCJ should have the power to confirm the appointment of a candidate for a judicial post by a qualified majority vote, where the President does not meet the requirement to appoint a proposed candidate within the 30-day time limit set out in Article 80(2) LJSJ.
- 20: Article 80 and Article 81(7) LJSJ should be amended to state that the HCJ makes a ‘decision’ to select a candidate for a judicial position, and that a ‘decision’ on candidates for judicial positions, rather than as is currently the case a ‘proposal’, is sent to the President for formal appointment.
- 21: If in fact the President has a veto, the HCJ should be given the power to overrule a Presidential veto of a proposed candidate for a judicial post, by a qualified majority vote.
- 22: The law should provide for recusal by judges where there are perceived, as well as actual, conflicts of interest.
- 23: The law should provide for recusal by judges at the stage of pre-trial proceedings.
- 24: Recusal obligations/disqualification conditions of judges should apply to pre-trial proceedings.
- 25: Judges should not participate in decisions on motions by parties to disqualify them from hearings on the grounds of conflict of interests.
- 26: Parties should be able to appeal decisions on disqualification of judges immediately.
- 27: Political leadership in Ukraine must demonstrate its seriousness about fighting corruption by ensuring that the National Agency on Corruption Prevention has a full complement of Commissioners committed to implementing the mandate of the NACP. The Verification Department must be adequately resourced. Automated cross-checks of e-declarations should take place.
- 28: State bodies with corruption prevention and investigation powers (for example the National Anti-Corruption Bureau, PIC, Special Anti-Corruption Prosecutor’s Office, HCJ Disciplinary Inspectors, the Council of Judges Judicial Ethics Committee) should be encouraged to develop ‘memoranda of understanding’ with NACP to facilitate the exchange of information vital for the fulfilment of their duties, as well as be adequately resourced to verify e-declarations where they have the authority to do so.
- 29: Civil society organizations that focus on judicial corruption should be supported to carry out scrutiny and verification of judges’ asset declarations.
- 30: The March 2017 amendment to the Law on the Prevention of Corruption obliging anti-corruption NGOs and their sub-contractors to submit e-declarations should be revoked.
- 31: The capacity of the CoJ Ethics Committee to carry out its wide responsibilities should be strengthened with appropriate resources and personnel so it can service the ethical training needs of all judges in Ukraine, and the NACP should undertake its responsibilities to monitor and advise judges.

32: The CoJ Ethics Committee and the NSJ should routinely remind judges that they may seek counsel from the Committee about conflicts of interest and ethical dilemmas.

33: The Ethics Committee of the CoJ should address and clarify to judges what ‘generally recognized ideas of hospitality’ means, so that they can clearly handle situations in which they receive gifts in the form of hospitality.

34: The Ethics Committee in cooperation with the NACP should develop a Regulation that establishes the procedure that judges should follow in declaring lawful and unlawful gifts.

35: The HCJ should improve the user-friendliness of the website for submitting complaints about judges.

36: HCJ Disciplinary Inspectors should be appointed immediately to carry out investigations of complaints against judges.

37: Article 106(3) LJSJ should more clearly and precisely state the behavior that attracts disciplinary liability.

38: The HCJ should be able to request the verification of e-declarations by the NACP under Article 60 of the LPC. Where the NACP is not fulfilling its mandate speedily or effectively, the verification of judges’ e-declarations should be prioritized, over those of other public officials, given judges’ central role in delivering justice and upholding the rule of law.

39: Article 44(1)4 LHCJ could be deleted as a ground to return a complaint without consideration, since the merit of the substance of a complaint should be considered before dismissing it.

40: The operation of Article (44)2 LHCJ must be monitored to assess whether the effect is to prohibit legitimate complaints or whether it in fact aids the HCJ in weeding out frivolous time-consuming cases.

41: The LJSJ and LHCJ should be amended to enable the submission of anonymous complaints.

42: The provisions of the draft Whistleblower Protection Law should be assessed against international standards on whistleblowing protection.

43: HCJ consent to detain or hold in custody judges, that is consent to lift judicial immunity, should not be required in all serious crimes, including corruption crimes such as bribery.

44: The State Judicial Administration should develop performance standards for courts and maintain updated statistical records, as well as publish regular reports on that data, that may assist in the evaluation of court, as well as individual judge’s, performance. Data on public attitudes to the quality of the performance of courts may also form a part of court evaluations.

45: Article 90 LJSJ ‘regular evaluations’ of judges should be revised to ensure that other judges mainly carry out the evaluations, a judge’s day-to-day performance in court proceedings is a significant part of the evaluation and the precise criteria used to evaluate a judge’s knowledge, skills, court performance, ability and integrity is spelled out in the law (LJSJ) as well as regulations.

46: The case allocation system should be developed with ‘open source’ software that facilitates inspection and auditing of the system.

47: The CoJ should ensure that professional audits of the case allocation system take place, with full access to the internal procedures of the system and specific analysis of ways in which the system may be manipulated. Inspections and audits should check that case allocation is automatically registered

and published and that unauthorized changes to the allocation system after allocations are made are not permitted.

48: The HCJ, in its capacity under Article 1 LHCJ to ensure that the judiciary is accountable to society and under Article 73 LHCJ, should cooperate with the CoJ, the PIC and non-governmental organizations to monitor and propose measures to improve the transparency and openness of court proceedings in compliance with Article 11 LJSJ.

49: The selection of judges for the specialized Anti-Corruption Court could involve the international community in, for example, vetting a long-list of candidates for potential selection to the court. In order to protect the independence of the Ukrainian judiciary, the final selection decision could be made according to the selection criteria and process provided for by the newly-reformed regular process for selecting candidates for judicial positions, that involves the PIC assisting the HQCJ.

50: Consideration of the design and competence of the specialized Anti-Corruption Court should take into account the following factors: the need for the court to have competence over pre-trial proceedings; the number of specialized judges and how they are appointed; does the anti-corruption court have first instance and appellate level jurisdiction and what are the risks of it not having jurisdiction of these stages of court proceedings; the scope of the jurisdiction of the court, that is the type of corruption crimes it handles and whether 'petty' corruption crimes remain within the jurisdiction of the regular court system. In making these policy considerations, attention should be paid to maintaining the unity of the judicial system and the independence of the judiciary.

JUDICIAL CORRUPTION

WHAT IS JUDICIAL CORRUPTION?

Judicial corruption is a manifestation of poor conduct within judicial institutions such as the courts, court administration offices and judicial governing bodies, as well as poor conduct by external political, private or civil society actors that seek to inappropriately or illegally interfere with judicial decision-making. When the judiciary performs poorly because of internal weaknesses or external pressures, ‘justice’ is not delivered to citizens and the rule of law is threatened, which can result in instability and even violent conflict in a society.

Poor conduct by judicial officials includes corruption offences that the United Nations Convention against Corruption (UNCAC) advises states to criminalize such as bribery (both solicitation and receipt of bribes), embezzlement, misappropriation or other diversion of property by a public official, trading in influence, the abuse of functions by public officials, illicit enrichment (meaning a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income), bribery and embezzlement committed by public officials in the private sector in the course of economic, financial or commercial activities, money-laundering, as well as concealment or obstruction of justice in relation to these crimes.¹ Nepotism and cronyism by public officials, where they use their competences to discriminate to the benefit of family members or other favored persons, are not explicitly mentioned in UNCAC but are two further corruption offences that some countries choose to criminalize, and others deal with by administrative sanctions.

Poor conduct and corruption in the judiciary does not only consist of criminally liable conduct. Indeed as international standards² make clear, and Article 106 of the Ukraine Law on the Judiciary and Status of Judges sets out in its description of types of poor judicial conduct that attract disciplinary liability,³ it also includes treating court users unequally and unfairly, a failure to follow legal procedures, a failure to ensure transparency of proceedings and access to information for court users and the public, a failure to engage in public education programs, excessive formalism or proceduralism, excessive informality, the arbitrary use of judicial discretion, as well as obstructionism, laziness and incompetence. Poor conduct is often enabled by weak or unclear laws and regulations governing judicial procedures and judicial conduct.

In assessing risks of corruption in the judiciary, special consideration must be given to the principle of judicial independence, that affords judges wide discretion in their decision-making to preserve their impartiality as guardians of the rule of law. The principle of judicial independence distinguishes the judicial sector, that delivers ‘justice’ to citizens, from other public service delivery sectors such as health or education, where there is no equivalent principle of independence that could curtail the accountability of decision-makers. There are occasions when mechanisms to increase the accountability of judges may clash with efforts to protect judicial independence, although there are often practical means available to avoid such tensions.

¹ UNCAC, Articles 15- 25.

² Venice Commission reports on Ukraine

http://www.venice.coe.int/WebForms/documents/by_opinion.aspx?lang=EN; Consultative Council of European Judges Opinions (CCJE) http://www.coe.int/t/dghl/cooperation/ccje/textes/avis_en.asp; UNCAC Implementation Guide and Evaluative Framework for Article 11

https://www.unodc.org/documents/dohadeclaration/JI/REFA11/Implementation_Guide_and_Evaluative_Framework_for_Article_11_-_English.pdf ; Bangalore Principles and Implementation Measures

<http://www.yargitay.gov.tr/sayfa/uluslararasi-belgeler/documents/bangaloreetigi.pdf>

³ Article 106 sets out the grounds for the disciplinary liability of judges that describe the kinds of poor conduct that can make a judge eligible for a disciplinary proceeding, including dismissal from judicial office on some – but not all – of these grounds. For a fuller analysis of the disciplinary system see below at section 6.

HOW JUDICIAL CORRUPTION MANIFESTS ITSELF IN UKRAINE

In public surveys of court users, citizens and judges carried out in Ukraine, as well as anecdotal evidence shared with the author, corruption when using the courts in Ukraine is considered the norm, with political interference considered to be a major obstacle to a clean judiciary.

A public opinion poll by the Iiko Kucheriv Democratic Initiatives Foundation in 2014 found that 81% of Ukrainians do not trust the courts and 80.5% think that judges ‘depend on politicians’.⁴ A 2016 USAID survey found that 58.6% of judges in high courts have experienced ‘external influence’ in their decision-making, with 22% stating the external influence came from politicians.⁵ In a 2017 USAID survey 38% of judges agreed with the statement that individual judges accept bribes as an inducement to decide cases in a specific way.⁶

It has been documented that, at least before the recent reforms to the recruitment, selection and appointments process for judges, it was common for judges to pay for their positions:

‘Within the courts, commercial courts were mentioned as the most corrupt...A number of stakeholders indicated that appointments to public positions are not transparent and are often subject to payment that can range from a few thousand dollars for teachers, to hundreds of thousands of dollars for judges, and millions of dollars for nomination for a parliamentary seat. The purchase of public positions is seen as an investment that needs to be recouped and explains a pyramidal organization of the bribery with the lower levels feeding the upper levels.’⁷

The substantial shortage of judges in Ukraine contributes to corruption as there are not enough judges to handle cases so procedural deadlines are missed, statutes of limitation expire and cases are lost in the system.⁸ Interlocutors described how corruption cases are sabotaged at the pre-trial stage as cases are allocated to pliant judges or judges enable procedural deadlines to expire or make unlawful procedural decisions. Interlocutors stated that the staffing of judicial assistant and court administrative positions is marked by nepotism and cronyism. NABU, the National Anti-Corruption Bureau responsible for investigating corruption cases, is under-staffed and overloaded with cases that divert its focus from high-level corruption cases. Delays by the National Agency on Corruption Prevention (NACP) and its ineffectiveness in verifying public officials’ asset declarations prevents other agencies from fulfilling their mandate to investigate judges (NABU), discipline judges (the High Council of Justice) and evaluate and select them (the High Qualification Commission of Judges).

One interlocutor stated that to avoid becoming mired in judicial corruption, lawyers and their clients must devote large sums of money to a strategy of litigating their cases in public. The strategy involves engaging PR firms and the media to shine light on court proceedings, in order to stave off attempts by judges to corruptly delay or ignore court procedures, because they are bribed or otherwise unduly influenced by private or political interests. For court users with deep pockets the publicity strategy is affordable; poor and middle-income court users suffer the greatest and are under pressure to engage in corruption crimes to secure court outcomes.

