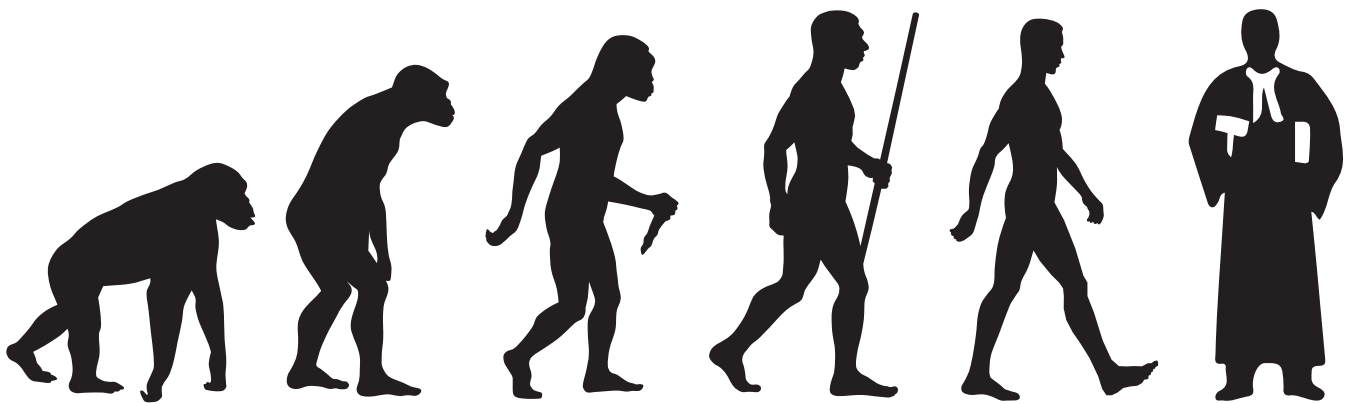


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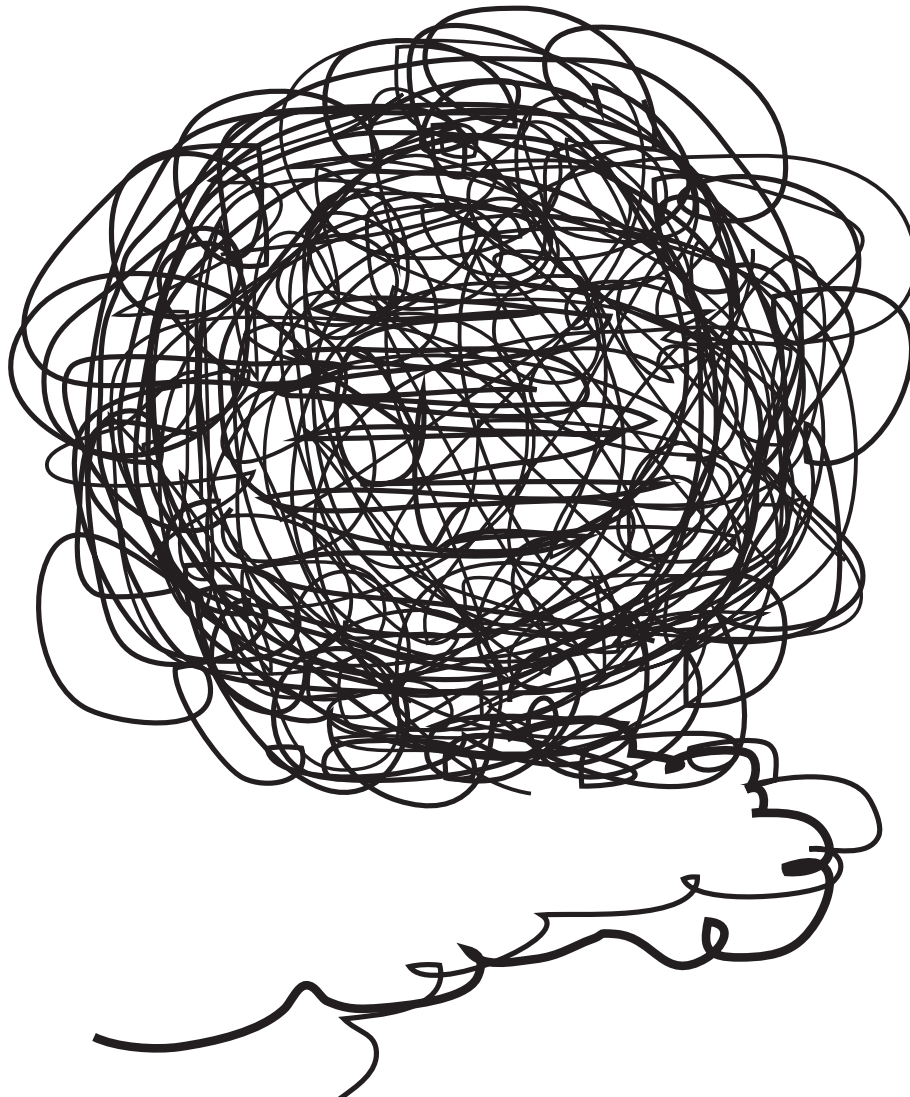
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How To Fix Ukraine's Broken Legal System



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Editors' Note

If it ain't broke, don't fix it. But if it is broke, as Ukraine's criminal justice system is, how to fix it? Does society start from scratch or simply focus on a few areas at a time? These are the questions that Ukrainians are still wrestling with, nearly 24 years after the collapse of the Soviet Union. The U.S.S.R.'s half-life is proving to be way too long, and the legal system provides one of the best examples of how much damage was inflicted during those 70 years.

Basic legal concepts are either not appreciated or in force here.

Probable cause – It still feels like a society where police can take people away in the dead of night on any pretext.

Presumption of innocence until proven guilty – Suspects can be subject to damning pre-trial publicity. Putting defendants in courtroom cages announces to the world: This is a guilty person. Lengthy pre-trial detention assumes guilt and ruins lives.

Plea bargains – These come in handy in getting lower-level suspects to turn state's evidence against top-level suspects, in murders and in financial crimes, and also in ensuring justice is done without lengthy and costly trials. I understand plea bargains are happening in Ukraine, but not nearly as often as they should.

Right to a public trial by a jury of one's peers – This is simply not happening in Ukraine's judicial system. Politically-appointed prosecutors still decide it all, or too much, when it comes to commanding corruptible and subservient judges. The bottom line is that politicians don't want to give up control, through appointed prosecutors, judges and police, of who goes to jail and who doesn't in Ukrainian society.

Right to a speedy trial – This is flouted through lengthy pre-trial detention, big delays in trials and incessant political manipulation of investigations. It isn't swift and it isn't justice.



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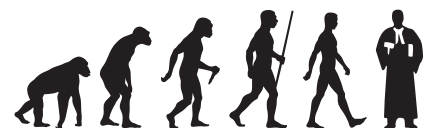
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(Cover photo) Will Ukraine's legal system evolve into a fair and civilized one?

At left, lawyer Valentyna Telychenko speaks with Eugenia Tymoshenko, daughter of ex-Prime Minister Yulia Tymochenko, and lawyer Serhiy Vlasenko in the courtroom of the European Court of Human Rights in Strasbourg, France, on Aug. 28, 2012. (UNIAN)



Is it time to scrap Ukraine's legal system and start over with another nation's system?

By **Brian Bonner**
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A number of lawyers and others who have looked at Ukraine's archaic and dysfunctional legal system have come to one inescapable conclusion: It needs to be replaced with one that allows Ukraine to become a rule-of-law democracy with a modern economy.

An incremental approach, they say, will not fix the fundamental flaws.

Irina Paliashvili, founder of the RULG Legal Group, leads a drive among law firms in Ukraine to find solutions to the legal problems, outlined in periodic "white papers," the next version of which will be published in autumn.

Her conclusion?

"Throw everything out, replace it with somebody else's laws," Paliashvili said. "Ukraine's legal system and judicial system need external management. Find the most modern system in European countries. I have no trust in the current judicial system, which is actually being reinforced as far as I can see. It's beyond fixing."

Paliashvili, who also chairs the legal committee of the U.S.-Ukraine Business Council, said that Ukraine is stuck in Soviet times in the legal sphere.

"What we have is a Soviet-based system and, on top of that piles and piles of special interest legislation of very bad quality. Over 20-something years, there have been piles and piles of these corrupt schemes incorporated in the legal system with zero care towards the people, towards the businesses," Paliashvili said. "That also explains the incomprehensible language of the legislation. When you find out why it's

written so, you understand it's just another smokescreen behind another corruption scheme."

Daniel Bilak, managing partner of the CMS Cameron McKenna law firm in Kyiv, also said that he doesn't think Ukraine's government is capable of reforming from within.

"We keep fragmenting the issues," Bilak said. "Somebody is talking about judicial reform, someone else is talking about reform of the prosecutor. Nobody is talking about reform of legal education. All of it is one actual unit."

Bilak said that President Petro Poroshenko's judicial reform strategy, outlined on his official website on May 27, will only perpetuate the existing system.

