

Ukrainian Helsinki Human Rights Union

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WORKING SESSION 4: Rule of law I, including independence of the judiciary and right to a fair trial.

Ukraine

Written submission

Ukrainian judiciary under full control of the politicians

The judicial reform carried out last year has made judges highly dependent on politicians.

The President and the majority in parliament which are at present part of one political force effectively have the opportunity, via the High Council of Justice, to exert influence on judges. This body of power plays a key role in the appointment and dismissal of judges and in bringing disciplinary proceedings against them.

The High Council of Justice resolves issues regarding judges and prosecutors. It plays a key role in appointing and dismissing judges, bringing disciplinary proceedings against judges; appointing and dismissing the heads of courts and their deputies.

According to Ukraine's Constitution, the High Council of Justice is a permanent body made up of twenty members: representatives of the Verkhovna Rada, the President, the Congress of Judges, the Congress of Bar Lawyers, and the Congress of Representatives of Higher Legal Educational Establishments and Scientific Institutions, each appoint three members to the High Council of Justice, and the All-Ukrainian Conference of Employees of the Prosecutor's Office — two members. The Head of the Supreme Court, the Minister of Justice and the Prosecutor General are ex officio members of the High Council of Justice. The term of office for members of the High Council of Justice, except those who are there ex officio, is six years.

As regards the enhancement of the independence of the High Council of Justice, Amendments to the Law on the High Council of Justice adopted on 7 July 2010 increase the proportion of judges among the members of this body, which is composed of 20 members. The Verkhovna Rada and the President each appoint three members of the High Council of Justice, two of whom must be judges. One of three members appointed respectively by the Congress of Judges, the Congress of Bar Lawyers and the Congress of Representatives of Legal Higher Education Institutions and Research Institutions also have to be appointed from the ranks of judges. The All-Ukrainian Conference of Prosecutors appoints two members, one of whom must be appointed from among the judges. Finally, the Head of the Supreme Court, the Minister of Justice and the Prosecutor General are, in accordance with the Constitution, ex officio members of the High Council of Justice.

As regards the amendments to the Law on the High Council of Justice, GRECO welcomes the fact that the proportion of judges in this body has been increased. Yet it regrets that judges still do not form a majority of the High Council of Justice members and that most of them are not elected by their peers.

This body essentially deals with the most important issues in the area of court proceedings. It is also clear that *this body is extremely politically dependent*. In Ukraine where the parliamentary majority and the President belong to the same political force, and this force appoints senior

executives (the heads of law institutes; ministers, the Prosecutor General etc.), only 7 (or less) members of the High Council of Justice can remain independent.

This is all the more worrying since recent legislative changes have increased the powers of the High Council of Justice, in particular with regard to the appointment of court presidents and the disciplining of judges. The High Council of Justice is also given the power to receive copies from the courts of cases still underway. This may undermine judicial independence by allowing direct influence / pressure on judges and court decisions in specific cases.

The appointment of the Head of the Security Service, V.Khoroshkovsky to the High Council of Justice in April 2010 seemed quite bizarre. He was dismissed from this position only in December 2010. The membership of two prosecutor's office representatives in the Council is also questionable. Taking into account the fact that they represent the prosecution in court and have authority to launch a disciplinary action against judges, the conflict of interests and partiality of these representatives becomes evident.

For example, on 7 June 2011 the Deputy Prosecutor General, Mykhailo Havrylyuk who is also a member of the High Council of Justice submitted a proposal to the latter to dismiss three judges from the Court of Appeal in Kyiv: Ihor Moroz; Valery Lashevich and Ludmila Bartashuk. These judges had taken the decision to release a person facing charges from detention on the grounds that there were no specific facts warranting his further remand in custody. This ruling was in full accord with Article 29 of Ukraine's Constitution and Article 5 of the European Convention. The Deputy Prosecutor General accused the judges of no less than flagrant violation of the norms of criminal procedure law, lack of objectivity, bias, injustice, engagement and violation of their oath. Such accusations from a representative of the body which is party to court proceedings seems more like reprisals against judges who passed a ruling which did not suit the Prosecutor.

This is why changes to the procedure for forming this body and elimination of operative control over the judiciary were key requirements formulated by the Council of Europe's Venice Commission.

In September 2010 Oleksandr Pasenyuk was approved as Head of the High Administrative Court. He occupied this position since 2005 and was lobbied by one of the group in the President's Administration that was in charge of developing the judicial reform.

In December 2010, Mykola Pshonka, the Prosecutor General's brother was appointed Fesenko's deputy.

Also in 2010 Leonid Fesenko, former National Deputy from the Party of Regions, was appointed President of the High Specialized Court for Civil and Criminal Cases. Under the Law on the Judicial System and Status of Judges, the motion for the appointment of the Head of the High Specialized Court for Civil and Criminal Cases is submitted by the council of judges of general jurisdiction courts, while the final decision is made by the High Council of Justice. However, Fesenko himself revealed that the proposal that he become the head of the Court had come directly from the President of Ukraine¹ Fesenko's biography shows that he was a Member of Parliament for two terms and headed the Luhansk Court of Appeal for 10 years. This gives grounds for prejudice, both with regard to independence and autonomy of the appointing bodies and the judge himself.

In September 2011 Viktor Tatkov, the former Head of the Donetsk Economic Court of Appeals was appointed the new President of the High Economic Court.

The High Council of Justice became the main instrument of political pressure on judges. Under these circumstances we are deeply concern on situation on independency of the judiciary in Ukraine.

Recommendation: Changing the mechanism for setting up the High Council of Justice; in particular, all its members must be elected by the judges' Congress; this institution can also be disbanded with the transference of its functions to the entities which meet the criteria independently formed body of judicial power.

¹ *The sublime call*, Kommersant <http://www.kommersant.ua/doc.html?docId=1507918>; *The High Court on Civil and Criminal Cases to be headed by the "regional" Leonid Fesenko*, <http://www.newsru.ua/ukraine/21sep2010/fesenko.html>.