Other interlocutors described the current problem of judicial corruption in Ukraine as a systematic and constant effort by political organs to chip away at the effectiveness and independence of judicial institutions. Lawmakers, particularly those who sit on the anti-corruption committee in the Rada, must

⁴ <http://dif.org.ua/article/judiciary-reform-public-opinion-poll-judges-and-experts-surveys>

⁵ http://www.fair.org.ua/content/library_doc/FAIR_Judges_Survey_Summary_2016_ENG1.pdf

⁶ See New Justice survey results September 2017

⁷ IMF assisted ‘Government of Ukraine Report on Diagnostic Study of Governance Issues Pertaining to Corruption, the Business Climate and the Effectiveness of the Judiciary’ (2014):

<https://www.imf.org/external/pubs/ft/scr/2014/cr14263-a.pdf>

⁸ Section 1 further explains the reasons for, and consequences of, the shortage of judges in Ukraine.

remain vigilant in their review of draft laws as regular efforts are made to reduce the authority of state agencies and others to prevent and root out corruption.

THE 2016 REFORMS TO TACKLE JUDICIAL CORRUPTION IN UKRAINE

In 2015 the ‘Strategy for Judicial Reform’ was adopted by Presidential decree.⁹ The current wave of reforms was set in motion in September 2016 when constitutional amendments and the new Law on the Judiciary and Status of Judges came into effect. The reforms included the overhaul of the judicial selection and appointments process to prevent judicial positions from being bought and selection bodies from being packed with political cronies. The five-year ‘probation period’ for new judges was abolished, to prevent parliamentarians from wielding power over the appointment of judges to permanent positions. The court system was re-organized to rid Ukraine of multiple layers of ‘state captured’ courts and to establish a new Supreme Court, which is to be staffed with judges recruited, selected and appointed under the new selection system. The reforms provided for a new disciplinary mechanism for judges located within the High Council of Justice, and commit to establishing a new specialized Anti-Corruption Court. Reforms have also addressed the integrity of judges.¹⁰

The judicial reforms involved amending the Constitution to provide a basis for statutory reform as well as amendments to statutes and subordinate legislation.

From the perspective of tackling corruption, the test of the effectiveness of the judicial reforms is whether they enable the judiciary to govern and manage itself, as well as adjudicate court proceedings independently from external influence, in particular free from undue interference by political organs such as the Office of the President and the Verkhova Rada; and whether the judges selected for office are competent with high levels of personal integrity.

As a general observation, it is of concern that statutes drafted and amended during the 2016 wave of reforms are overly-detailed and verbose and, yet, on occasion not sufficiently precise.

Clear laws are a key mechanism in preventing corruption. Better use could be made of subordinate legislation such as Regulations or Codes to set out detailed procedures for implementing the competences described in the statutes and the Constitution.

Indeed, article 55 of the Law on the Prevention of Corruption obliges the Ministry of Justice and the Verkhova Rada to perform an ‘anti-corruption examination’ of draft laws and regulations, to find factors that ‘facilitate or may facilitate the commitment of corruption offences’. The NACP and civil society may also carry out anti-corruption examinations. Factors to consider are whether a draft law falls into corruption pitfalls such as using confusing, repetitive language and whether proposed competences or bodies duplicate already existing powers or introduce ambiguities or opportunities for corruption in new competences. ‘Corruption-proofing’ of laws needs to be strengthened.

Recommendation 1: The Ministry of Justice, as well as judiciary governing bodies with competence to draft subordinate legislation should ensure they have an adequate methodology to ‘corruption proof’ statutes and subordinate legislation.

⁹ See the strategy and action plans on judicial reform in Ukraine: <http://jrc.org.ua/plan/en>

¹⁰ See Venice Commission Opinions and other documents on justice system reform in Ukraine: <http://www.venice.coe.int/webforms/documents/?country=47&year=all>; IMF Staff Report September 2016 <https://www.imf.org/external/pubs/ft/scr/2016/cr16319.pdf>; and IMF assisted ‘Government of Ukraine Report on Diagnostic Study of Governance Issues Pertaining to Corruption, the Business Climate and the Effectiveness of the Judiciary’ (2014): <https://www.imf.org/external/pubs/ft/scr/2014/cr14263-a.pdf>; Transparency International Ukraine National Integrity Study (2015) https://ti-ukraine.org/wp-content/uploads/2016/12/nis_assessment_eng.pdf

1. PROTECTING JUDICIAL INDEPENDENCE IN UKRAINE

The independence of judges is guaranteed by Article 126 of the Constitution and the laws of Ukraine. Article 6 of the LJSJ prohibits ‘interference with the administration of justice’ and specifically requires state bodies to refrain from ‘statements and actions which may undermine the independence of the judiciary.’

The formal legal protections of judicial independence operate within a political reality where ‘lustration’ laws provide for vetting and dismissal of judges. On account of the historically high levels of judicial corruption and low levels of public trust in the judiciary, since February 2016 all judges are undergoing a qualifications assessment that includes a vetting procedure before they are appointed permanently to their judicial positions. The procedure consists of a performance evaluation of judges that includes case studies and a public interview as well as a vetting of the assets of judges and their families. Approximately 1600 judges resigned rather than go through the evaluation and vetting process and around 25% of judges who were evaluated did not get through the process.¹¹

A small group of judges were also vetted under the ‘Law on the Restoration of Trust to the Judiciary’ by a Special Interim Commission on Vetting Judges that assessed the decisions taken by judges in cases connected to the ‘Revolution of Dignity’. Ultimately 22 judges were dismissed by the HCJ in 2016 because of wrongful sentencing of protesters during the ‘Revolution of Dignity.’ Furthermore, judges are subject to vetting under the ‘Law on Purification’ that prohibits certain categories of persons, with links to former regimes, including those who did not resign during the Maidan protests and those with attachments to the former Communist regime, from holding office.

The upshot is that currently less than 50% of judgeships are filled in Ukraine. In addition, there is a lack of administrative staff in courts.¹² A shortage of judges and administrative staff provides opportunities for corruption as the backlog of cases grows and procedural deadlines and statute of limitations expire.

The lustration laws are understandable, but there is nonetheless a risk they could be abused to remove judges for reasons other than their stated intent. The Venice Commission considers:¹³

‘...the existence of several parallel and overlapping procedures extremely problematic, as an assessment of the professionalism, ethics and honesty of all the judges can only be an extraordinary measure which requires the utmost care: the parallel enforcement of substantially different procedures carried out by different organs is unlikely to ensure respect of the most stringent safeguards for those judges who do meet these criteria. The Venice Commission finds that the extraordinary measure should be limited in time and should be carried out swiftly and effectively.’

Recommendation 2: The ongoing different procedures for vetting judges should, in line with the Venice Commission recommendation, be ‘limited in time and should be carried out swiftly and effectively’.

Prosecutorial powers present a risk to judicial independence in Ukraine: under article 375 of the Criminal Code prosecutors may initiate a criminal proceeding against judges for the ‘delivery of a knowingly illegal sentence, judgment, ruling or order...’ which is ‘punishable by restraint of liberty for a term up to five years, or imprisonment for a term of two to five years’. Interlocutors stated that prosecutors abuse this power to intimidate judges and interfere with their judicial decision-making.

¹¹ Figures provided by the HQCJ.

¹² Figures provided by the HQCJ.

¹³ [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)027-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)027-e) at paragraph 38

They further stated that judges rarely use article 376 of the Criminal Code that enables them to complain about interference in their decision-making because of concern about public perception and personal security.

Recommendation 3: Consideration should be given to amending or removing article 375 of the Criminal Code, to prevent its abuse by prosecutors against judges.

Recommendation 4: Judges should use the complaints system provided by Article 73 of the Law on the High Council of Justice to protect judicial independence, whereby the High Council of Justice investigates ‘statements of judges concerning the interference in the functioning of a judge regarding the administration of justice’, and, where the HCJ finds an interference in judicial functions, ‘files motions to the respective authorities or officials on identifying and holding liable...persons who committed acts or a lack of action which are [a] breach of the guarantees of the judicial independence...’

The security of judges is crucial in protecting judicial independence, so that judges are not put under pressure in their judicial decision-making as a result of intimidation or threats. Interlocutors stated that there have been incidents of attacks against courts and judges. The Council of Europe (2010)¹² recommendation on ‘Judges: independence, efficiency and responsibilities’ states that:

‘All necessary measures should be taken to ensure the safety of judges. These measures may involve protection of the courts and of judges who may become, or are victims of, threats or acts of violence.’

Recommendation 5: Security measures must be taken to protect courthouses and judges.

2. JUDICIAL SELF-GOVERNANCE IN UKRAINE

Article 126 of the LJSJ sets out the objectives of judicial self-governance in Ukraine. In order to safeguard the independence of the judiciary, judges in self-governance bodies protect their professional interests and address the ‘issues of internal operation of the courts in Ukraine’. This includes organizational support for courts and the activity of judges as well as ‘social protection of judges and their families’.

There are three ‘organizational forms’ of judicial self-governance: ‘meetings of judges’ at all court levels, the Council of Judges and the Congress of Judges.

The Congress of Judges is the highest representative body of judicial self-governance and meets every 2 years. Its key functions include (Article 129, LJSJ): appointing the judges of the Constitutional Court, electing the members of the High Council of Justice and the members of the High Qualifications Commission. It also elects the Council of Judges, that is charged with implementing decisions of the Congress of Judges and acting in lieu of the Congress of Judges during the two-year period between meetings. The members of the Congress of Judges and the Council of Judges, in line with international standards, are drawn from all levels of courts.¹⁴

The ‘State Judicial Administration’ provides organizational and financial support to the judiciary (Article 151 LJSJ). It represents the budgetary interests of the judiciary to the Cabinet of Ministers and the Parliament during the preparation of the annual State Budget. It is accountable to the High Council

¹⁴ See Council of Europe Recommendation (2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities: paragraph 27 ‘Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary’. See also OSCE/ODIHR Kyiv Recommendations, paragraph 7

of Justice. Its powers (Article 152 LJSJ) include ensuring proper conditions of courts and other judicial bodies, as well as studying the practices related to the organization of the operation of the courts and developing proposals for improvement.

The role of the High Council of Justice was substantially reformed by the 2016 judicial reform. The HCJ consists of 21 members who serve a single four-year term, 10 of whom are elected by the Congress of Judges. The President, Parliament, congress of Advocates, conference of prosecutors and conference of the higher legal education institutions select two members each. The Chief Justice is an *ex officio* member. Amongst other requirements, members must belong to the legal profession and be politically neutral, that is they may not belong to political parties, trade unions or engage in any political activity. The changes to the HCJ composition have eliminated previous aspects that were not in line with international standards: the Minister of Justice and the Prosecutor General are no longer *ex officio* members and the majority of members are judges elected by their peers.

The HCJ has a role in appointments, disciplinary proceedings, dismissal and supervision of incompatibility requirements of judges. The HCJ is now competent for all disciplinary hearings against judges and prosecutors (previously disciplinary responsibilities were shared between the HQCJ and the HCJ). It submits to the President recommendations for judicial appointments. It decides on the transfer of judges from one court to another and gives consent to the detention or taking into custody of a judge, amongst other competences. The changes are both welcome and require careful monitoring given that the ‘Judicial Council’ model of judges managing their own governance has led to problems in other countries.¹⁵ Section 3 examines some of the corruption risks of judges being in a position to appoint and dismiss their peers.

Recommendation 6: The effect of the changes to the HCJ’s composition and its role in the administration of the judiciary should be monitored, given the corruption risks of its members comprising of a majority of judges, elected by their peers. NGO scrutiny of the operation of the HCJ’s decision-making chambers for evidence of cronyism, undue leniency towards peers or other poor judicial conduct should be supported.

The High Qualifications Commission of Judges (HQCJ) is responsible for the recruitment and selection of candidates for judicial positions. Previously it also had competence for disciplinary proceedings of judges of local courts and courts of appeal. These competences have now been transferred to the HCJ, although the HQCJ will complete the disciplinary proceedings that were underway before the 2016 judicial reform process instituted the changes to its mandate.

The HQCJ consists of 16 members (8 judges elected by the Congress of Judges who have at least 10 years’ experience, 2 members by the higher legal education institutions, 2 members from the Congress of Advocates, 2 members by the Ombudsman and 2 members by the State Judicial Administration. All members must have a background in law and are subject to strict rules of incompatibility with political activity. The role of the reformed HCQJ in the selection and appointment of judges is analyzed in the following section.