"The latest decree of the president plays around the edges of reform," Bilak said. "It keeps the existing structure and just makes the existing system more transparent. This is not the wholesale institutional reform Ukraine needs."

Judicial reform is crucial to the economy. "You cannot have a market economy unless you have protection of property rights. Otherwise you will always have corruption. These rights are the only leverage that business has against the administrative resources of the state. It provides a check on government," Bilak said.

Mykola Stetsenko, managing partner at Avellum Partners in Kyiv, favors a more incremental approach.

"It's not that we need to cancel all the laws in Ukraine and start over," Stetsenko said. "It's impossible and we don't need to do it." Stetsenko cited improvements in taxation,

deregulation and steps towards “cleansing the judiciary and firing those judges who were absolutely corrupt” as signs of progress.

While Paliashvili, Bilak and Stetsenko are focused on civil law, the criminal justice system is also a mess, said Valentyna Telychenko, a Kyiv lawyer who has represented Myroslava Gongadze, the widow of slain journalist Georgiy Gongadze, and ex-Prime Minister Yulia Tymoshenko.

“The whole society is sick,” Telychenko said. “We have prosecutors who had unlimited authority and judges who worked with prosecutors and who also had unlimited authority. It’s very deep in our blood.”

Paliashvili agreed, concluding: “During the Soviet period, whatever real justice people had in their mentality was eliminated the hard way, by throwing millions of people in the gulag and by using fake institutions and fake pretenses. In every person, there’s common sense and intelligence, but this is not translated into legislation and the legal system. What we have now is totally imposed on the people. It’s all the same clique. They are trying to save the system.”

Here’s their breakdown of some of the hot-button issues and possible solutions:

Estonia and Georgia as models: “Estonia did e-government. What they have in Estonia is much more advanced. Why not take something which is several steps forward? What Georgia can offer is an example of a successful anti-corruption fight and enforcement as well. If you combine those two examples, you will throw Ukraine into the stratosphere. It’s now in the stone age,” Paliashvili said.

Fewer but better – and enforced – laws are needed: “When the system doesn’t want to do something, it becomes extremely legalistic and extremely technical. The system serves (politicians) very well. It lets them do it. ‘The tapes must be original’ and ‘on this document, the corporate seal should be on the right side and not on the left side.’ Then when the system doesn’t want to see infringements, it ignores them,” Paliashvili said.

Cancelling the commercial code: Bilak and Paliashvili are among the lawyers critical of conflicting codes – civil and commercial – that regulate economic activity. They want the Soviet-style commercial code scrapped and the more progressive civil one kept.

“The simple thing is to cancel the commercial code. It’s useless,” Paliashvili said. “For corrupt judges, it’s a dream come true. If they cannot make a decision based on the civil code, they can issue one based on the commercial code. For business, it’s a nightmare. You have two fundamentally conflicting documents regulating the basis of entrepreneurial activities.”

Prosecutors: Prosecutors have too much power. “What Ukraine needs is a state prosecution service that represents the interests of the state in criminal matters,” Bilak said. “What we have is very broad investigative and oversight powers that go way beyond what a proper prosecution service in a democracy has,” Bilak said.

Impunity: Ukraine’s politicized system means innocent people go to jail and the guilty go free. “Until we see

Lawyer Irina Paliashvili says Ukraine should adopt the best laws from other nations to replace its corrupt Soviet system.

actually criminal investigations that result in trials and convictions, not much will change,” Stetsenko said.

Judges: “The current judges are basically blackmailing society, saying only they are experienced and only they know how to operate this legal system,” Paliashvili said. “If you throw out the old system, they are no longer relevant. They cannot blackmail anybody. A modern system will require new modern judges. You cannot replace one without replacing the other. Both have to go.”

On absence of jury trials: Politicians, through appointed prosecutors and others in the legal system, don’t want to give up control of who goes to jail and who goes free, irrespective of evidence. Telychenko said that General Prosecutor Viktor Shokin, while more competent than predecessors who staffed the prosecution service with political cronies, remains Soviet at core. And that doesn’t bode well for jury trials in the future. “He is absolutely sure that a judge should decide as the prosecutor says,” Telychenko said.

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Mykola Stetsenko

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"Long live our court, the most humane court in the world!" is one of the most popular phrases from a Soviet-era movie. It was uttered by actor Georgy Vitsin (R) in the 1960s Soviet classic comedy film "Kidnapping, Caucasus Style." Of course, justice in the Soviet Union was decided by those who ran the hierarchical Communist Party. (Courtesy)



Judicial reform is still a pipe dream in former Soviet Union



Armine Sahakyan

YEREVAN, Armenia – Armenian President Robert Kocharian attracted international attention in 2007 by dismissing a judge who had sided with two business people against the government.

Yerevan District Judge Pargev Ohanian acquitted the owner and a top executive of the Royal Armenia coffee packaging company of criminal tax evasion and fraud charges. The charges were widely seen as retribution against the defendants for publicly accusing senior customs officials of trying to shake down their company for bribes.

For those who know anything about justice system corruption in the former Soviet Union, the real shocker was not so much that Kocharian fired the judge but that Ohanian ruled against the government in the first place.

Judges across the former Soviet Union almost never go against the power structure for fear of having their careers ruined — or worse. When prosecutors bring a case before them, they don't have to be told they had better side with the government: They know the game.

Not only do judges in the former Soviet Union find for the government in almost all criminal and civil cases. They also sell justice to the highest bidder in civil cases that

don't involve the government. In other words, their decisions are based on which side offers the biggest bribe.

The European Union, the Organization for Security and Cooperation in Europe, the World Bank and other international organizations have been trying to help former Soviet countries improve their judicial systems almost from the time the Soviet empire disintegrated in 1991.

The help, in the form of expert advice and financing, has failed to create an independent judiciary in most of the region — that is, one that is not subject to government influence. The exception is Georgia, which instituted widespread political and justice system reforms beginning in the early 2000s as part of its courtship with the West. Georgia has made it clear it wants to join the EU.

Some former Soviet countries have made perfunctory judicial reforms.

Kazakhstan, for example, has instituted a European-style private-bailiffs system to ensure that those who win court cases actually get the damages due them. The change was a response to the widespread problem of judgement winners being unable to get their money.

Kazakhstan's reforms have just nibbled around the edge of the judicial system, however. As with other countries in

the region, the key reform that's needed — an independent and uncorrupt judiciary — has yet to be achieved, critics say.

This means that judges always side with the prosecution in criminal cases and with officialdom in civil cases pitting the government against a private party, observers say. In addition, it means judges often take payoffs in civil cases involving two private parties, according to observers.

The chairman of Kazakhstan's Supreme Court, Kairat Mami, acknowledged the depth of the judicial corruption problem in late 2013 by noting that the high court had received more than 4,000 complaints against judges in the first nine months of the year. "Eight judges were fired, two judges were convicted and six more judges are facing corruption charges," he said.

Mami's admission was a rarity. More often than not, judicial officials in former Soviet countries deny corruption allegations.

So it came as a shock when our national human rights ombudsman here in Armenia, Karen Andreasian, released a report in 2013 based on a survey of judicial officials and lawyers that concluded that the court system was riddled with corruption.

The report, which asserted that judges even had an unofficial "price list" for bribes, drew angry denials from judicial officials. The Council of the Union of Judges was so worked up that it declared that Andreasian's allegations represented a "serious threat to the stability of the state and to public order."

Lawyers who had come before those judges said the findings were on the mark, however. One of them, Tigran Hayrapetian, said he couldn't have imagined a "better or more reliable report."

When ordinary citizens in former Soviet countries are surveyed about the judicial system, their opinions are as negative as the lawyers whom Andreasian interviewed.

The country whose citizens appear to have the least faith in the courts is Russia.

Eighty-four percent of Russian households whom the Global Corruption Barometer surveyed in 2013 said the judiciary was either "corrupt" or "extremely corrupt."

It's rare when Russian judges are disciplined or prosecuted, so the criminal corruption charges that were brought against Commercial Court Judge Irina Baranova in 2014 generated national headlines.

She accepted hefty bribes in exchange for siding with a number of business people who were being sued for illegally seizing buildings and other property, according to the news agency RIA Novosti. The fact that an official Russian news agency would cover the story indicated that top officials considered Baranova's behavior so egregious that they wanted to send a message to judges that some bribe-taking was OK, but don't go overboard.

Most Russians — rank and file and elites — refuse to criticize trumped-up, politically motivated prosecutions for fear of retribution. But political leaders, judicial-fairness groups and human-rights defenders in the West feel no such compunction.

In 2013 the Council of Europe blasted the surge in the number of politically motivated trials in Russia since Vladimir Putin's return to the presidency in 2012.

The protest came amidst high-profile court cases against Putin opponents, including Alexei Navalny and the rock band Pussy Riot.

Nils Muiznieks, the council's commissioner for human rights, said Russia needed to make major reforms "to remedy systemic deficiencies

in the administration of justice" and to "strengthen the independence" of the judiciary.