¹⁵ ‘Making a post-totalitarian judiciary a self-administrative body before any genuine internal change and renewal has taken place will result in a formally constitutionally “independent judiciary” with rather dependent judges in it.’ Bobek, Michal and Kosar, David, Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe (November 7, 2013). Department of European Legal Studies Research Paper in Law, 07/2013. Available at SSRN: <https://ssrn.com/abstract=2351299> or <http://dx.doi.org/10.2139/ssrn.2351299>

3. SELECTING AND APPOINTING JUDGES IN UKRAINE

GENERAL COMMENTS

From November 2016 to August 2017 the High Qualification Commission of Judges organized the first selection process under the reformed system to select 120 judges for appointment to the newly established Supreme Court. The reformed High Council of Justice is expected to vote imminently on whether to recommend the appointment of the 120 judges to the President.

Section IV articles 65 – 82 and Section V articles 83 – 88 as well as Article 101 of the Law on the Judiciary and Status of Judges,¹⁶ set out the procedures for recruiting, selecting and appointing judges. As has been previously mentioned by Venice Commission Opinions, the LJSJ is very detailed and repetitive, and better use could have been made of subordinate legislation to define particular procedures.¹⁷

Recommendation 7: The LJSJ should be streamlined to clearly set out the process for recruiting, selecting and appointing judges, with subordinate legislation such as Regulations used to detail particular procedures.

The number of bodies involved in the recruitment, selection and appointment of judges in Ukraine raises the concern that the process is vulnerable to interference. There are historical institutional reasons why the HQCJ is a separate body from the HCJ, but it would be more efficient and less of a corruption risk, if the HQCJ was an integral part of the HCJ.

Recommendation 8: Consideration should be given to integrating the work of the HQCJ with the HCJ, to minimize the number of institutions involved in selecting judges and reduce the risk that corruption of the process, include interference with the process occurs. However, that consideration should also take into account the current effectiveness of the work of the HQCJ and whether that may be jeopardised by merger with another judicial body.

OVERVIEW OF THE SYSTEM FOR SELECTING AND APPOINTING JUDGES IN UKRAINE

The law sets out a comprehensive system for the selection and appointment of judges. The selection system is impressive in its thoroughness and efforts to be open to public scrutiny. Paradoxically the open, public, lively setting in which the selection of judges takes place, does not always translate into greater transparency of behind-the-scenes decision-making, and may even run the risk of damaging judicial independence in Ukraine. There is a risk that the high levels of public scrutiny of judicial candidate selection proceedings and related documents, may be co-opted to unfairly compromise judges' reputations and independence.

The system for selecting judges is also marked by a complex institutional structure, a lack of opportunities to appeal decisions taken by the selection bodies, and the risk of undue external influence by political organs, civil society and others.

¹⁶ Law of Ukraine On the Judiciary and Status of Judges

http://www.vkksu.gov.ua/userfiles/doc/Law_on_Judiciary_and_Status_of_Judges_16%2007%202016_ENG.pdf

¹⁷ See Venice Commission Opinions CDL-AD(2015)007 and CDL-AD(2015)008.

The process from recruitment to appointment of judges proceeds through the following stages: the HQCJ is responsible for the recruitment and selection of judges, assisted by the Public Integrity Council. It submits its list of selected candidates to the HCJ for confirmation. The HCJ sends its 'proposal' for candidates for judicial positions to the President for appointment. Interlocutors in the President's Office and amongst the judiciary stated that the President's appointment power is ceremonial and the President may not refuse to appoint judges. This remains to be tested.

The selection process by the HQCJ comprises the following six steps: first the HQCJ verifies that applicants meet the legal requirements of the recruitment process; second the HQCJ carries out an 'eligibility assessment' where candidates' general legal theoretical knowledge is tested and their language skills and personal and moral values are assessed; third the HQCJ undertakes a 'background check' that involves competent authorities verifying a wide range of information about candidates that may also come from private sources. At the same time candidates' asset declarations and 'declarations of family ties are submitted; fourth, candidates undertake twelve months training at the National School of Judges that culminates in a 'qualifications exam'; fifth the HQCJ leads a 'Qualification Evaluation' of the candidates' competence, professional ethics and integrity. The PIC assists the HQCJ in assessing the latter two qualities; sixth the HQCJ rates candidates and makes recommendations to the HCJ for appointment.

The HCJ reviews the list of candidates and decides on which candidates to propose to the President for appointment.

APPEALING DECISIONS MADE IN THE SELECTION PROCESS

At several stages during the selection process candidates for judicial positions may appeal decisions made by the HQCJ and the HCJ on the progress of their applications. Article 101(7) of the LJSJ sets out the right to appeal decisions made by the HQCJ.

The right to appeal is an important feature of ensuring transparency of, and preventing corruption, in the process to select judges. However, the right to appeal as set out in the LJSJ limits the power to review decisions by the HQCJ and the HCJ to tightly prescribed procedural grounds, rather than providing for a full review of the substantive and procedural grounds for decisions taken. A full review of the merits of a decision to terminate a candidate's participation in the selection process is an important mechanism against decisions on a candidate taken because of external influences or considerations irrelevant to the selection process.

In the following instances candidates may appeal decisions taken about their applications for judicial positions: an HQCJ decision taken after the 'background check' to terminate their participation in the selection process (Article 74(6)); an HQCJ decision taken after the consideration of the declaration of family ties to terminate further participation of the candidate in the selection process (Article 76(6)); an HQCJ violation of the procedure for the qualifications examination may be challenged in the manner stipulated in the Code of Administrative Proceedings (Article 78(12)); an HQCJ decision on the 'qualification evaluation' may be challenged in the manner stipulated in the Code of Administrative Procedure (Article 88(2)), which is tightly restricted to procedural grounds. The candidate may also challenge an HCJ decision to refuse to submit a proposal to the President for appointment of a candidate to judicial office (Article 79 (20) and (21)), which is also tightly restricted to procedural grounds.

Recommendation 9: candidates for judicial appointments should be entitled to appeal all decisions made by the HQCJ and the HCJ in consideration of their applications on substantive as well as procedural grounds.

THE SELECTION PROCESS FOR 120 JUDGES FOR THE SUPREME COURT

An in-depth review and assessment of the most recent process to select 120 judges for the Supreme Court should be carried out, including interviews with officials and candidates, to evaluate the effectiveness and efficiency of the process, and make recommendations for its improvement. This section offers some observations and recommendations based on interviews with HQCJ officials, and other interested parties, whilst the process was underway in June 2017.

Recommendation 10: The HQCJ should work with international partners to evaluate the efficiency and effectiveness of the first ‘qualifications evaluation’ procedure for candidates for positions as Supreme Court justices.

Article 85 of the Law sets out the different stages of the ‘qualifications evaluation’. The evaluation consists of (a) two tests of candidates’ knowledge, (b) a psychological test, that includes an interview with a psychologist, and a ‘general skills’ test (c) ‘information’ or an ‘conclusion’ provided by the Public Integrity Council¹⁸, that assists the HQCJ in determining the levels of professional ethics and integrity of judicial candidates and (d) the examination of candidates’ dossiers including by an oral interview with candidates. The HQCJ submits recommendations to the High Council of Justice to appoint candidates to the positions of judges and (e) the HCJ adopts a decision to submit a proposal to the President to appoint candidates to judicial positions. In this section, each of these stages (a) to (e) will be assessed against international anti-corruption standards.

(a) Tests

Candidates for judicial positions to the Supreme Court undertake two tests, the first is a general legal knowledge test, the second is a case study that concerns individual judges’ areas of specialization. Article 85(2) of the LJSJ, in line with international standards on examinations for judges, states that ‘Test items and case study/practical tasks for the examination shall be developed taking into account the principles of instance hierarchy and specialization’. It is fair and in accordance with international standards that tests are specialized to suit the knowledge and expertise of judges, some of whom will have spent their career in a highly specialized area and not have practiced general law.

(b) Psychological testing

Article 85(3) of the LJSJ states that the HQCJ may decide to conduct tests ‘to check personal moral and psychological qualities’ and ‘general abilities’. Such tests, according to the LJSJ, must apply to all candidates for judicial positions and not just an individual judge or a group of judges. In accordance with international standards, candidates have a right to be informed about and to have access to any relevant documents and to deal with relevant issues in the course of the interview: Article 85(8) LJSJ states that candidates ‘have access to view their dossier in full’, that includes the results of tests and reports on moral and psychological testing

‘Moral and psychological qualities’ speak to the integrity of candidates, a selection criteria that is encouraged by international standards,¹⁹ but that is an elusive concept to define.

Psychological testing can produce subjective opinions on the moral character and integrity of an individual. International standards prohibit discrimination (with the exception of citizenship requirements) and it is vital that testing ‘moral and psychological qualities’ is not used as a cover to discriminate against candidates because of grounds such as religion, political opinion, language or sexuality, that are prohibited grounds of discrimination under European and international human rights conventions.

¹⁸ The English-language version of the Law on the Judiciary and Status of Judges, states that the body is the ‘Public Council of Integrity’, although it is commonly referred to as ‘PIC’.

¹⁹ Inter alia Principle 10 of the UN Basic Principles on the Independence of the Judiciary: “Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law”.

The Council of Europe Recommendation (2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities²⁰ states in Chapter VI - Status of the judge: Selection and career:

45. There should be no discrimination against judges or candidates for judicial office on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, disability, birth, sexual orientation or other status. A requirement that a judge or a candidate for judicial office must be a national of the state concerned should not be considered discriminatory.

Recommendation 11: The LJSJ and subordinate legislation that regulates judicial evaluations, in particular evaluations of ‘moral and psychological’ factors as well as work and personal experience of the candidate, should explicitly state that evaluations are to be conducted in accordance with the legal provisions which protect human rights and freedoms.

(c) The role of the PIC

The PIC is a novel feature of the Ukrainian selection process for judges. It is composed of civil society representatives who are tasked to assist the HQCJ ‘in determining the eligibility of a judge (a judicial candidate) in terms of the criteria of professional ethics and integrity for the purposes of qualifications evaluation.’

There is a substantial risk that members of the PIC have conflicts of interest in carrying out the PIC mandate to assess the professional ethics and integrity of judges. PIC members may be drawn from civil society groups, including practicing lawyers, who may have appeared or will appear in the future before judges they assess during the selection process. The rules on who may be a member of the PIC need to be clearly defined and members themselves should be subject to a clearly defined mechanism to check any conflicts of interest they may have with candidates for judicial positions that they are assessing.

Recommendation 12: Membership of the PIC should be subject to clearly defined rules that reflect the diversity of civil society, and conflict of interest mechanisms should be strengthened beyond that of individual members’ obligation to recuse themselves from assessing candidates in particular cases.

Under Article 87(6) paras. 2 and 3 of the LJSJ the PIC is empowered to provide ‘information’ or a ‘conclusion’ on judicial candidates to the evaluation committee of the HQCJ.

‘Information’ raises questions about a candidate’s conduct but does not contain evidence of misconduct. A ‘conclusion’ (which is also referred to as an ‘opinion’ in material published by the HQCJ as well as in media reports) consists of ‘justifiable reasons’ why a judicial candidate ‘does not meet professional ethics and integrity criteria’.

Both ‘information’ and ‘conclusions’ are included in the dossiers of judicial candidates and so candidates have access to the data provided by the PIC and have the opportunity at the interview stage to refute or defend the data. The HQCJ can further investigate or decide to dismiss the ‘information’ or ‘conclusion’.

The opportunity for candidates to review and refute information collected about them is essential and accords with international standards. However, it is only at the interview stage, when allegations contained in ‘information’ or ‘conclusions’ are publicly available, that the candidates are able to respond to the PIC’s allegations. In 12 cases during the process to select candidates for the Supreme Court, the PIC withdrew ‘information’ or ‘conclusions’ after hearing candidates’ responses to them during the interview. It would be fairer for candidates, and better for the legitimacy and reputation of

²⁰ Council of Europe (November 2010), *Recommendation (2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities* <https://wcd.coe.int/>

the PIC, if the PIC had an opportunity to communicate with candidates before they submit 'information' or 'conclusions' to the HQCJ.

Recommendation 13: PIC internal procedures should be drafted to oblige the PIC to present to candidates for judicial positions the evidence they have collected on candidates' professional ethics and integrity, before decisions are made to include the evidence in 'information' or 'conclusions' that are presented to the HQCJ.

PIC 'information' and 'conclusions' are based on verifications of candidates' assets and information collected about the character and lifestyle of judicial candidates. In practice, according to PIC members' statements, the PIC had access to the same information about candidates as the HQCJ (that is, asset declarations, judicial integrity statements and National Anti-Corruption Bureau 'analytical references' which contained information from other sources *inter alia*).²¹ Curiously, Article 87(6) para 7 of the LJSJ states that the PIC 'shall be provided with the right of free and complete access to open state registers', which begs the question whether there are fee-paying, closed state registers to which the PIC does not have access. In addition, the PIC established a portal on its website where people could post information about judges, that the PIC would investigate.²²

Recommendation 14: The PIC should have the same rights of access to closed, or fee-paying state registers as the HQCJ.

An obvious criticism of the PIC is that it is privy to highly sensitive information about judges and could potentially use unverified information to smear candidates for judicial office. The withdrawal of PIC 'information' or 'conclusions' in 12 cases indicates that the PIC's ability and powers to verify allegations is not adequate. There is a danger that good judges may be put off from applying for judicial positions because of the stress and intimidation of subjecting themselves and their families to such high levels of scrutiny, especially where the PIC's ability to verify information it discovers is weak.

A further criticism is that the internal procedures by which the PIC carries out its mandate are not publicly available or have not been drafted. The work of the PIC was largely carried out *pro bono* by its members and they had no dedicated office space or adequate financing and other resources to develop internal regulations, in addition to their massive task of evaluating all documents related to the integrity and professional ability of candidates for judicial positions.

However, despite the criticisms, the PIC is an innovative institutional response to the serious problem of low public trust in the judiciary of Ukraine. The PIC's work is valuable because it has the potential to not only improve the quality and independence of candidates selected for judicial office, but also bolster and support 'clean' judges, as well as build trust amongst citizens that there are safeguards against judges being hand-picked stooges of powerful politicians.

It is vital to strengthen the structures and improve the resources of the PIC to carry out its mandate to assist the work of the HQCJ effectively and responsibly.

Recommendation 15: The PIC should be adequately staffed and resourced to carry out verification of information about candidates for judicial positions. Procedures by which the PIC carries out its mandate should be drafted and publicly available.

As with the precaution described above concerning 'moral and psychological' testing, any evaluation of a candidate's integrity must not discriminate against candidates on grounds prescribed by European and international human rights standards, such as their religion, political opinion, language, sexual orientation and so on.

²¹ See interview by a member of the PIC: <http://euromaidanpress.com/2017/08/09/judicial-reform-in-ukraine-betrayal-or-victory-explained-by-the-public-integrity-council/>

²² <https://grd.gov.ua> (Ukrainian speaker should check that it exists)

Recommendation 16: The LJSJ, and subordinate legislation that regulates the work of the PIC in carrying out judicial evaluations, should explicitly state that evaluations are to be conducted in accordance with the legal provisions which protect human rights and freedoms.

(d) Oral interview

Interviews of candidates for judicial positions to the Supreme Court were based on the content of judicial dossiers and were broadcast on Youtube. PIC members had the right to ask questions. Interviews were thorough and covered legal knowledge as well as questions about the source of candidates' finances and assets. The public scrutiny of the proceedings is largely commendable from an anti-corruption perspective, and may serve to increase public trust in the integrity of candidates selected for judicial office.

On the other hand, the airing of unverified allegations that are ultimately refuted or disproved by candidates may diminish respect for judges. The methods that PIC uses to seek and verify information about candidates is not transparent. As mentioned above the PIC's competences and resources should be strengthened so that it can adequately verify information about candidates and present its findings to judicial candidates and hear their response, before 'information' and 'conclusions' are submitted to the HQCJ.

In addition, there is an anomalous practice in Ukraine of including in candidates' dossiers evaluations carried out by the lecturers of the National School of Judges, many of whom are judges, but nonetheless base their evaluations on judges' competence on courses undertaken at the NSJ, and not on judges' performance in their day-to-day court work. It is of concern that judicial dossiers include information not strictly appropriate for the evaluation of the performance of a judge, that may inappropriately impact applications for judicial positions and regular evaluations of judges for other promotions or benefits.

Recommendation 17: Evaluations by lecturers at the NSJ should be limited to comments on results of tests and progress during training and should not purport to evaluate the performance of a judge during court proceedings.

(e) Appointment of judges

Article 128 of the Constitution states that 'Judges are appointed by the President of Ukraine on the motion of the High Council of Justice, in the manner prescribed by law.' The procedure to appoint judges is set out in Article 70(14) and (15) and described in more detail in Article 80 LJSJ. The appointment procedure will soon be tested as the first selection process for candidates to the Supreme Court nears completion: the HQCJ selected and transferred the details of 120 candidates to the HCJ in August 2017. The HCJ must recommend candidates to the President for appointment to judicial positions. A reading of the LJSJ indicates some potential concerns with the appointment process.

The President's role in the appointment process appears to ensure that the President's power to appoint judges is curtailed and ceremonial.²³ However, despite intense consideration of the appropriate limits of the President's power to appoint judges, most notably by the Venice Commission,²⁴ the LJSJ fails to take the precaution of clearly stating that a 'proposal' by the High Council of Justice to the President to appoint a candidate to a judgeship is *binding* (the Constitution uses the word 'motion' rather than 'proposal' and also does not state that the 'motion' is binding). There is a concern that a

²³ See the Venice Commission report CDL-AD(2015)026 [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)026-e)

²⁴ See, inter alia, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)026-e) at paragraph 51 and [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)026-e) at paragraphs 26 and 27

‘proposal’ implies the candidate’s selection is not a binding decision by the High Council of Justice and the President has discretion to consider and, then, accept or reject the proposal.

Article 81(7), that deals specifically with appointment of judges to a High Specialized Court or the Supreme Court, also raises the concern that the President’s power includes the power to refuse an appointment: the article states that the High Council of Justice may adopt a ‘decision’ to submit to the President ‘a *proposal* on appointing [a] candidate to a judicial position’.

There is ambiguity in the LJSJ concerning on what grounds, if any, the President can delay or refuse to appoint a selected candidate, and what should happen in the event of Presidential delay or veto.

Article 80, states that the President must appoint a candidate to a judicial position without seeking to verify the qualifications of the candidate or the procedure for selecting and evaluating the candidate. The law goes on to state that an appointment cannot be prevented where there are ‘enquiries’ regarding a candidate. It is not clear from whom those enquiries would emanate, since the law prevents the President from making enquiries such as seeking to verify the qualifications of the candidate or the procedure for selecting him or her. However, the overall message seems to be that the President cannot delay the appointment because of concerns about the qualifications of a candidate or the procedure by which he or she was selected. So far so good.

However, the LJSJ goes on to provide that the President may raise those aforementioned enquiries with ‘the competent authorities’ to conduct a verification of those facts ‘following a procedure envisaged by law’. It is of concern that such a verification procedure would in practice delay the appointment of a candidate by the President.

There is no provision in the law for the action the High Council of Justice could take in the event that the President delays the appointment of a candidate beyond the statutory 30-day time-limit set out in Article 80(2) of the LJSJ, or vetoes the appointment of a candidate for a judicial position.

The OSCE/ODIHR Kyiv Recommendations offer guidance on how the Presidential appointment power should be drafted. Article 23 states:

‘Where the final appointment of a judge is with the State President, the discretion to appoint should be limited to the candidates nominated by the selection body (e.g. Judicial Council, Qualification Commission or Expert Commission; see paras 3-4). Refusal to appoint such a candidate may be based on procedural grounds only and must be reasoned. In this case the selection body should re-examine its decision. One option would be to give the selection body the power to overrule a presidential veto by a qualified majority vote. All decisions have to be taken within short time limits as defined by law.’

Recommendation 18: The appointment of judges should be completely de-politicized, however where it is decided that there should be a role for the President it should be ceremonial only.

Recommendation 19: The High Council of Justice should have the power to confirm the appointment of a candidate for a judicial post by a qualified majority vote, where the President does not meet the requirement to appoint a proposed candidate within the 30-day time limit set out in Article 80(2) LJSJ.

Recommendation 20: Article 80 and Article 81(7) LJSJ should be amended to state that the High Council of Justice makes a ‘decision’ to select a candidate for a judicial position, and that a ‘decision’ on candidates for judicial positions, rather than as is currently the case a ‘proposal’, is sent to the President for formal appointment.

Recommendation 21: If in fact the President has a veto, the High Council of Justice should be given the power to overrule a Presidential veto of a proposed candidate for a judicial post, by a qualified majority vote.

4. TRAINING OF JUDGES IN UKRAINE

As mentioned above, candidates for judicial positions must complete twelve (12) months special training at the National School of Judges (NSJ). In addition, judges undertake continuous training every 3 years for at least 40 hours. They are regularly evaluated by instructors, who are for the most part judges (see section 7 on ‘Evaluating the performance of courts and judges’ for criticism of the process of evaluation of judges by the NSJ). On-line training is also provided.

The chair of the NSJ is appointed and dismissed by the HQCJ and participates in the Judicial Reform Council, including making suggestions on amendments to laws and gaps in the law that lecturers recommend based on their research and discussions with judges. The NSJ has focused training in latter years on anti-corruption legislation, including how judges should handle administrative corruption cases and also provides training on conflicts of interest and ethics.

In cases where the twelve (12) month training period may not be suitable for candidates who have applied for judicial positions, because they are already practicing judges or have been judicial assistants, the HQCJ has the authority to reduce the period of training where candidates for judicial positions have three or more years of service as a judge or as a judicial assistant.

5. SUPERVISING THE ASSETS, INTERESTS AND ETHICAL BEHAVIOUR OF JUDGES IN UKRAINE

CONFLICT OF INTEREST LAWS IN UKRAINE

Where judges have interests in a case, they may fail to adjudicate cases impartially and corruption of justice can occur. Conflict of interest laws are an essential part of preventing corruption of the judicial process. They typically establish mechanisms whereby judges may recuse themselves from hearing a case in situations in which they have, or may be perceived to have, an interest. In addition, procedural codes may regulate when judges may be disqualified from hearing a case, and enable parties to proceedings to challenge the participation of a judge in a case.

The LPC sets out the broad parameters of conflict of interest regulation in Ukraine, and the civil, criminal, administrative and commercial procedural codes describe the conditions under which a judge is disqualified from participating in proceedings.

Under the LPC Chapter V regime on the prevention and management of conflicts of interest, judges are obliged to report a conflict of interest to the Ethics Committee of the Council of Judges, except when the conflict of interest is governed by procedural law (see also Article 133(10) LJSJ). Where the judge fails to report a conflict of interest, or does so in an untimely manner, he or she may be subject to disciplinary liability (see below at section 5) or an administrative sanction.

A recent study by USAID New Justice Program examined the effectiveness of the mechanisms, and the quality of the laws and regulations, to handle conflicts of interests in the judiciary in Ukraine.²⁵ The report identifies weaknesses in the conflict of interest legal framework in Ukraine. There is no obligation on judges to recuse themselves from cases where there is a perceived, as opposed to an actual conflict of interest. What is more, there is no specific obligation for judges to recuse themselves at the pre-trial stage.

Recommendation 22: The law should provide for recusal by judges where there are perceived, as well as actual, conflicts of interest.

Recommendation 23: The law should provide for recusal by judges at the stage of pre-trial proceedings.

There is ambiguity about the extent of a judge's obligation to disclose conflicts of interest to a party, although parties to the case or a prosecutor may challenge the participation of a judge in court proceedings. However, in certain criminal, civil and commercial proceedings, motions by parties to disqualify a judge are heard by the judge who is the subject of the disqualification motion, which undermines the objectivity of the process. In addition, it is not possible to appeal disqualification decisions immediately: an appeal is possible only at the end of proceedings, together with an appeal on the substance of a judgment. Consequently, a partial judge may participate in adjudicating a case and if, on appeal, the judge is in fact found to have a conflict of interest, significant resources are wasted in re-litigating proceedings.

Recommendation 24: Recusal obligations/disqualification conditions of judges should apply to pre-trial proceedings.

Recommendation 25: Judges should not participate in decisions on motions by parties to disqualify them from hearings on the grounds of conflict of interests.

Recommendation 26: Parties should be able to appeal decisions on disqualification of judges immediately.

IDENTIFYING JUDGES' CONFLICTS OF INTERESTS

To aid court users, civil society and judges in identifying real or perceived conflicts of interests, there are three documents that judges in Ukraine are obliged to file with authorities about their assets, family connections, person and lifestyle, under provisions of the LPC and the LJSJ.