Putin did not respond to the council's accusations of lack of judicial independence and judicial corruption. He had already made his feelings clear in 2012, the year before the council ripped the Russian justice system.

"I disagree with the statement that we lack a fully independent judicial system," RIA Novosti quoted Putin as saying. He also disagreed with "sweeping accusations that our judiciary and certain judges are corrupt."

The first step toward resolving a problem is admitting there is one, of course. It was apparent from Putin's comments that Russia is apt to do little or nothing to reform a judiciary that the vast majority of the citizenry believe is flawed.

Other countries in the former Soviet Union, trying to show they're a civilized society and keep on the good side of the West, are making bite-sized judicial reforms — like Kazakhstan.

But the ultimate reform — creating a judicial system in which judges are not afraid to rule against the government and which roots out and punishes judges who can be bought — appears to be way off in the sunset.

As with other kinds of graft in the former Soviet Union, the losers when judicial corruption occurs are the citizens. They include those who go to prison on trumped-up criminal charges and those unable to obtain damages in civil cases for wrongs done to them.

Armine Sahakyan is a human rights activist based in Armenia.

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The obsolete labor code dating back to 1971 offered good protection for employees under the Soviet planned economy. Despite 93 amendments since then, it is still not suited for the modern realities of either employers or employees. A proposed draft law doesn't change it much, while trade unions are lobbying for the old legislation to stay in place.

Soviet social guarantees for employees scare away investors, often backfire

By **Olena Gordiienko**
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Ukrainian labor legislation is paternalistic and focuses excessively on employee rights, many lawyers and employers say. And it also leads to unintended consequences.

Ukrainians earn less than any other nation in Europe, \$180 per month on average. Unemployment rose from 7.3 to 9.3 percent in 2014. More than half of the country's salaries are paid unofficially.

Part of the problem is the country's rigid labor code. It aims to protect employee rights, but actually pushes employers to seek

flexibility outside of the law. And employees who need the work often consent, according to Yuriy Kuzovoy, head of social policy department of the Ukrainian Employers' Federation, founded and led by industrial oligarch Dmytro Firtash.

The Labor Code of Ukraine, largely a holdover from Soviet days, causes potential foreign investors to balk. According to Oksana Voynarovska, a partner at Vasil Kisel & Partners, they are daunted by employee guarantees that give "certain categories of employees near-absolute immunity

from termination, including for poor performance, prohibiting business trips even if the employee consents... and restrictions on overtime work.”

Shareholders also face problems with Ukraine’s top managers, who are protected by the employment law, making it difficult to dismiss them or to hold them accountable for bad managerial decisions, Illya Tkachuk of Gide Loyrette Nouel says. In many EU countries executives are not employees of the company, but rather work under a service agreement.

The current labor code was adopted in 1971 and was very effective in protecting employees in a planned economy of USSR, according to Voynarovska. At the time, the state was both guaranteeing and bearing the costs of “safety nets” for its workers.

“However, this approach does not work nearly as well in a modern market economy,” Voynarovska says. Private businesses end up paying the price for state guarantees, which distort normal market relations.

To overcome labor-code restrictions, employers often rely on unregistered employees, or are creative enough to have new employee sign an undated resignation letter before signing a contract. In such cases, it is the employee who suffers from the rigid protection policy, Kuzovoy says.

A market economy implies flexibility and allows for employer-employee negotiations, which the current legislation thwarts.

There is no flexibility regarding working hours and days off, for example, under the existing code. Women are not allowed to work night shifts except within certain industries, while those with children under the age of three cannot work night shifts at all – even if they want to.

There have been efforts to make the labor codes more flexible. A new draft law, proposed by lawmaker Mykhaylo Papiyev of the Opposition Bloc, is currently being reviewed by deputies after it has been rejected twice since December 2014. It gives employers more rights and discretion in terms of supervising employees, remuneration, dismissal, suspension, and lay-offs, while also keeping many current protective provisions for employees, says Volodymyr Yakubovskyy, a partner at Nobles.

But trade unions are happy with the existing laws. “In the current crisis and circumstances in the country, it’s not worth changing the labor code, because it will not be in favor of workers,” Natalia Levitska, deputy head of the Free Trade Unions Confederation, says. She worries that changes will limit benefits and compromise the rights and role of trade unions.

“A change of legislation in favor of employers will not guarantee the shift to more legal employment,” Levitska adds.

But many businesses are pushing for the draft law.

“The (new) labor code, if adopted in the current draft, is a step forward in the regulation of employment relations and in many aspects it reflects the needs of businesses,” says Nataliya Nakonechna, senior associate with CMS Cameron McKenna.

Others argue that the draft law does not go far enough.

“Generally speaking, the draft code is not changing anything,” Voynarovska says. “We are waiting for a radically different European document that would enable us to be more flexible and get away from the stern wording of a country with a planned economy.”

Kyiv Post staff writer Olena Gordienko can be reached at gordienko@kyivpost.com

Main changes in the draft labor law

- All employment agreements to be in writing
- Flexible regulations for working off premises
- No job probation period for men with children under three and for pregnant women.
- Breach of non-disclosure obligations to be grounds for dismissal.
- Background checks allowed, subject to applicant’s consent.
- The introduction of a six-month probation period for top management.
- Technical surveillance to be allowed, subject to notification.
- Single mothers no longer protected from dismissal for poor performance.
- Severance pay to be based on employee’s time within a company.
- Remuneration for overnight work to be paid in an amount not less than 30 percent of the regular rate.
- Clearer rules for suspension from work duties.
- Annual paid-leave entitlement to be increased from 24 to 28 calendar days

Sources: CMS Cameron McKenna, Nobles, and Vasil Kisel & Partners



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Anders Aslund: How to reform prosecution and judicial system



Anders Aslund

Ukraine's judicial system, including the prosecutor's office, is in dire need of reform. Since the fall of President Viktor Yanukovich on Feb. 22, 2014, the malfunctioning of the prosecutor's office has been nothing but baffling. No action has been taken on the many billion-dollar embezzlement cases that have been exposed in the media. The worst offenders have fled to Russia. The popular explanation is that they have paid prosecutors to close their cases, which appears all too plausible. Only on Jan. 12 were Yanukovich and a score of his top accomplices finally declared wanted for organized crime by Interpol.

Prosecutors and judges are both excessively lenient, raising questions about whom they may be protecting. At present, Ukraine has 10,279 judges and 20,367 prosecutors. The almost unanimous popular view is that they are all corrupt.

An example illustrates the corruption in the system: In 2007 a Constitutional Court judge was caught red-handed accepting a bribe of \$12 million (officially a "consultancy fee" to her retired mother). President Viktor Yushchenko sacked her, but Prime Minister Viktor Yanukovich reinstated her, claiming that the president had exceeded his legal authority.

Ukraine has an independent High Council of Justice that appoints judges, but several institutions that appoint its members are considered pervasively corrupt, such as those representing judges, lawyers and legal scholars, which each appoint three of its 20 members. Corrupt lawyers and judges should not be allowed to reappoint one another. Institutions that appoint members

of the High Council of Justice should be either purged or prevented from appointing judges.

On Oct. 14, the parliament adopted a new law on prosecution, which was an important first step and one of the European Union conditions that Yanukovich refused to fulfill. It sought to reduce the power of the prosecutors to the norm in developed societies. It took away the prosecutors' general oversight function, which was a Soviet inheritance that rendered them superior to judg-

Ukraine has 10,279 judges and 20,367 prosecutors. The almost unanimous popular view is that they are all corrupt.

es. It eliminated their right to interfere in the lives of Ukrainian citizens and businesses. Prosecutors can no longer conduct pretrial investigations, which are now supposed to be handled by a state investigation bureau yet to be created. The qualifications to become a prosecutor are supposed to become rigorous and recruitment transparent. This law amended no fewer than 51 laws and 10 legal codes.

In the preceding week, the Parliament adopted amendments to the Criminal Code and the Criminal Procedural Code to bring to justice the nation's former leaders, who have fled the country and to confiscate their property. In a next step, Poroshenko signed a decree to form a council for judicial reform.

To accomplish these goals, Ukraine needs assistance, which the European Union, the Council of Europe, Canada or the United States should consider providing.

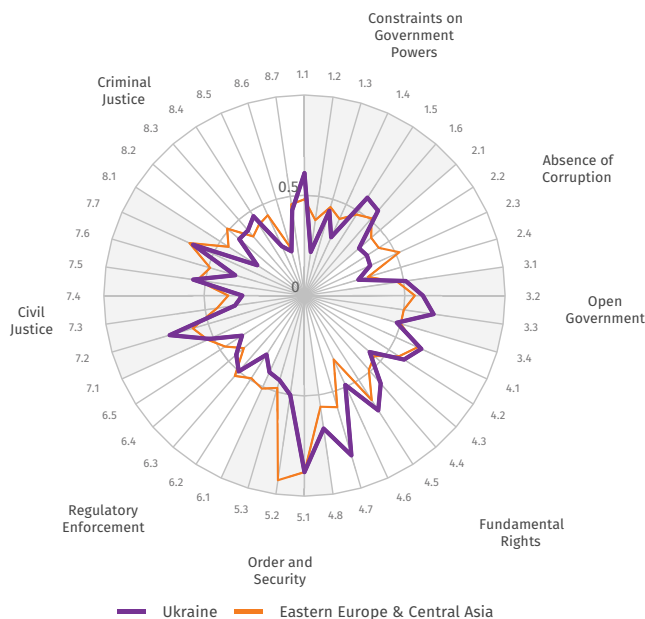
Initially the High Council of Justice could be made up exclusively of qualified Ukrainian-speaking lawyers, judges and legal scholars from abroad, for example, Canada, the United States and Europe. They should appoint new judges from the top down, drawing on younger Ukrainian lawyers. After the corps of judges has been built, the High Council of Justice could be composed anew on the lines of the current Constitution.

Anders Aslund is the author of "Ukraine: What went wrong and how to fix it." The book is published by the Peterson Institute for International Economics.

Activists on June 17 hold banners outside Parliament to protest the proposed subservience of the National Anti-Corruption Bureau to the general prosecutor.



Ukraine's 2015 rule of law ranking



Overall Score	Regional Rank	Income Rank	Global Rank
0.48	9/13	13/25	70/102

	Factor Trend	Factor Score	Regional Rank	Income Rank	Global Rank
Constraints on Government Powers	—	0.45	7/13	17/25	77/102
Absence of Corruption	▲	0.34	11/13	18/25	84/102
Open Government	—	0.56	4/13	5/25	43/102
Fundamental Rights	—	0.61	3/13	5/25	44/102
Order and Security	▼	0.6	13/13	18/25	87/102
Regulatory Enforcement	—	0.42	12/13	16/25	80/102
Civil Justice	—	0.49	9/13	9/25	65/102
Criminal Justice	—	0.36	9/13	13/25	71/102

▲ Trending up ▼ Trending down ■ Low ■ Medium □ High

Ukraine ranks 70th out of 102 nations in rule of law based on eight factors measured in a survey of 1,000 respondents in Kyiv, Kharkiv and Odesa as well as in-country legal practitioners and academics, the U.S.-based World Justice Project found in a study published on June 2. Regionally, Ukraine placed 9th among 13 nations, ahead of only Kyrgyzstan, Russia, Turkey and Uzbekistan. Number 1 indicates the strongest adherence to rule of law, whereas 0 indicates weakest. Ukraine was weakest in absence of corruption (0.34) and criminal justice (0.36), while performing best in fundamental rights (0.61) and order and security (0.6).

Source: World Justice Project



Mykola Stetsenko

Managing Partner, Avellum Partners

Shareholders Agreements in Ukraine

Corporate law of major Western countries has long been adapted to the needs of private investors to ensure maximum flexibility in arranging relations of shareholders amongst themselves. One of the main instruments, which provide such flexibility, is shareholders agreements. Such agreements usually include corporate governance provisions, voting arrangements, deadlock resolution mechanisms, dividend distribution procedures, and rules on the issuance and transfer of shares. Quite often they set out a more detailed regulation than the one provided in the legislation using a flexible corporate law regime of the local law. While this instrument was first invented in common law countries, over the past three decades it was adopted by leading continental jurisdictions such as Germany, France and The Netherlands.

Unfortunately, Ukrainian law is seriously lagging behind in this area. In fact, Ukrainian court practice principally prohibits any shareholders agreements, which contradict mandatory norms of Ukrainian law. Given that Ukrainian corporate law is very inflexible and court practice on such matters is virtually nonexistent, it is pointless to enter into a shareholders agreement at the Ukrainian company level. This forces investors to structure shareholders agreements outside of Ukraine at the foreign holding company level. Hence, Ukrainian law and courts have little influence on the relations of shareholders in companies, which often have all of their assets in Ukraine. Such situation prevents Ukrainian corporate law from developing and contributes to the lack of investment attractiveness of Ukraine as a whole.

In the last few months the Committee on Corporate Law and Stock Markets of the Ukrainian Bar Association with significant input of the legal team of Avellum Partners launched an initiative to bring Ukrainian corporate law in line with leading Western practices in this area.

The proposed reform aims to introduce changes to the Civil Code of Ukraine, the Law on Joint Stock Companies and the Law on Business Entities. These changes will introduce the notion of the shareholders agreements (corporate agreements) to Ukrainian law, providing that such agreements may be signed for an indefinite term. Special rules will be provided for joint stock companies and companies, in which the state has a stake. Proposed changes also create the possibility to issue an irrevocable power of attorney, clarify that performance of agreements may be subject to will of one of the parties, and finally introduce a notion of option agreements into the Civil Code of Ukraine.

These suggested changes are only the first step in the corporate law reform that awaits Ukraine in the next few years. Foreign investors and the Ukrainian legal community agree that Ukraine desperately needs a brand-new Law on Limited Liability Companies, which would give more flexibility to participants of LLCs to structure their corporate governance. Furthermore, a substantial overhaul of the Civil and Commercial Codes of Ukraine is needed to introduce progressive practice in mergers and acquisitions, such as warranties, indemnities and limitation of liability of parties in commercial contracts.

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The comments above do not constitute legal advice or opinion, and should not be regarded as a substitute for detailed advice in individual cases.



Activists wearing masks of former prosecutor generals (from left) Oleh Makhnitsky and Vitaly Yarema, President Petro Poroshenko and Prosecutor General Viktor Shokin during a June 17 demonstration in front of the parliament in Kyiv. The activists warned that anti-corruption investigations of top officials will go nowhere if parliament passes a law to make a special anti-corruption branch of the prosecutor's office subservient to the president. (Volodymyr Petrov)

Prosecutors rule above all

By **Johannes Wamberg Andersen**
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In democratic nations, a judge or jury gets the final word in the court system, with levels of appellate courts designed to step in and stop miscarriages of justice. But in Ukraine, a court fight is not a fair fight. Prosecutors have had such inordinate powers that they dictate many court rulings in criminal cases. The prosecutors answer to no one – except, perhaps, the politicians who appoint them.

It's a big reason for public distrust of the courts.

"It's a threat to democracy," Igor Fomin, a lawyer with the Ukrainian Legal Company, said. "Without proper checks and balances, the concentration of power takes us in the direction of dictatorship."

Taras Kuzio, a Ukraine political analyst,

said: "The General Prosecutor's Office is incompetent, corrupt and overmanned. Some 20,000 prosecutors live off bribes and state salaries and they have zero productivity to their name...They are more likely to defend and protect corrupt elites rather than actually prosecute them."

The system that remains in place was created to serve a totalitarian state with courts rubber-stamping the will of politically subservient prosecutors.

Valentyna Telychenko, a lawyer and human rights advocate, said judges still favor prosecutors over defense attorneys, who are seen as representing "bad guys."

Prosecutors have other ways to get the rulings they want. If a court ruling goes against the prosecution – a rare occurrence because

only 0.3 percent of criminal trials end in acquittals – the prosecutor has ways to pressure judges.

As an example, Fomin cites the case of Judge Serhiy Vovk. He faced criminal charges and disciplinary actions to keep him “on track” when he presided over the controversial 2011 trial against former Interior Minister Yuriy Lutsenko. The West saw the case as politically motivated. Fomin was Lutsenko’s attorney.

With most judges pliant, the ground is fertile for politically motivated injustice. Top prosecutors are appointed by, and answer to, Parliament and the president, according to Oleksandr Banchuk, an expert with the Center for Political and Legal Reform.

And judges fear going against prosecutors. “They know very well that they have made undue rulings, and now they sit tight,” Fomin said. Telychenko said many judges are on the take and could rightfully be investigated, making them even more compromising candidates for criminal investigations.

This leaves a situation where criminal cases are opened or closed at the discretion of the prosecution, with bribes and political connections often determining the result. “Many prefer to pay up than to face trial and prison,” Fomin said. “A former prosecutor general told me that he estimated his office to be worth \$1 billion.”

Legislation that overhauls the role of the prosecutor, co-authored by the Council of Europe, will address some of the flaws – at least on paper. Defense lawyers will enjoy better access to evidence. Prosecutors will be stripped of the “general oversight” function, which allows them to control all other state institutions and even corporate entities.

But even under the new law, the prosecutor general will still be appointed by the president and prosecutors can abuse and harangue judges.

“They turn the justice system upside down,” Fomin said, arguing that the judge should be in charge of the trial, not the prosecutor.

How to create impartial and independent judges in this corrupt environment is a challenge. Changes to the High Council of Justice, which has the authority to hire, fire, and discipline judges, fall short.

Fomin said that President Petro Poroshenko has taken control over new appointees to the council. “Now the execu-

Prosecutors stand at top of corrupt pyramid of Ukraine’s judicial system, dictating verdicts in criminal cases to judges and arbitrarily deciding who gets investigated and who doesn’t. They answer to no one – except the politicians who appoint them.

utive once again is in control of the judiciary,” Fomin said. “We have been through all this during the Yanukovich administration, when loyal judges were protected and the disloyal ones ousted.”