First, judges must submit annual asset declarations to the NACP (Article 45 LPC) which may be done via the NACP website (known also as e-declarations). A failure to submit an asset declaration, untimely submissions, inaccurate submissions or deliberate omissions of information are grounds for disciplinary liability of a judge (Article 106(9) and (10) LJSJ). Such failures also attract administrative and criminal liability.

Second, according to Articles 61 and 76 of the LJSJ a judge, as well as judicial candidates, must submit a 'Declaration of Family Ties of a Judge', which is done by filling out a form on the website of the HQCJ. The declaration sets out whether they have relations with persons who hold, or have held during the past five years, positions in a broad range of judicial, political and state bodies, including the PIC.

²⁵ For an in-depth analysis of conflict of interest laws in Ukraine and recommendations for improvements, see Tilmann Hoppe Report on Managing Conflict of Interest in Ukrainian Judiciary, prepared for USAID New Justice Program, Kyiv, 2016

Third, judges must annually submit a ‘declaration on judicial integrity’ (Article 62 LJSJ) by filling out a form on the website of the HQCJ. The declaration consists of statements that they must confirm concerning, for example, the correspondence of the level of their lifestyle and property owned and income received with their and their family members’ income; that they have not committed corruption offences; there are no grounds on which to discipline them; they have not interfered with justice rendered by other judges; they are undergoing the vetting of judges in line with the Law on the Restoration of Trust in the Judiciary; there are no prohibitions on their service established by the Law on Government Cleansing (lustration law). A failure to submit a declaration, untimely submission or knowingly submitting unreliable (or incomplete) data results in disciplinary liability.

SUPERVISING JUDGES’ ASSETS AND BEHAVIOUR: THE ROLE OF THE NACP, HQCJ AND HCJ

The three documents generate different levels of scrutiny and supervision.

Article 60 LJSJ states that at least once every five (5) years ‘a central executive body’ which in this case is the NACP, will carry out a full verification of asset e-declarations. The HQCJ and the HCJ may also request the NACP to carry out a full verification of a judge’s declaration of assets, for example to assist with selecting candidates for judicial proceedings or to aid investigation of a disciplinary complaint. The NACP must itself submit evidence of criminal behavior to NABU, and evidence of a disciplinary offence to the HQCJ or the HCJ.

In addition, article 59 LJSJ, tasks the NACP with monitoring the lifestyle of a judge upon the request of the HQCJ or the HCJ. The results of lifestyle monitoring must be sent back within thirty (30) days of receipt of the request. The results may also be attached to the judicial dossier and used to evaluate the compliance with judicial ethics rules.

The ‘Declaration of Family Ties of a Judge’ and the ‘Declaration of Judicial Integrity’ are submitted to the HQCJ and they are deemed as credible, ‘unless there is any other evidence’²⁶ in which case, the HQCJ is obliged to verify the declarations.

The NACP plays an essential role in the verification of asset declarations and the investigation and determination of the integrity of judges. Its findings are essential for determining conflicts of interest, selecting candidates for judicial positions, undertaking performance evaluations of individual judges, establishing disciplinary offences by judges and uncovering evidence of criminal behavior.

However, in practice the NACP is failing to effectively fulfil its responsibilities to verify e-declarations and therefore failing to facilitate the operation of an effective conflicts of interest system, judicial disciplinary system, performance evaluation system for judges as well as failing to fulfil its obligation to submit evidence of criminal activity of judges to NABU.

Where the NACP fails to fulfil its mandate vis-à-vis the verification of e-declarations, civil society groups, as well as civil society members of public bodies including the PIC during the recent selection process for Supreme Court judges (see above at section 1), have, by contrast, seized on the public availability of e-declarations to carry out verifications. They have successfully fostered a culture of transparency in Ukraine that has raised public expectation of transparency of public officials’ assets and lifestyle.

The vibrant civil society environment and public scrutiny of public officials’ wealth in Ukraine has attracted political opposition. The government supported an amendment to Article 3 of the LPC to include anti-corruption NGOs, and sub-contractors who carry out work for them, in the list of officials

²⁶ LJSJ Article 61(4) and Article 62(4) LJSJ

who are obliged to make e-declarations.²⁷ The amendment puts an excessive burden on NGO activists and those who work with them and creates a threatening situation whereby the NACP can use criminal investigations to put pressure on anti-corruption activists. What is more, the amendment is not compatible with European standards that call for NGOs to be free to pursue their objectives.²⁸

Recommendation 27: Political leadership in Ukraine must demonstrate its seriousness about fighting corruption by ensuring that the NACP has a full complement of Commissioners committed to implementing the mandate of the NACP. The Verification Department must be adequately resourced. Automated cross-checks of e-declarations should take place.

Recommendation 28: State bodies with corruption prevention and investigation powers (for example NABU, PIC, SAPO, HCJ Disciplinary Inspectors, the Council of Judges Judicial Ethics Committee) should be encouraged to develop ‘memoranda of understanding’ with NACP to facilitate the exchange of information vital for the fulfilment of their duties, as well as be adequately resourced to verify e-declarations where they have the authority to do so.

Recommendation 29: Civil society organizations that focus on judicial corruption should be supported to carry out scrutiny and verification of judges’ asset declarations.

Recommendation 30: The March 2017 amendment to the Law on the Prevention of Corruption obliging anti-corruption NGOs and their sub-contractors to submit e-declarations should be revoked.

ETHICS ADVICE AND TRAINING FOR JUDGES IN UKRAINE

The Code of Judicial Ethics was approved by the Congress of Judges of Ukraine in February 2013. It sets out ‘general provisions’, guidelines on ethical ‘judicial conduct in the administration of justice’ as well as ethical ‘judicial conduct off-the-bench’. The Code is publicly available and copies are given to all judges.²⁹

The Council of Judges ‘Ethics committee’ trains judges, together with the National School of Judges, on judicial ethics. The Ethics Committee also advises judges individually about ethical dilemmas and conflicts of interest and informs the relevant authorities about failures by judges to respect the code of ethics. The possibility for judges to approach the Ethics Committee for advice about ethical dilemmas in their day-to-day work is important and judges should be routinely reminded of this possibility. However, despite the broad mandate of the Ethics Committee, it is composed of only four (4) permanent members.

The Ethics Committee has recently signed a memorandum of understanding with the NACP to exchange information and respect each other’s mandate. It is important that the NACP carries out its share of responsibility to monitor the lifestyle of judges and provide ethical and anti-corruption advice to judges, in order to facilitate the effectiveness of the work of the Ethics Committee.

Recommendation 31: The capacity of the Council of Judges Ethics Committee to carry out its wide responsibilities should be strengthened with appropriate resources and personnel so it can service the ethical training needs of all judges in Ukraine, and the NACP should undertake its responsibilities to monitor and advise judges.

²⁷ <http://euromaidanpress.com/2017/03/28/new-law-on-e-declarations-for-anti-corruption-ngos-seen-as-return-to-authoritarianism-in-ukraine/>

²⁸ Recommendation [CM/Rec\(2007\)14](#)

of the Committee of Ministers to member states on the legal status of non-governmental organizations in Europe https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d534d

²⁹ <http://court.gov.ua/userfiles/Kodex%20sud%20etiki.pdf>

Recommendation 32: The Council of Judges Ethics Committee and the National School of Judges should routinely remind judges that they may seek counsel from the Committee about conflicts of interest and ethical dilemmas.

GIFTS

The LPC sets out the rules on gift-giving to public officials, including judges. Gifts are defined in Article 1, LPC as ‘monetary funds or other assets, advantages, privileges, services, and intangible assets that are granted/obtained at no cost or at a price below the minimum market price.’

Gifts are banned except, as set out in Article 23 of the LPC, when they ‘correspond to generally recognized ideas of hospitality’ or when one gift from a giver on a single occasion does not exceed the amount of one minimum wage salary in the year it is given, or several gifts from a giver on multiple occasions within one year, does not exceed the cost of two minimum wage salaries within the year the gifts are given. It is unclear what ‘generally recognized ideas of hospitality’ constitute and there is a concern that it could enable judges to accept lavish levels of hospitality, that would clearly be a breach of the spirit of the law. Linking the acceptable value of gifts to the minimum salary implies the acceptable level of gift-giving will increase over time.

Recommendation 33: The Ethics Committee of the Council of Justice should address and clarify to judges what ‘generally recognized ideas of hospitality’ means, so that they can clearly handle situations in which they receive gifts in the form of hospitality.

The crucial questions on gifts from an anti-corruption perspective is whether judges must declare any gifts they have accepted and to whom, as well as declare any proposals to make unlawful gifts, and whether those declarations of gifts are recorded and audited. Judges are obliged under Article 24 of the LPC to reject and report unlawful gifts including identifying the person making the proposal and involving witnesses if possible. Judges should report unlawful gifts in writing to the chair of the court and to the NACP.

Recommendation 34: The Ethics Committee in cooperation with the NACP should develop a Regulation that establishes the procedure that judges should follow in declaring lawful and unlawful gifts.

6. SANCTIONING POOR CONDUCT OF JUDGES THROUGH DISCIPLINARY PROCEEDINGS IN UKRAINE

GENERAL REMARKS

The 2016 judicial reforms established a new system for disciplining judges that has been in operation since 5 January 2017. Most notably there is now only one body responsible for the discipline of judges: the High Council of Justice. Previously, responsibility was shared with the HQCJ. The location of disciplinary proceedings in one body is a welcome development and should aid consistency in the approach to disciplining judges.

There is a three-year statute of limitations for initiating a disciplinary complaint that runs from the date of the disciplinary misconduct, excluding periods of temporary incapacity to work, leave or of disciplinary proceedings.

A detailed template for drafting complaints about judges is available on the HCJ website.³⁰ To further aid complainants the website should clearly state – in non-legalistic language – the process for handling a complaint and when the complainant can expect feedback from the HCJ.

Recommendation 35: The HCJ should improve the user-friendliness of the website for submitting complaints about judges.

The HCJ stated that they currently have no Disciplinary Inspectors to assist with investigating complaints. They estimate they require 42 Disciplinary Inspectors to carry out their workload.

Recommendation 36: HCJ Disciplinary Inspectors should be appointed immediately to carry out investigations of complaints against judges.

Section VI articles 106 to 111 and Section VII article 112 to 118 of the LJSJ, as well as Article 42 - 50 of the LHCJ, set out the grounds for disciplinary liability of a judge and the procedure for dismissing a judge. Disciplinary liability can take several forms short of dismissal, as set out in Article 109 of LJSJ: admonition; reprimand, with the deprivation of the right to receive bonuses for one month; censure, with the deprivation of the right to receive bonuses for three months; temporary suspension of a judge from one to six months; and transfer of a judge to a court of a lower level.

There are six grounds in Article 126 of the Constitution that could give rise to the removal of a judge from office. Paragraphs 2, 3 and 6 of Article 126 set out three grounds that could be the subject of disciplinary proceedings and require a decision by the Disciplinary Chamber of the HCJ to dismiss a judge:

2. *violation of the conflict of interests requirements by the judge*
3. *commission of a substantial misconduct, gross or systematic neglect of duties, which is incompatible with the status of a judge or reveals his incompatibility with the office held;*
6. *breach of the obligation to prove the legality of origin of his assets”.*

Paragraphs 1 and 4 cover the grounds of ill health and submission of a letter of resignation or voluntary discharge. Paragraph 5 concerns dismissal where a judge refuses a transfer to another court in the event of dissolution or reorganization of the court.

Article 55(3) of the LJSJ prevents judges from resigning on grounds of ill health or retiring before a Disciplinary Chamber of the HCJ can consider disciplinary complaints against them that would lead to their dismissal. In some countries³¹ legal lacuna can enable the undesirable situation whereby a judge, on the point of being dismissed on the grounds found in paragraphs 2, 3 and 6 of Article 126 of the Constitution, avoids his or her fate of being dismissed in disgrace by seeking to be removed from office because of ill health or voluntary retirement. In such undesirable cases, judges who avoid dismissal can easily find employment as lawyers or indeed re-apply at a later date for judicial appointments.

Should a judge be dismissed from office because of paragraphs 2,3 and 6 of Article 126 of the Constitution or because of a criminal conviction, Article 65(4) LJSJ holds that they may not be a candidate for a position of judge.