Moving judicial power from politically-driven prosecutors to politically-driven judges is not the answer.

Fomin said that a jury system is one solution. He also said that Ukraine needs a higher standard of trained prosecutors. These changes would place the courtroom at center stage. The current batch of prosecutors are appointed more for loyalty than competence, he said, and poorly equipped at competently putting together cases and evaluating evidence.

The Prosecutor General’s Office declined repeated requests for comment. However, on June 18, Prosecutor General Viktor Shokin asked the United States for assistance in investigating corruption in his office.

Kyiv Post staff writer Johannes Wamberg Andersen can be reached at johannes.wa@gmail.com.

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The first ever jury trial in independent Ukraine took place in Lviv on June 30, 2013. Morocco citizen Shakib Otman was accused of beating a prominent Lviv doctor to death and was acquitted by the jury. (UNIAN)



Jury trials, transparency are crucial for public trust

By **Olena Gordiienko**
gordiienko@kyivpost.com

When asked whether public participation, such as having jury trials, is fundamental to public trust in the judicial system, David Vaughn, head of the U.S.-funded Fair Justice Project, replied with one word: “exactly.”

Yet juries are hardly used in criminal trials to weigh the facts and issue verdicts. Public trust in the judiciary, in turn, is low. In December, a joint survey by the Democratic Initiatives Foundation and Razumkov Center found that only 9.4 percent of 2,008 respondents generally trust Ukrainian judges.

The nation now has the chance to change public attitudes thanks to a fair trial law that came into force on March 28. The measure opened courtrooms to the public. Taking pictures or making video and audio recordings is allowed.

One lawyer, Stanislav Batryn, head of the Lions Litigate law firm, has since April started filming and uploading numerous trials on YouTube and a website that is part of his Open Court civic initiative.

He said publicity is the greatest tool to fight corruption in courts.

“A small camera lets the judge know that they are watched by millions of people,” he said. “You won’t believe

how this person is changing right in front of your eyes, how they start to think whether to take the unlawful decision or act according to the law.”

In the early 1990s, recordings of court proceedings were not allowed. Later, audio recordings became possible. Still, judges would act rudely and with disrespect towards those in the courtroom. They would intimidate defendants or witnesses, and disregard evidence. They could make a witness stop talking by sight or movement that an audio recorder wouldn’t catch, Batryn said.

He said his tactics are more efficient than lodging official complaints.

“We have never had such an instrument of civil influence as we have now,” Batryn said. “If the judge is misbehaving, we want the entire country to see such ‘heroes’ and then put that to the presidential level.”

Old habits still persist. On June 9, Kyiv Desnyansky District Court Judge Iryna Dikhtiar forbade a Kyiv Post photographer to take pictures at a criminal hearing of American citizen Robert T. Fletcher.

Jury trials

Jury trials were introduced in Ukraine in 2012 but have been rarely used. Only 16 cases had juries in the first half

of 2014 out of 459,700, Kateryna Gupalo of Arzinger law firm said.

In Ukraine, they are only used in criminal procedures that may carry a life imprisonment sentence and only if the accused requests a jury. Moreover, three jury members reach a verdict together with two judges, not independently, Mykhail Kundenko of Syutkin and Partners said.

Moreover, the public still isn't familiar with jury procedures and lacks a fundamental understanding of its role in ensuring a fair judicial process.

Countries with established rule of law use juries to take the decision of guilt or innocence out of the hands of legal professionals and put it in the hands of the peers of the accused. The belief is that citizen juries help ensure that the innocent don't get convicted but the guilty do.

Batryn said that jury trials work well in countries where judicial institutions are strong, transparent and trusted. But in Ukraine, Batryn said, jury trials may simply open up more avenues for "intimidation and bribes."

A case in point is the trial of two former Berkut riot police officers who are accused of killing 39 activists during the EuroMaidan Revolution. The jury selection process has been postponed twice because the Kyiv City Council didn't provide a jury list. Two jury members that were chosen both had worked for the police, making their impartiality doubtful.

Legal ombudsman

Lawyer Bate C. Toms, chairman of the British Ukrainian Chamber of Commerce, suggests an additional measure.

Since people have no effective redress of the unjust court decisions having a legal ombudsman funded by the international community would "very quickly change the legal

system in Ukraine and dramatically reduce corruption," he said.

Having the ability to complain to an ombudsman chosen by business associations, and have them publish legal opinions, might be enough to make judges revise some unwise decisions. Parliament, according to Toms, could also act on the ombudsman's opinion to initiate impeachment proceedings of judges. "After one or two impeachments, the system in Ukraine will be changed forever. This is the magic bullet that can dramatically rectify Ukraine's legal system," Toms said.

Making court a public service

"One of the key functions of the judiciary is to ensure it properly engages the communities that it serves," Vaughn said. Thus, they should make courts open public service institutions.

Kyiv Post staff writer Olena Gordiienko can be reached at gordiienko@kyivpost.com

Jury trials exist in theory but not practice in Ukraine. Procedures are vague and many people are not interested in getting chosen, so jurors -- on the rare occasion of a jury trial -- are often drawn from retirees or public servants.



Judges, prosecutors, police score lowest in public trust

"To what extent do you trust the following institutions?"

A poll on public trust of institutions was conducted by the Ilko Kucheriv Democratic Initiatives Foundation and Razumkov Center. Some 2,008 respondents were polled. The Kyiv Post combined the "do not trust/largely do not trust" and "trust/largely trust" categories into one and included 2013 results for comparison.

While the ranking of president, Parliament and government has markedly improved in comparison with 2013, judiciary and prosecution continue to lead the 2014 distrust ranking, closely followed by the police, Constitutional Court of Ukraine, and SBU.

To what extent do you trust the following institutions?		2014	2013	2014	2013	2014	2013
		Do not trust		Trust		Difficult to say	
1.	Judges	80.6	71.3	9.4	19	10.1	9.6
2.	Prosecution	75.2	68.1	11	20.2	13.8	11.7
3.	Police	74.2	70.3	16.4	22	9.6	4.8
4.	Constitutional Court	67.6	62.5	12.1	22.1	20.3	15.4
5.	Security Service of Ukraine (SBU)	61	57.4	24.7	30.3	14.4	12.2
6.	Parliament	56.9	74.7	31.1	20.9	12.0	4.4
7.	Cabinet of Ministers	54.2	65.8	35.8	29.3	9.9	4.8
8.	President	44.3	61.5	49.4	34	6.2	4.5

Former police general Oleksiy Pukach is appealing his life in prison sentence for the Sept. 16, 2000 murder of journalist Georgiy Gongadze. The case has dragged on for 15 years because, critics say, political leaders did not want the criminal justice system to prosecute the people who ordered Pukach and other police officers to commit the murder. (UNIAN)

Justice delayed, justice denied



By **Brian Bonner**
bribonner@gmail.com

On Sept. 16, 2015, 15 years after the crime, the person or persons who ordered the murder of Ukrainian journalist Georgiy Gongadze may be home free. While in most civilized nations, there is no statute of limitations for murder, that limit is only 15 years in Ukraine. Some exceptions apply, but the lawyer representing Gongadze's widow, Valentyna Telychenko, is not sure whether this murder would qualify.

No case in Ukraine's independent history more famously illustrates the extent to which Ukraine's criminal justice system is broken than the deliberately flubbed investigation into who ordered the Sept. 16, 2000 killing of the muckraking journalist.

This case has had it all, including tampering with the crime scene, obstruction of justice, mysterious deaths of witnesses, audio recordings implicating former President Leonid Kuchma and his top aides and, conversely, suggestions of Kremlin involvement to set up Kuchma with the political aim of provoking the West to cut their ties with him.

And the case is still ongoing.

The highest-level person convicted in the crime, former police Gen. Oleksiy Pukach, is still appealing his life sentence.

Here's a rundown of only a small fraction of theories and absurdities, at least from my point of view, in the case after a conversation with Telychenko. She, incidentally, remains bound by confidentiality from discussing some aspects of the case because she is an official part of the investigation. (This is another perverse way to shut up people in criminal cases in Ukraine: Make them part of the case.)

The guilty verdict against Pukach is not in force – Much to my surprise, while Pukach was arrested in 2009 and convicted in 2013, the verdict is still not in effect – and won't be until the appeals court says so. It hasn't ruled yet. Insane. He remains, however, jailed in a Security Service of Ukraine jail, described to me as a country club of prisons.

The recordings implicating Kuchma in ordering the murder cannot be used as evidence because prosecutors don't have the originals – This is the most absurd contention I have heard, repeated over and over through

the years as if a mantra. Look, whether the recordings are original or not, or have been doctored or not, should do nothing to damage the investigation. Here's why: Competent investigators would listen to the recordings, subpoena Kuchma's schedule, verify whether the persons in the recordings actually held those meetings with Kuchma, study what events corroborated those talks and then offer the participants limited immunity from prosecution in exchange for truthful testimony against Kuchma or whoever ordered the murder.

Kuchma, who claims he is innocent, only wants to clear his name – Complete and total hogwash. The case has been marred by incompetence and, worse, obstruction from the start, with a parade of changing investigators and prosecutors who spun fanciful tales about who might be responsible – including the dead suspects Cyclops and Sailor Boy. Obstruction of justice is evidence of guilt. And Kuchma was the chief obstructionist.

Why Kuchma doesn't insist on a trial to clear his name – “You know what Kuchma is afraid of? A Ukrainian court is not an independent court. You do not know who will bribe the court and how it will conduct its sessions,” Telychenko said.

Kuchma was popular, having just been re-elected in 1999, and had no reason to kill Gongadze – Again, complete and total nonsense. Kuchma ran the nation into the ground, ruled as a dictator and enriched selected oligarchs around him, the favorite being his son-in-law Victor Pinchuk, who became a billionaire under daddy-in-law's reign of error. Kuchma is a reprehensible figure devoid of conscience and one of the biggest reasons why Ukraine is in its pitiful state today. While the Baltics and Poland were doing their homework to get into NATO and the European Union, as well as raising standards of living, Kuchma was godfather of a criminal state, content to treat 45 million people like cattle. He flirted with a third term until Ukrainians told him to forget it, in no uncertain terms. As for his “popularity,” Kuchma controlled the media and set up a contest between himself and the hapless Communist Party leader, Petro Symonenko, in the 1999 election. Still, Kuchma felt compelled to cheat to win. Gongadze was murdered as a symbol of independent thinking and independence of media – in Kuchma's world, such impudence could not be tolerated. Even if he did not order Gongadze's murder, evidence shows he ordered many other crimes, including police surveillance of dozens of enemies.

So, it's obvious that Kuchma ordered the murder? – I would have said yes until recently. After all, the chain of command from the convicted police officers to Pukach to then-Interior Minister Yuriy Kravchenko to Kuchma is pretty clear and is corroborated by other evidence, including police tailing Gongadze and events described on the recordings that happened in real life. However, the most popular theory now is that the Kremlin did it, through its agents who infiltrated high positions of Ukrainian law enforcement. Inconveniently, those suspected Kremlin agents – Eduard Fere and Yuriy Degaev – are dead. Fere died in 2009 after six years in a coma and Degaev, in 2003. Telychenko believes they were poisoned to death.

Why is the case taking so long? – There are three big theories. One is that politicians and prosecutors wanted to keep extracting bribes from Pinchuk and Kuchma. I believe that – and fugitive ex-prosecutor Renat Kuzmin of the President Viktor Yanukovich era poured fuel on that theory by accusing Kuchma of giving a \$1 billion bribe to close the case. Another theory is that Kuchma has effective immunity from prosecution. I believe that one also. A third one is that Ukraine knew Russian agents were involved, but didn't want to create a public rift with its Slavic neighbor by publicly releasing evidence to support this theory. Now that Russia is an enemy of Ukraine, we may yet see this become the official version. It also fits with a long line of suspected Kremlin attempts to control Ukraine, including through the dioxin poisoning of President Viktor Yushchenko and the subversion of Yanukovich. In light of today's war, and the West's isolation of Kuchma after the Gongadze murder, the Kremlin did-it-theory looks more persuasive all the time.

Interior Minister Yuriy Kravchenko's death in 2005 – The victim succumbed to two gunshot wounds to the head in 2005 on the same day that he was publicly known to be scheduled to give testimony in the case. His death, probably murder but ruled suicide, is one of many cases in which law enforcement destroys cases by publicly outing key witnesses – inviting assassinations. This subversion continues to this day.

After years of stops and starts, Telychenko says a final official version of the investigation may be released publicly on the 15th anniversary of the murder.

When asked what she's certain about involving the case, she replied: “Kuchma will not go to prison. I can be sure about that.”









Kyiv Post chief editor Brian Bonner can be reached at bribonner@gmail.com.

The advertisement for LCF Law Group features a central word cloud with terms such as 'PROTECTION', 'GOODWILL', 'SUCCESS', 'JUSTICE', 'INTEGRITY', 'FAIRNESS', 'EFFECTIVENESS', 'RESISTANCE', 'DIGNITY', 'SINCERITY', 'PROFESSIONALISM', 'EFFICIENCY', 'EFFECTIVENESS', 'RESISTANCE', 'DIGNITY', 'FAIRNESS', 'INTEGRITY', 'SUCCESS', 'GOODWILL', 'PROTECTION'. The text 'LCF LAW GROUP' is positioned above the word cloud, with 'litigation corporate finance' below it. To the left of the word cloud, the text reads 'WHILE OTHERS FACE PROBLEMS' and to the right, 'WE GIVE SOLUTIONS'. Below the word cloud, the LCF logo is displayed, followed by the address: '47, Volodymyrska St., office 3, Kyiv, 01001, Ukraine, phone/fax: +38 (044) 455 88 87 www.lcf.ua info@lcf.ua'. At the bottom of the advertisement, several logos are shown, including '2014', 'Best Lawyers INTERNATIONAL', 'LEGAL 500', '2014', and 'CHAMBER EUROPE'.









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+38 044 371 4007	Aleksandr Peremeshko	Kyiv, Ukraine	2010	Litigation & Arbitration; Tax and Customs; Corporate and M&A; Competition and Anti-monopoly; Media and Communication; Intellectual Property; White Collar Defense	VIETTEL Global Investment JSC, Sharp Electronics Ukraine, Lego Ukraine, B&H, UFD, LeDoyen Studio, Eurofins Food & Agro Testing Sweden AB, Ciklum Ukraine, AstraZeneca	English, German, Polish, Russian, Ukrainian
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+38 044 391 3377	Daniel Bilak	London, UK	2007	Energy; Infrastructure; Corporate and M&A; Banking and Finance; Commercial; Tax&Customs; Competition; Dispute Resolution; Compliance; Employment; Property; Technology Media and Communication; Agribusiness; Lifesciences/Pharmaceuticals; Intellectual Property	WND	English, German, French, Ukrainian, Russian
						
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19B Instytutska St., Kyiv 01021, Ukraine; kyiv@cms-rrh.com, www.cmslegal.com						
+38 044 500 1718	Johannes Trenkwalder	Vienna, Austria	2006	Corporate and M&A; Banking & Finance; Tax; Dispute Resolution; Antitrust; Tax; IP; Employment; Restructuring	WND	English, German, Ukrainian, Russian
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+38 044 494 4774 +38 044 494 1991	Oleg Batyuk	Global law firm	1992	Banking and finance; Corporate/M&A; Dispute resolution; Investments; IP&T; Real estate and Construction; Restructuring; Tax	Multinational corporations, commercial and investment banks, energy companies, developers, hotel chains, investment funds, international organisations	English, Russian, Ukrainian
EBS						
13A Universytetska St., Kyiv 03110, Ukraine; info@ebskiev.com, www.ebskiev.com						
						
+38 044 249 7905	Helen Volska	Kyiv, Ukraine	1998	Legal Services; Management Consulting; Accounting and Financial Management Outsourcing; Tax and Audit; IFRS Reporting; IT and HR Consulting; Transfer Pricing	3M, Wizz Air, EBA, Dragon Capital, ABB, ACC, Alcon, Castrol, Florange, Michelin, Yves Rocher, Winner Automotive	English, German, French, Russian, Ukrainian
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+38 044 537 0910	Oleg Bondar	Kyiv, Ukraine	1998	Corporate and M&A; Antimonopoly & Competition; Dispute Resolution; Air Law & Transportation; Insurance Law; Sport Law; Energy & Resources; Tax; Real Estate; Banking & Finance; Government Relations	Ukraine International Airlines, Reso Group, Opower Corp., Bank of Cyprus, Alumil Ukraine, United Basketball Investments, IC "Persha", Danske Commodities Ukraine	English, German, Russian, Ukrainian
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Right to speedy trial, presumption of innocence trampled

Less than 1 percent of all criminal trials result in acquittals

By **Mark Rachkevych**
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American citizen Robert T. Fletcher III spent more than six years in pre-trial incarceration before a judge released him on bail in February. He has already spent 15 more months in jail than the minimum sentence for the crimes he's merely accused of committing.

"This is kidnapping. The laws are set up to torture everyone," Fletcher, 51, told the Kyiv Post outside the Kyiv Desnyansky District Court on June 9 where he is being tried on charges of serious financial crimes – allegations that he denies. Fletcher is suspected of embezzling more than \$10 million from 226 victims.

A trial judge did not schedule a court appearance with Fletcher, an Oregon native, for four years and five months – nearly three years beyond the limit for pretrial investigations under the previous criminal code, the one in force when he was charged.

Short pretrial detention and speedy trials are pillars of any normal justice system, longtime human rights activist Yevhen Zakharov told the Kyiv Post, if presumption of innocence – another pillar – is to be taken seriously.