³⁰ http://www.vru.gov.ua/add_text/155

³¹ See V Jennett, Council of Europe Project against Economic Crime in Kosovo (PECK) II project; Technical Paper: Corruption risk assessment in judiciary <http://www.coe.int/en/web/corruption/projects/peck2/tp>

The following observations and recommendations are made in the context that the disciplinary regime is only just getting underway and it will take close monitoring to assess where problems remain within the system.

DISCIPLINARY GROUNDS

The long list of grounds for disciplinary liability set out in Article 106 LJSJ include where a judge intentionally or as a result of negligence denies justice by misapplying procedural laws, fails to give reasons for a decision or fails to follow the rules of publicity and openness of a trial. Further grounds for disciplinary liability include unreasonable delays in court proceedings or in drafting or submitting decisions into the court registry. The list of grounds is mostly clearly drafted, with the exception of Article 106(3) LJSJ that states

A judge may be brought to disciplinary liability within the procedure of disciplinary proceedings on the following grounds...
(3) judge's conduct disgraces a status of judge or undermines the authority of justice, in particular, on the issues of moral, integrity, incorruptibility, congruence of the lifestyle of a judge with his/her status, compliance with other norms of judicial ethics and standards of conduct which ensure public trust in court, disrespect to other judges, lawyers, experts, witnesses or other court process participants.

Article 106(3) LJSJ is a vague and wide 'catch-all' ground that is inconsistent with international standards on disciplinary liability for judges. Such a wide ground can be used to harass judges and threaten their independence, since the law does not afford judges the possibility to foresee how they can precisely organize their affairs and decisions to meet its requirements.

Recommendation 37: Article 106(3) LJSJ should more clearly and precisely state the behavior that attracts disciplinary liability.

The HCJ stated that they are hampered in handling complaints from citizens on the ground of judges' 'inexplicable wealth' since it is the responsibility of the NACP to verify declarations of assets by public officials, including those of judges, and the NACP has not made substantial progress in verifying the e-declarations of judges.

Under Article 60 of the Law on the Prevention of Corruption the HCJ can request the NACP to carry out a full verification of judges' declarations. But the HCJ itself has neither the legal competence – nor the resources – to verify judges' assets and wealth. It is appropriate that the HCJ does NOT have the power to verify judges' declarations, since an independent body (NACP) is in theory better placed to carry out an impartial verification. The HCJ was not able to offer statistics on the number of 'inexplicable wealth' complaints against judges it had received.

Recommendation 38: The HCJ should be able to request the verification of e-declarations by the NACP under Article 60 of the LPC. Where the NACP is not fulfilling its mandate speedily or effectively, the verification of judges' e-declarations should be prioritized, over those of other public officials, given judges central role in delivering justice and upholding the rule of law.

DISCIPLINARY PROCEEDINGS

The new disciplinary procedural rules are set out in Chapter 4 Article 42 to 50 of the Law on the High Council of Justice. The disciplinary proceeding consists of three stages according to Article 42(3):

- 1. a preliminary review and check of the disciplinary complaint*
- 2. an opening of the disciplinary case*
- 3. a hearing on the disciplinary complaint and an adoption of a decision to impose disciplinary liability on the judge or refuse to impose disciplinary liability on the judge.*

A Disciplinary Chamber handles each complaint. It consists of at least 4 HCJ members, at least half or a substantial part of whom must be judges or retired judges. The hearings are open to the public.

A complaint can be submitted by a ‘any person’, lawyer or citizen (Article 107(1) LJSJ) or can be initiated by a Disciplinary Chamber or by the HCQJ, in cases stipulated by law (Article 42(1) LHCJ). At the preliminary review stage the Rapporteur (the member of the Disciplinary Chamber responsible for the preliminary check of the complaint) may ‘return’ a disciplinary complaint to the complainant without consideration on certain grounds which render it, according to Article 44(3) LHCJ, *‘not necessary to evaluate credibility of the information on the features of the disciplinary offense of the judges and on the evidences of such an offense’*.

This is an important stage for both complainants seeking a review of their complaint and the HCJ Disciplinary Chamber Rapporteur who is tasked with establishing which cases may be returned without further consideration, and thereby weeding out ‘frivolous cases’.

There are two grounds upon which the Rapporteur may return a complaint, that raise anti-corruption concerns.

Article 44 (1)4 states that a complaint may be returned if *‘the disciplinary complaint contains obscene remarks or statements offending the honor and dignity of any person.’*

Article 44(2) states that a ‘manifestly groundless’ disciplinary complaint may be returned without consideration if the complainant had *‘repeatedly submitted manifestly groundless complaints within the twelve months prior to the filing of this complaint’* which were also returned or where the Disciplinary Chamber refused to open a disciplinary case.

Both grounds for returning complaints without further consideration present concerns that they could be abused so as to refuse to hear quite legitimate complaints about the poor conduct or corrupt behavior of judges, because abusive language was used or a bothersome individual repeatedly submits complaints. The merit of the substance of a complaint should be considered before dismissing it.

Recommendation 39: Article 44(1)4 could be deleted as a ground to return a complaint without consideration, since the merit of the substance of a complaint should be considered before dismissing it.

Recommendation 40: The operation of Article (44)2 must be monitored to assess whether the effect is to prohibit legitimate complaints or whether it in fact aids the HCJ in weeding out frivolous time-consuming cases.

The Rapporteur, who investigates the initial complaint should not be in a position to also take the decision on the merits of the case.

The HCJ stated in a meeting with the author, that a glut of complaints concerning judges not entering court decisions in a timely fashion into the ‘Unified State Registry of Court Decisions’ are contributing to clogging up the disciplinary proceedings system. The HCJ stated that large numbers of such complaints were often signed by the same two lawyers. The HCJ stated that in some complaints the judge has registered court decisions just one or two days late. The HCJ stated that under the procedural rules, it is difficult for the rapporteur to weed out such cases at the Article 44 ‘return’ stage, and so such cases often necessitate the collection of necessary documents and other materials, thereby clogging up the work of the disciplinary body.

Untimely entering of court decisions into the official register can constitute a real harm to the delivery of justice. However, if a large number of complaints without merit are submitted by the same individuals or are signed by the same lawyers, Article 107(4) of the LJSJ provides justification for the

H CJ rapporteur in the disciplinary proceedings to refuse to consider complaints from these individuals:

'Abuse of the right to apply to the disciplinary body including initiating the issue of judicial liability without sufficient grounds, and using such right as a means of pressure on a judge related to his/her administration of justice shall not be allowed'

Article 107(5) (5) of LJSJ enables the H CJ to submit complaints to lawyers' governing bodies about the conduct of the lawyers who sign unjustified disciplinary complaints against judges.

The Disciplinary Chamber can take a decision to refuse to open a disciplinary complaint. The decision cannot be appealed by the complainant. However, if one of the members of the Disciplinary Chamber does not agree with the decision, it can be forwarded for consideration by a plenary session of the H CJ, who can adopt a decision to maintain the decision to refuse to open a disciplinary complaint or in fact to open a disciplinary case (Article 46(3) LHCJ). Decisions taken about the dismissal of a judge are considered by the plenary session of the H CJ, following a motion of the Disciplinary Chamber on the dismissal of a judge (Article 56 LHCJ).

ANONYMOUS COMPLAINTS AND WHISTLEBLOWERS

Anonymous complaints about the conduct of judges are not permitted by law. Article 107(6) LJSJ specifically bars disciplinary cases against judges based on 'anonymous applications and notifications'. According to the law (Article 107(2)1 LJSJ and Article 44(1) 1) complaints must be signed by the complainant and a failure to sign a complaint constitutes a ground for returning a disciplinary complaint without further consideration.

This is a serious weakness in the anti-corruption architecture of the judiciary in Ukraine. It is also contrary to international standards (see Article 13 UNCAC) that require anti-corruption bodies, of which the H CJ with its supervisory and discipline powers over judges is undoubtedly one, to provide anonymous anti-corruption hotlines. The H CJ could check the merits of complaints that are anonymous, and dismiss those that are not backed up by facts.

Recommendation 41: The LJSJ and LHCJ should be amended to enable the submission of anonymous complaints.

Article 53 of the LPC provides some limited protection for whistleblowers. However, it does not clearly set out to whom whistleblowers may direct their reports, nor detail how whistleblowers are to be supported by authorities in line with international standards.³²

Whistleblowers such as court staff, lawyers, parties to cases and others, who may be vulnerable to perceived or real retribution or intimidation by a judge who is the subject of a complaint, and who observe poor or corrupt conduct by a judge, are barred from submitting their complaints anonymously to the judicial disciplinary body, and are not adequately protected by law. Currently the legislature is drafting a whistleblower protection law and its provisions should be assessed against international standards on whistleblowing protection, in particular CoE Recommendation CM/Rec (2014)7.

Recommendation 42: The provisions of the draft Whistleblower Protection Law should be assessed against international standards on whistleblowing protection.

JUDICIAL IMMUNITY

³² See the requirements for an adequate whistleblower protection mechanism set out in Council of Europe Recommendation CM/Rec(2014)7.

Judicial immunity has been reformed so that rather than the Verkojva Rada having the power to lift a judge's immunity and therefore consent to the detention or custody of a judge, that power is now located in the HCJ: article 126 of the Constitution states:

'Without the consent of the High Council of Justice a judge may not be detained or held in custody or under arrest before he is convicted by a court, except for detention of a judge during or immediately after commission of a grave or especially grave offense. A judge may not be held accountable for a judgment that he has made, except for the commission of an offense or misconduct'

Under the previous regime there was a risk that judges would leave the territory to escape justice, before the Rada lifted their immunity: that 'flight risk' remains under the new regime, since the HCJ must consent to a judge's detention or custody. In the time it takes to secure the consent of the HCJ to lift a judge's immunity, a judge could flee justice. HCJ consent is not required in 'grave or especially grave offenses' which is a positive reform, but it still remains the case that there are other categories of serious crimes that do require HCJ consent and therefore enable unscrupulous judges in such situations to evade justice.

Recommendation 43: HCJ consent to detain or hold in custody judges, that is consent to lift judicial immunity, should not be required in all serious crimes, including corruption crimes such as bribery.

7. EVALUATING THE PERFORMANCE OF COURTS AND JUDGES IN UKRAINE

Performance evaluations of courts and individual evaluations of judges are two separate forms of judicial evaluation that nonetheless complement each other. They serve as important anti-corruption tools to improve the poor performance of courts and the poor conduct of judges, as well as highlight positive practices and traits. In line with international standards they should be separate evaluations as well as distinct from disciplinary procedures, although if grounds for disciplinary liability are uncovered during evaluations they should be addressed to the appropriate disciplinary complaints mechanism (see section 1 on the disciplinary mechanism implemented by the HCJ).³³

PERFORMANCE EVALUATIONS OF COURTS

The Ukrainian judiciary does not yet have a fixed set of performance standards against which the performance of courts is evaluated, although the 'State Judicial Administration of Ukraine, that reports to the High Council of Justice, is at an early stage of developing a court performance evaluation methodology, with assistance from the European Union 'Support to the Justice Sector Reform Program' in Ukraine.

The State Judicial Administration of Ukraine's powers to undertake performance evaluations of courts are articulated in Article 152 LJSJ:

'The State Judicial Administration of Ukraine shall: study the practices related to the organization of the operation of the courts, develop and submit in the prescribed manner the proposals for improvements;³⁴ examine the human resources issues of court staff, estimate the

³³ CCJE, Opinion No. 17 (2014) on the Evaluation of judges' work, the quality of justice and respect for judicial independence, paragraph 10.

³⁴ Article 152(3) LJSJ

need for specialists, and submit requests for the training of the respective specialists;³⁵ organize the keeping of court statistics, case management and archiving; monitor the status of case management in the courts³⁶

Performance evaluations of courts typically focus on ‘Key Performance Indicators’ of courts as a whole, such as the rate at which courts resolve incoming cases in one year against the number of new entries (‘clearance rate’), the time it takes to dispose of a case (‘disposition time’), the number of pending cases, new cases entering the system and re-opened cases in light of the number of cases disposed of in one year (‘congestion rate’), the appeals rate, execution of judgments, numbers of adjournments and the costs of carrying out its function (‘cost efficiency’), as well as other metrics of the quality of judicial decision-making.³⁷

Understanding how courts operate is essential for understanding individual judges’ performances. International standards make it clear that statistics on court operations such as those identified by ‘Key Performance Indicators’ are ‘only one of the factors in the evaluation of judges.’³⁸ However, they are important: as CCJE Opinion No. 17 (2014) states in paragraph 26:

‘It would be particularly unjust that an individual judge be evaluated negatively because of problems caused by poor working conditions that he or she cannot influence, such as for example delays caused by massive backlogs, or because of lack of judicial personnel or an inadequate administrative system’³⁹

Recommendation 44: The State Judicial Administration should develop performance standards for courts and maintain updated statistical records, as well as publish regular reports on that data, that may assist in the evaluation of court, as well as individual judge’s, performance. Data on public attitudes to the quality of the performance of courts may also form a part of court evaluations.