"What if a person is innocent yet spends seven years in pretrial detention," Zakharov told the Kyiv Post. "Under the old procedural criminal code (upgraded in November 2012), at any given time there were more than a dozen people sitting in detention centers for at least seven years."

Languishing in jail for long periods ruins lives – professional, personal and financial.

A speedy trial is important for justice.

Over time, memories fade about what happened and evidence gets lost.

Once a suspect is charged in Ukraine, they face a 99.7 percent chance of being convicted, Zakharov added. "This happens partly despite the lack of evidence, falsified forensics and coerced witness testimonies," he said.

Judges who do not want to convict but who also don't want to come into conflict with prosecutors had often sent cases back for further investigation, leaving the accused longer in prison.

A report by Penal Reform International, a non-profit group, found that the longer a suspect is incarcerated before trial, the higher the risk of a confession or statement being coerced by torture or ill-treatment."

That's what happens to many in Ukraine, Alla Bozhok, Fletcher's defense attorney, told the Kyiv Post.

"I've seen innocent people plea bargain, get a reduced sentence and acknowledge a crime just to rejoin their families, instead of fighting to prove their innocence" she said.

Under new criminal procedures, authorities have up to nine months to conduct pretrial investigations. Once the time expires, judges can't send the case for further investigation. They must rule on the case, Zakharov said. If an acquittal, the person must be freed. Other legal changes allow for more suspects to be released on bail or placed under house arrest.

Fewer people are being held in pretrial incarceration.

There were some 40,000 people in pretrial detention when the old criminal procedures were changed on Nov. 11, 2012.

As of May 1, there were 16,255 people in pretrial detention, or 23 percent of the prison population, according to the State Penitentiary Service.



Whether he's guilty or not, American Robert Fletcher – who is suspected of conning many Ukrainians out of their savings – is only now getting his day in court. He was arrested and jailed in 2008, but only got released on bail earlier this year. His case illustrates the low regard in Ukraine for two pillars of a fair and functioning judicial system: The right to a speedy trial and the right to the presumption of innocence.

“The changes are more humane, it’s a considerable improvement,” said Zakharov.

Still, the acquittal rate for crimes hasn’t changed and hovers at 0.3 percent, he added.

Meanwhile, Fletcher’s trial drags on because many victims are difficult to find after so many years, with some having registered addresses in Russian-occupied Crimea and Donbas. He is confident of his acquittal and has lost more than 30 kilograms since his arrest on Nov. 23, 2008.

“I’m the victim, my businesses were taken away from me,” Fletcher said. When asked to describe Ukraine’s criminal justice system, he said: “It’s not broken, it doesn’t work.”

He is back to being a business coach, delivering trainings on “sales, marketing, advertising...the internet business” at the Soviet-era Tourist Hotel near the Livoberezhna subway station, he said.

Although the U.S. Securities and Exchange Commission fined him \$5 million for securities fraud in August 2008, Fletcher said he’s learned from his mistakes.

“If you notice, all the rich Ukrainians, they got nothing in their names, it’s all either in their relatives’ names or proxies,” he said.

The website that offers registration for the “free introductory Robert Fletcher millionaire course,” frtrs.com, doesn’t say to whom the site belongs.

Kyiv Post editor-at-large Mark Rachkevych can be reached at rachkevych@kyivpost.com.



American Robert Fletcher (right) gives one of his “Secrets of Millionaires” training seminars on Feb. 21, 2008 in Kyiv, nine months before police arrested him outside an exposition center late at night on Nov. 23, 2008 on suspicion of large-scale fraud of over \$10 million. (UNIAN)

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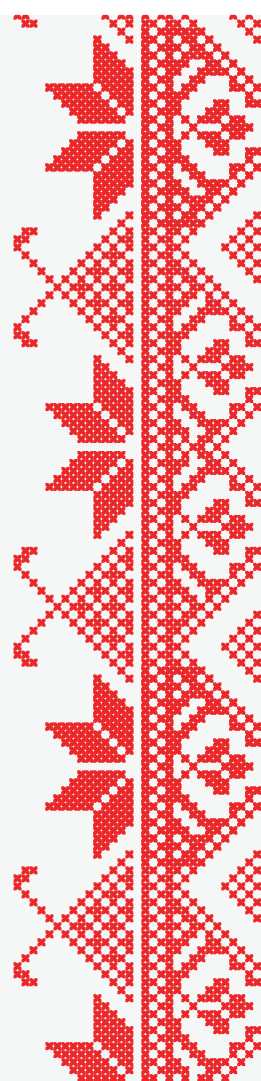


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Only baby steps are being taken to create independent, impartial judges for Ukraine

Judges in Ukraine have historically ruled the way that prosecutors have told them to do. And prosecutors have historically followed politicians orders. How to undo this vicious cycle while paying judges so poorly?

By **Mariana Antonovych**
antonovych@kyivpost.com

Ukraine has underestimated the importance of creating an independent judiciary since its very independence.

“In Soviet times, there was no separation of powers,” Vasyl Kisel, senior partner at Vasyl Kisel & Partners told the Kyiv Post. While cultivation of executive and legislative branches took six years, having a judiciary based on rule of law never made it on the agenda.

As a result, Ukraine’s Constitution has no mention on the right to fair trial by an independent and impartial tribunal, while judges still defer to prosecutors, especially in criminal cases.

Sergiy Smirnov from Sayenko Kharenko law

firm believes the law on fair trial, in force since March 29, finally launched some progressive novelties.

The law introduces a public profile of a judge to include all professional information. It obliges judges to declare their property, revenues and expenses. It also expands grounds for discipline, according to Kostyantyn Krasovsky, secretary of the presidential judicial reform council.

In addition, judges must report any criminal intrusion to influence or pressure them to law enforcement and other members of the judiciary.

But these changes are not enough.

At least four groups are involved in appointing judges – High Qualification Commission of Judges, High Council of Justice, the president and Parliament.

After a candidate successfully completes a competition, a qualification commission recommends him/her to High Council of Justice. Unless the council finds a violation of procedure, it introduces a candidate to the president, who appoints judges for five-year term.

The Verkhovna Rada appoints judges for life, with the High Council of Justice becoming a trustee of judicial independence and professionalism with disciplinary powers.

But politics intrudes too often and too deeply with so many outside bodies picking the council’s members.

The Parliament may alter the composition of the High Council of Justice in autumn, a need underscored by the council’s inability to do its job from April 11, 2014, until June 9 of this year.

As early as 2012, two years before becoming

The average monthly salary for most judges is more than Hr 18,000, or roughly \$830, but it’s not high enough to eliminate corruption within the judiciary.



prime minister, Arseniy Yatsenyuk wanted to cut out the General Prosecutor's Office and the presidency from the selection.

Some favor replacing the multiple judicial bodies with one administrative entity.

Valentyna Symonenko, head of the Council of Judges, says Ukraine needs a single autonomous authority to represent the judicial branch and provide accountability to the government.

Controversial powers of the president to liquidate courts and transfer judges to another court is the other side of a coin.

David Vaughn, the chief of party of the USAID Ukraine Fair Justice Project wants to eliminate presidential powers to liquidate court and transfer judges. "This is something Ukraine has to get rid of by amending the Constitution," Vaughn said.

Volodymyr Kravchuk, a judge of the Lviv District Administrative Court, said the legal reasons for removing judges are too vague, allowing for the dismissal of "almost any politically undesirable judge."

But perhaps nothing will improve until judges are paid adequately and shielded from political pressure with life-time appointments.

"These are the guarantees which give judge an independence to decide the case according to law and Constitution, regardless of Parliament, government or president's

preferences," Bohdan Futey, a senior federal judge for the United States Court of Federal Claims told the Kyiv Post.

There are many other areas that require improvement, including avoiding ex-parte communication. In Ukraine, "judges have meetings with one party in absence of another one. This should never be a case," Futey added.

Judges historically do what prosecutors want in criminal cases and have the reputation of selling their ruling to the highest or most politically well-connected bidder in civil cases. Hopes for improvement are not high, considering the average judge's salary is Hr 18,000, or \$830, a month.

What's needed, however, is a comprehensive approach rather than patching holes, Evgen Kubko from Squire Patton Boggs said. "The judicial reform must be accompanied by the reform of law enforcement and advocacy and based on the principle of checks and balances," Kubko said.

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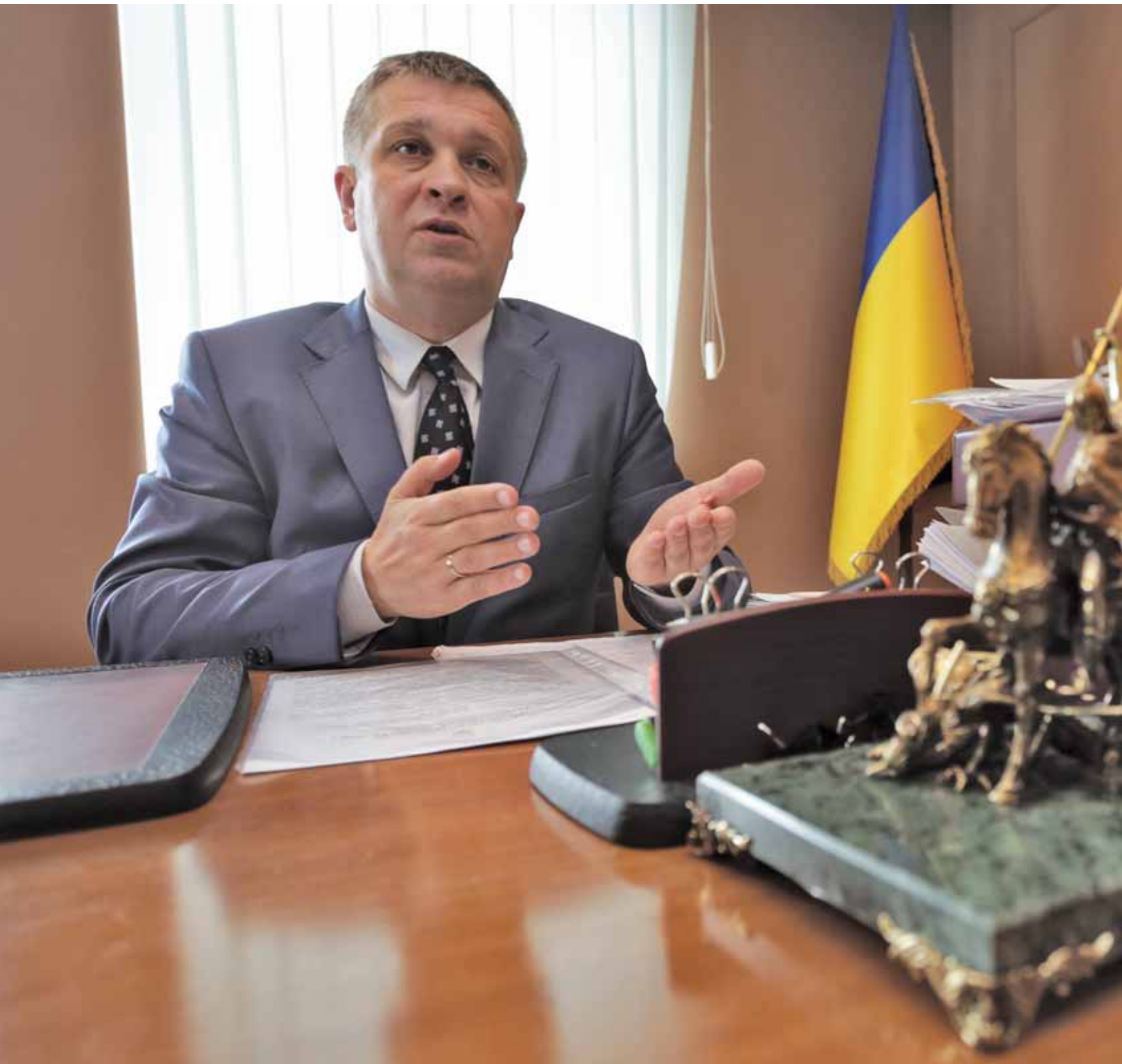
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On May 29, Sergiy Shklyar, deputy justice minister, talks with the Kyiv Post about Ukraine's poor enforcement of court judgements. (Kostyantyn Chernichkin)



Shklyar: Ukraine looks for private sector help in enforcing court orders, judgements

Ukraine’s poor record in enforcing court orders is a major deterrent to investors, but the Justice Ministry says it has solutions.

Sergiy Shklyar was appointed deputy minister of justice on March 24 to overhaul Ukraine’s poorly functioning service for enforcing court rulings and judgements. Shklyar needs to make quick progress in order to improve the nation’s low ranking in the World Bank’s Ease of Doing Business survey – in which Ukraine has set a goal of moving up 20 places next year.

Because of the ridiculously small salaries and the enormous caseload, the enforcement service isn’t doing its job, meaning most court orders don’t get enforced.

“Of course, it breeds corruption,” Shklyar told the Kyiv Post in an interview.

In 2014, Ukraine’s State Enforcement Service enforced only 1.3 million of execution writs, or 20.5 percent of the caseload. The amount of money recovered was a meager Hr 18.8 billion (\$890 million), or just 4.3 percent of the amount that could be collected. In 2014, 42 percent of execution writs were returned to creditors because the debtors had no money to

enforce collection.

Back in 2009, the European Court of Human Rights issued a judgement against Ukraine for systematic non-execution of final domestic court decisions, citing 1,400 applications that had been filed against Ukraine from individuals seeking enforcement of court orders.

The European court called upon Ukraine’s government to “introduce in its legal system, within one year ... an effective remedy, which secured adequate and sufficient redress for non-enforcement of domestic judgements.”

That never happened.

But Ukraine’s Ministry of Justice has found a way to make progress by hiring private enforcement agents to supplement the public enforcement service.

Shklyar said Ukraine should have had such a system a long time ago.

Parliament needs to approve two laws to make this happen: one on enforcement proceedings and second – on enforcement agents with public and private status.

Number of cases in which the European Court of Human Rights found violation of legal obligations to enforce domestic judgements (by country)

	2014	Overall (1959-2014)
Russian Federation	11	64
Romania	3	40
Ukraine	8	29
Republic of Moldova	3	18
Poland	0	3
Slovak Republic	0	2
Hungary	0	0

Source: 2014 Annual Report of European Court of Human Rights

By **Mariana Antonovych**
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In 2014, public enforcement agents recovered only \$866 million out of \$20.1 billion in court judgements. The overworked staff makes only Hr 1,218, or \$57 a month.



“If everything goes smoothly, Parliament will approve both bills before the summer holidays ... and in four months, first private enforcement agents will get to work,” Shklyar said. “However, final estimates regarding the viability of a mixed enforcement system could be done only in two-three years, at the earliest.”

After the new laws come into effect, at least

three months are needed for adoption of secondary legislation and training of private enforcement agents. Similar to notaries, future private enforcement agents will be obliged to insure their business and meet security requirements.

Lawyers, bankruptcy commissioners and state enforcement agents are expected to find this sideline attractive, although Shklyar said it is hard to estimate demand for this job.

The Justice Ministry plans to strengthen the collection process in other ways, including clear deadlines for each procedural step, legal responsibility for non-enforcement and a regulatory body to enforce standards.

A court ruling that isn't enforced is essentially worthless to the beneficiary.

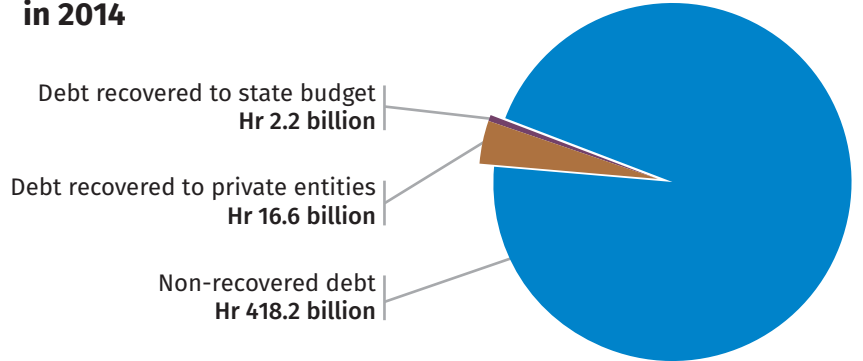
Enforcement agents will also “be given access to all registers... They will get a right to seize or attach property... and send certain rulings by e-mail instead of post mail,” Shklyar said.

A public register of debtors will be created and published by the Justice Ministry as an incentive to pay debts. “It will contain information on the name of the debtor and the sum of the debt,” Shklyar said.

Shklyar is a former partner at Arzinger law firm where he was in charge of dispute resolution and antitrust & competition practices. In October, he was appointed a member of the council on judicial reform.

Kyiv Post legal affairs reporter Mariana Antonovych can be reached at antonovych@kyivpost.com.

Enforcement of judgements in 2014



Statistics demonstrate how poor enforcement of court orders is costing the state and private businesses lots of money.

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Yurydychna Gazeta names best lawyers by area of expertise

By **Mariana Antonovych**
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To help businesses choose an attorney, trade publication Yurydychna Gazeta (Legal Newspaper) identified the best lawyers by area of expertise based on their annual survey of corporate lawyers and law firms. The results of the survey were approved by the international auditing company, Grant Thornton International Ltd., and the market research agency, NOKs fishes. It is published here in the Kyiv Post Legal Quarterly first.

The poll covers 20 major legal practices: intellectual property; agriculture & land; antitrust & competition; banking & finance; energy & subsoil; mergers & acquisitions; corporate; criminal law and procedure; tax & customs; international arbitration & mediation; real estate & construction; media law & IT; family law; sports law; litigation; labor; pharmaceuticals; international law & external economic activity and investment.

The survey does not rank lawyers. Names appear in alphabetical order. Yurydychna Gazeta published similar rankings in the 2010-2011 and 2012-2013 calendar years.

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