INDIVIDUAL EVALUATIONS OF JUDGES

Individual evaluations of a judge’s performance focus on a judge’s knowledge, quality of decision-making, efficiency in handling his or her workload as well as personal and moral characteristics. According to international standards, the criteria for evaluation should be ‘clearly spelled out, transparent and uniform...the precise criteria used in periodic evaluations shall be set out further in regulations, along with the timing and mechanisms of performing evaluations.’⁴⁰ In Ukraine, such individual evaluations are called ‘regular evaluations’ and regulated by Article 90 of the LJSJ. They are distinct from the ‘qualifications evaluations’ that take place during selection procedures for candidates to fill judicial positions (see above in section 1).

The form of ‘regular evaluation’ in Ukraine does not meet international standards or good practice for individual evaluations of judges. Article 90 LJSJ sets out an inadequate form of evaluation of judges whereby the dominant form of evaluation is by lecturers at the National School of Judges. The OSCE/ODIHR Kyiv Recommendations state that ‘Evaluations shall be conducted mainly by other judges.’⁴¹ In addition, the evaluation criteria set out in Article 90 focuses predominantly on the judge’s training performance and not of their day-to-day court performance, which should be the main focus of the evaluation.

³⁵ Article 152(4) LJSJ

³⁶ Article 152(6) LJSJ

³⁷ See European Commission Support to Justice Sector Reforms in Ukraine; Adris Hodzic ‘Performance Management in Courts: Local General Courts in Ukraine (2016) EuropeAid/134175/L/ACT/UA No 2013/328-160

³⁸ OSCE/ODIHR Kyiv Recommendations, Professional Evaluation of Judges Recommendation 28’

³⁹ CCJE, Opinion No. 17 (2014) on the evaluation of judges’ work, the quality of justice and respect for judicial independence

⁴⁰ OSCE/ODIHR Kyiv Recommendations: paragraph 29

⁴¹ OSCE/ODIHR Kyiv Recommendations: paragraphs 30 and 31

The lecturers, some of whom may be judges themselves but this is not always the case, evaluate judges by completing questionnaires about the performance of judges. Upon the completion of every training course the lecturer fills in a questionnaire which includes the evaluation of the ‘judge’s knowledge, skills and abilities; accuracy and timeliness of completing the training assignments; analytical abilities and ability to evaluate information; team playing ... communication skills and strong points of the judge’.

In addition, judges who practice in the court of the judge under evaluation may also fill out questionnaires about the performance of the judge and ‘civic organizations’ may do independent evaluations of the judge’s work in court sessions. The judge himself/herself also fills in a self-evaluation questionnaire.

The judge may object to evaluation results and questionnaires may be revised.

The evaluation questionnaires, as well as objections and revised evaluation questionnaires are included in the judicial dossier of a judge, and therefore may be referred to in ‘qualifications evaluations’ when judges apply for other judicial positions.

Recommendation 45: Article 90 LJSJ ‘regular evaluations’ of judges should be revised to ensure that other judges mainly carry out the evaluations, a judge’s day-to-day performance in court proceedings is a significant part of the evaluation and the precise criteria used to evaluate a judge’s knowledge, skills, court performance, ability and integrity is spelled out in the law (LJSJ) as well as regulations.

8. COURT CASE MANAGEMENT SYSTEM IN UKRAINE

Corruption risks in a court case management system may be mitigated by a robust case allocation system, clear provisions for the lawful withdrawal of judges from cases⁴² and a proactive approach to making court proceedings and the work of judges transparent.

CASE ALLOCATION

The process of allocating cases to judges presents opportunities for corruption as judicial staff and other parties could seek to influence the distribution of cases to particular judges who may be partial to the outcome of the case. International standards call for ‘objective, pre-established criteria in order to safeguard the right to an independent and impartial judge.’⁴³

The Bangalore Principles elaborate:

‘Such arrangements may be changed in clearly defined circumstances such as the need to have regard to a judge’s special knowledge or experience. The allocation of cases may, by way of example, be made by a system of alphabetical or chronological order or other random selection process.’⁴⁴

⁴² The legal provisions on lawfully removing judges from cases in Ukraine is considered in section 5 ‘Supervising the assets, interests and ethical behavior of judges.’

⁴³ CoE (2010) 12, paragraph 24

⁴⁴ Bangalore Principles www.yargitay.gov.tr/

The procedure for allocating cases to judges in Ukraine is set out in Article 15 of the LJSJ and the Regulation on the Unified Court Information (Automated) System from 2010.

The criteria for assigning cases is set out in Article 15(5) LJSJ. It is not random as such but rather takes into account the following factors:

- the specialization of judges,
- caseload of each judge
- prohibitions on a judge participating in the review of decisions where that judge participated in rendering the court decision in question (except for the review of newly discovered circumstances
- vocation leaves of judges⁴⁵
- absence due to temporary incapacity to work
- business trips
- other cases provided by law where a judge cannot administer justice or participate in consideration of a case

Where the automated system is not functioning for more than 5 working days, case assignment is determined by the 'Regulation on the Unified Court Information (Automated) System (Article 15(9) LJSJ).

Article 15(7) and (8) set out that information on the results of the case assignment are stored in the automated system and must be protected against unauthorized access and interference. Unauthorized interference with the automated system is a criminal offence under Article 376(1) of the Criminal Code.

Interlocutors with knowledge of the system stated that the general system itself is of a low quality that was developed by a 'state enterprise' using 'closed source' code to develop the allocation procedure. The internal working procedures of the case management system are therefore not open to inspection or modification by others, which hampers effective auditing of the system. Furthermore, interlocutors stated that the system is not user-friendly and it is complicated to carry out searches as queries must be written in computer language.⁴⁶

Recommendation 46: The case allocation system should be developed with 'open source' software that facilitates inspection and auditing of the system.

Despite the regulations, interlocutors stated that the automated case allocation system can be manipulated so that cases are assigned to particular judges. The 'specialization' of judges may be altered to ensure a particular judge is allocated a case. All judges but one particular judge may be designated as 'ill' for short periods to ensure that the particular judge is allocated a case. Court users could submit multiple identical complaints to a court and then choose to pay the court fees when their preferred judge is allocated one of the complaints.

Recommendation 47: The Council of Judges should ensure that professional audits of the case allocation system take place, with full access to the internal procedures of the system and specific analysis of ways in which the system may be manipulated. Inspections and audits should check that case allocation is automatically registered and published and that unauthorized changes to the allocation system after allocations are made are not permitted.

⁴⁵ It appears there is a misspelling in the English translation of the law and 'vocation' should read 'vacation'.

⁴⁶ E-court pilots are taking place in Ukraine that seek to improve the case allocation and case management systems.

TRANSPARENCY OF JUDICIAL DECISION-MAKING

International standards emphasize that transparency of court proceedings is crucial for building public trust in the judiciary. Transparency is essential in every aspect of a court's handling of a case. Transparency requirements include the publication of court schedules, recording and publishing videos and transcripts of proceedings, publishing judicial decisions in databases, registries and websites 'in ways that make them truly accessible and free of charge' and ensuring that decisions are indexed in a searchable manner with subject-matter, legal issues raised and names of judges who wrote them clearly identified. What is more the access of journalists to courts should be encouraged and facilitated.⁴⁷

Article 11 of the LJSJ sets out the requirements of 'transparency and openness of court proceedings' in Ukraine, which are compatible with international standards. Court decisions, court hearings and information on cases considered are open and everyone is entitled to free access to judgments. Cases *in camera* are permitted by reasoned court decisions in cases determined by the law. Courts are obliged to publish on official web-sites information about court hearings including the venue, date and time of the court session, parties to a dispute, subject of the claim, date of receipt of the claim, transfer of the case from one court to another, amongst other details. The media and persons present in the courtroom may take photographs, and make video and audio recordings without specific permission of the court, although broadcasts require court permission.

Each of the transparency requirements of court proceedings require monitoring to ensure they are routinely and adequately implemented. The governance bodies of the judiciary are specifically directed to cooperate with each other and NGOs to develop and introduce 'measures to guaranteed independence of judges and authority of justice' (Article 73 LHCJ) and should support regular monitoring of the transparency of court proceedings across all courts in Ukraine.

Recommendation 48: The HCJ, in its capacity under Article 1 LHCJ to ensure that the judiciary is accountable to society and under Article 73 LHCJ, should cooperate with the Council of Judges, the PIC and non-governmental organizations to monitor and propose measures to improve the transparency and openness of court proceedings in compliance with Article 11 LJSJ.

9. ESTABLISHING A SPECIALIZED ANTI-CORRUPTION COURT IN UKRAINE

Specific anti-corruption courts are not the norm in European countries, nonetheless they are a policy option in countries where high levels of corruption in the courts result in impunity for perpetrators of corruption, including high level government officials.⁴⁸ The international community in Ukraine strongly supports the establishment of an anti-corruption court and the Ukrainian government has committed to its establishment.⁴⁹ Section X11(16) of the LJSJ states that within twelve (12) months

⁴⁷ See the OSCE Kyiv Recommendations paragraphs 32 and 33

⁴⁸ See U4 Specialized anti-corruption courts: A comparative mapping <http://www.u4.no/publications/specialised-anti-corruption-courts-a-comparative-mapping/>

⁴⁹ See IMF <https://www.imf.org/external/pubs/ft/scr/2016/cr16319.pdf>

after coming into force of the law the ‘High Anti-Corruption Court’ shall be established and a competition for the positions of judges within the court announced.

Interlocutors stated that specific legislation setting out the design of the court is delayed because of political disagreements about the need for such a specialized court as well as disagreements over the structure of the court and its competences.

Typically, an anti-corruption court specializes in adjudicating high level corruption crimes and has specialized judges, not regular judges. In Ukraine, the logic for such a court flows from the establishment of other specialized anti-corruption law-enforcement bodies: the National Anti-Corruption Bureau (NABU) and the Specialized Anti-Corruption Prosecutor’s Office (SAPO). The progress made by, in particular, NABU in investigating cases of corruption runs the risk of being scuppered in the courts, where pliant judges are prone to political interference in their decision-making and regular judges are not equipped or trained to handle complex corruption cases.

Indeed, one of the compelling reasons for opting to establish a specialized Anti-Corruption Court was the ‘efficiency’ of training a specialized cadre of judges to handle complex cases for the whole territory of Ukraine, rather than investing in specialized trainings for judges in ordinary chambers throughout the country.

The selection of judges for the specialized Anti-Corruption Court will be a key factor in the independence and success of the integrity and efficiency of the court. Consideration must be given to what extent the newly reformed regular process for selecting and appointing judges is appropriate to handle selection of judges to the Anti-Corruption Court. A special selection procedure may be required. Some level of international participation in that process could give a guarantee of the integrity of the process, but must be balanced with the requirement to protect the independence of judicial governance bodies in managing the recruitment and selection processes for judges. In addition, consideration must be given to the number of specialized judges and whether their appointment to the specialized Anti-Corruption Court drains talent from the regular court system.

Recommendation 49: The selection of judges for the specialized Anti-Corruption Court could involve the international community in, for example, vetting a long-list of candidates for potential selection to the court. In order to protect the independence of the Ukrainian judiciary, the final selection decision could be made according to the selection criteria and process provided for by the newly-reformed regular process for selecting candidates for judicial positions, that involves the PIC assisting the HQCJ.

Interlocutors stated that at the pre-trial level corruption cases are easily sabotaged. Therefore, an Anti-Corruption court should have competence over pre-trial and trial proceedings. Consideration should also be given to the court that hears appeals to decisions of the Anti-Corruption Court. There have been gains made in the reform of the ordinary court system, especially in the recent reform of the Supreme Court and the selection procedure for judges to that court. In order not to undermine these gains, it is appropriate that appeals to decisions of the Anti-Corruption court could be made to the Criminal Chamber of the Supreme Court. Interlocutors amongst NGOs in Ukraine expressed opposition to this view and are advocating for a separate appellate panel within the Anti-Corruption Court.

Recommendation 50: Consideration of the design and competence of the specialized Anti-Corruption Court should take into account the following factors: the need for the court to have competence over pre-trial proceedings; the number of specialized judges and how they are appointed; does the anti-corruption court have first instance and appellate level jurisdiction and what are the risks of it not having jurisdiction of these stages of court proceedings; the scope of the jurisdiction of the court, that is the type of corruption crimes it handles and whether ‘petty’ corruption crimes remain within the jurisdiction of the regular court system. In making these policy considerations, attention should be paid to maintaining the unity of the judicial system and the independence of the judiciary.

ANNEX 1: TABLE OF OVERVIEW OF THE RISKS OF JUDICIAL CORRUPTION IN UKRAINE

| <i>Area</i> | <i>Types of corruption and problems</i> | <i>Manifestations, Examples and Preconditions</i> |
|------------------------------|--|--|
| <i>Judicial Independence</i> | <ul style="list-style-type: none"> — Undue interference in judicial decision-making; — Bribes; exchange of favors or promise of future favors (kickbacks); receipt of favors — Threats to the security of judges, their families and courthouse | <ul style="list-style-type: none"> ▪ Frequent attempts to interfere in the judicial decision-making process by politicians, state bodies, civil society, business sector, court users as well as undue interference by other judges; ▪ Lack of psychological and moral strength to resist outside illegal interference or pressure from politicians, other branches of power or other judges; ▪ Prosecutors regularly initiate proceedings under Article 375 of the Criminal Code against judges for an 'unfair sentence, judgment, ruling or order...'; ▪ Judges regularly miss procedural deadlines or misapply or manipulate procedural issues to favor one party; ▪ Lack of effective mechanisms to address complaints of illegal interference in the delivery of justice.; |

- Legislative acts concerning the organization and administration of the judiciary are overly-detailed and verbose and, yet, on occasion not sufficiently precise;
- Politicians, public officials, NGOs and media unjustifiably publicly denounce judges and undermine judicial decision-making process;
- The various lustration and judicial vetting processes in Ukraine are not swiftly concluded;
- PIC 'information' and 'opinions' on the 'professional ethics and integrity' of judges are found to not be adequately substantiated;
- Required measures to secure judges and courthouse are systematically neglected;
- The Office of the Prosecutor General selectively addresses complaints about undue interference in court processes and procedures.

| | | |
|---|---|---|
| <p><i>Judicial governance and self-governance</i></p> | <ul style="list-style-type: none"> — Bribes, exchange of favors or promise of future favors (kickbacks); receipt of favors — misuse of power — Corporatism and loyalism towards other judges, judicial assistants and other administrative personnel | <ul style="list-style-type: none"> ▪ All management and administrative roles in the judiciary (appointment of judges to administrative positions, appointment of members to commissions and councils, selection of high-profile public positions in the judiciary, such as the Head of the SJA) as well as decisions on a judge’s career (appointment, selection, transferal, discipline, etc.) may be influenced by corruption; ▪ Lack of transparency in selecting delegates to the Congress of Judges; ▪ It is not possible for candidates for judicial positions to appeal the substance of decisions to reject their applications at all of the various stages of the selection and appointment process; ▪ Unavailability of statistics on key performance indicators about the performance of the courts; ▪ There is a failure to publish annual reports on the performance of the courts. |
| <p><i>Selection and appointment of judges</i></p> | <ul style="list-style-type: none"> — Political interference in decisions — Bribes, exchange of favors or promise of future favors (kickbacks); receipt of favors — Loyalty to political powers; | <ul style="list-style-type: none"> ▪ Candidates for judicial positions cannot appeal the substance of decisions to reject their applications at the various stages of the selection and appointment process; ▪ The President delays proposals by the HCJ for appointment of candidates to judicial positions; |

| | |
|--|---|
| <ul style="list-style-type: none"> — Private interests and conflict of interests — Nepotism, cronyism and corporatism; | <ul style="list-style-type: none"> ▪ HQCJ criteria and methods for evaluating candidates for judicial office are not publicly available; ▪ There is a lack of transparency of PIC evaluation criteria; ▪ There is a risk that due to lack of resources, time or other factors PIC 'information' and 'opinions' on candidates for judicial office are not always substantiated and occasionally contain false statements; ▪ Multiple bodies are involved in the process of selecting judges; ▪ PIC members who assess the professional ethics and integrity of judges have conflicts of interest, for example, they may be lawyers who appear before the judges they assess or the candidate has been previously the subject of criticism by the NGO represented by the PIC member; ▪ PIC members do not have the same rights of access to registers and other information held by state bodies in order to carry out fully their evaluations of judges; ▪ Laws are introduced to make it more difficult for civil society organizations to fulfil their public scrutiny and monitoring roles of the judiciary as members of state bodies, and in other fora, for example the amendment to the LPC requiring anti-corruption NGOs and their sub-contractors to submit e-declarations; |
|--|---|

| | | |
|---|---|---|
| | | <ul style="list-style-type: none"> ▪ The merit aspect of selecting judges is reduced or ignored by politically-directed selection or internal networks of influence; ▪ Civil society scrutiny of judicial qualifications includes making unsubstantiated claims against judges that harass and intimidate judges; ▪ Civil society organizations with the lawful right to sit as members on the PIC and other state bodies with scrutiny capacity over the judiciary, are targeted by political interests and subject to pressure and harassment with the aim of diminishing their capacity to carry out public scrutiny and monitoring of the judiciary. |
| <p><i>Training and Individual Evaluations</i></p> | <ul style="list-style-type: none"> — Abuse of power including to certify judges — Bribes, exchange of favors or promise of future favors (kickbacks); receipt of favors | <ul style="list-style-type: none"> ▪ Trainers of the National School of Judges abuse their power to evaluate judges. Evaluations should be based on to what extent judges are effective in their day-to-day work in courts, rather than performance in the NSJ. ▪ Evaluations of judges are influenced by irrelevant factors and/or third parties to favor judge’s promotion and salary increase; ▪ The criteria for individual evaluations of judges is not clearly spelled out, transparent and uniform; ▪ The timing as well as the mechanism for judicial performance evaluations are not clearly set out in regulations; |

| | | |
|--|---|--|
| <i>Judicial Recusal/ Self- recusal</i> | <ul style="list-style-type: none"> — Conflict of Interest | <ul style="list-style-type: none"> ▪ Evaluations are not conducted mainly by other judges; ▪ The evaluation does not focus on the judge's day-to-day work and performance in a court. ▪ ›The judge cannot object to or request review of evaluations. |
| <i>Declarations of Assets</i> | <ul style="list-style-type: none"> — Abuse/sabotage of asset declaration process — Interference into declaration procedure — Bribes, exchange of favors or promise of future favors (kickbacks); receipt of favors — Trading of influence | <ul style="list-style-type: none"> ▪ Low rate of successfully prosecuted corruption offences or crimes ▪ Disciplinary proceedings are not initiated by the HCJ against judges who fail to submit, or submitted inaccurate, asset declarations because the NACP fails to conduct verifications; ▪ Administrative proceedings are not initiated against judges who fail to submit asset declarations; ▪ Asset declarations are inaccurately or falsely completed, details are omitted or there is a failure to submit in a timely fashion; |

| | | |
|---|---|--|
| | | <ul style="list-style-type: none"> ▪ The NACP fails to verify asset declarations and fails to submit evidence of criminal behavior to NABU because of political pressure, offer of bribes/favors or incompetence; ▪ The NACP fails to carry out or share verifications of e-declarations of judges with judicial bodies who are undertaking evaluation processes, selection processes, disciplinary proceedings or other assessments of judges, because of political interference in their work, payment of bribes or exchange of favors now or in the future. |
| <p><i>Lifestyle Monitoring</i></p> | <ul style="list-style-type: none"> — Political pressure and other illegal attempts at pressure — Abuse of power | <ul style="list-style-type: none"> ▪ The NACP does not respond within 30 days to HQCJ or HCJ requests under Article 59 LJSJ to carry out lifestyle monitoring of judges. ▪ The NACP does not carry out lifestyle monitoring of judges because of strong political pressure or abuse of office. |
| <p><i>'Declaration of Family Ties of a Judge' and 'Declaration of Judicial Integrity'</i></p> | <ul style="list-style-type: none"> — Hidden private interests — Corporatism and loyalism — Nepotism and cronyism | <ul style="list-style-type: none"> ▪ 'Declarations of Family Ties of a Judge' and 'Declarations of Judicial Integrity' are inaccurately or falsely completed because of corrupt motives by judges to hide interests. ▪ The HQCJ does not verify declarations despite the submission of evidence that the declarations are not accurately completed; |

*Gifts and
hospitality*

| | |
|--|---|
| <ul style="list-style-type: none">— Trade of influence— Abuse of position— Offer of favors and precious gifts in exchange for preferable decisions— Excessive levels of hospitality | <ul style="list-style-type: none">▪ Statutory rules on the value of gifts and level of hospitality that are permitted to be given to judges are unclear; There is a weak, poorly supervised mechanism for registering and supervising the gifts and hospitality given to judges;▪ It is not possible for the public including the media and NGOs to access information on gifts and hospitality given to judges;▪ There are weak ethical guidelines and training on the acceptance of gifts and hospitality▪ Judges receive gifts and levels of hospitality that exceed the statutory maximum value of gifts that is permitted, because politicians, business interests, other judges as well as citizens and other court users seek to curry favor with judges and interfere in judicial decision-making or gain favors such as positions in the judiciary; |
|--|---|

*Discipline of
judges*

| | |
|---|---|
| <ul style="list-style-type: none">— Misuse of the disciplinary procedure, by internal networks of judges or political actors, to harass or put pressure on judges | <ul style="list-style-type: none">▪ The disciplinary system is misused against judges who resist undue political interference in judicial decision-making;▪ The disciplinary system is misused by internal networks of judges to ignore judicial misconduct or to harass judges;▪ Judges are affected in their decision-making by the threat of disciplinary action;▪ Lack of Disciplinary Inspectors to investigate complaints against judges |
|---|---|

*Judicial
Immunity*

| | |
|---------------------|--|
| | <ul style="list-style-type: none">▪ Delay in setting up the Service of Inspectors due to the absence of adequate premises and equipment;▪ Disciplinary authority is not consistent in sanctioning judges; disciplinary sanctions are not always proportionate to judicial misconduct;▪ Grounds for disciplinary liability are overlapping, duplicative, or too wide and can potentially be used to impose undue pressure on judges who are independent and act with integrity (e.g. Article 106(3) LJSJ).▪ Grounds for refusing to hear disciplinary complaints are too restrictive (e.g. Article 44(1)4 LHCJ on 'obscene comments' and Article 44(2) LHCJ on the repeated submission of 'manifestly groundless' complaints).▪ State bodies that are obliged to cooperate with judicial disciplinary bodies fail to do so, e.g. the NACP's failure to verify e-declarations of judges hampers the work of the HCJ in inspecting disciplinary complaints against judges.▪ Abuse of the right to complain to the disciplinary body by lawyers and parties to a case in order to delay court proceedings and/or force the judge to take a particular decision. |
| — Abuse of Immunity | <ul style="list-style-type: none">▪ Judges abuse immunity to avoid liability for corruption-related crimes and offences, and escape from prosecution; |

| | | |
|--|---|--|
| | | <ul style="list-style-type: none"> ▪ The HCJ must consent to a judge being detained or held in custody before he/she is convicted by a court, except in 'grave or especially grave cases' (Article 126 of the Constitution). The situation leaves open the possibility that in the time it takes to secure HCJ consent to a judge being detained or held in custody for certain crimes, a judge could theoretically (and as has happened in the past) flee the country. |
| <p><i>Court case management system</i></p> | <ul style="list-style-type: none"> — Manipulation of case allocation system — Political interference in case allocation and management system | <ul style="list-style-type: none"> ▪ The assignment of cases is manipulated so that preferred judges adjudicate particular cases; ▪ The design and internal operation of the case assignment system is not easily audited by external bodies in order to understand how it may be manipulated to assign cases to preferred judges; ▪ Professional audits of the case allocation system and case management system are not regularly carried out; ▪ There is a lack of information about court proceedings. |