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Could a judicial ombudsman help solve Ukraine's rule of law problems?

UkraineAlert by **Bate Toms**

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Ukraine's flawed judicial system is widely regarded as a major obstacle to reform. (REUTERS/Andrew Kelly)

Ukraine should have a bright future as Europe's leading agricultural producer and a growing IT powerhouse. However, corruption continues to hold back this progress.

US Secretary of State Blinken recognized this while visiting Ukraine in May, when he stated that "effectively combating corruption is one of the most important issues to the Ukrainian people, and is crucial to improving their lives." The British Ambassador to Ukraine likewise recently emphasized the role of Ukraine's rule of law problems in depressing trade and investment for Ukraine.

This corruption is rooted in Ukraine's courts. As the President of the American Chamber of Commerce recently declared, "the court system is absolutely rotten to the bone. It is the reason why investors have shied away."

One possible solution to this problem is the creation of a Ukrainian Judicial Ombudsman, acting as a prosecutor to provide judicial oversight. Such an ombudsman was successfully used to provide systemic reform for the Swedish judicial system in a similar situation early in the previous century, and continues today to oversee Swedish courts.

To implement this proposal, the Ukrainian Judicial Ombudsman would need to be established by a statute that could provide for candidates to the position to be nominated, for example, by a representative group of Ukrainian and bilateral chambers of commerce and business associations (to encourage investors), jointly with a committee of the Ukrainian parliament, with the nominee then subject to appointment by the president or parliament.

There should also be supporting statutes adopting criminal law standards for judicial behavior. Under Ukraine's Constitution, judges are not immune to criminal law enforcement. In particular, these laws should criminalize material misconduct by judges. This could follow the "denial of justice" standard applied under Ukraine's bilateral investment treaties (BITs) pursuant to which many foreign investors have brought arbitration proceedings against Ukraine for compensation for wrongful judgments by Ukrainian courts.

The problem with the right to bring such BIT investment treaty arbitration cases is that they provide little practical protection for most investors in Ukraine, because such a proceeding can take five or more years to exhaust local remedies and to then conduct the arbitration, which is typically very expensive. Ukraine has a poor record paying its obligations under such arbitration awards. BITs also do not protect domestic investors.

Unfortunately, no reform yet undertaken or proposed in Ukraine has effectively addressed the country's rule of law problem. Instead, the limited reforms so far have focused on restructuring some courts and replacing some judges, while at the same time failing to tackle the systemic causes of the long-term corruption.

Often, a newly appointed "reform" judge merely profits by fitting into an entrenched system of corrupt expectations. To protect the independence of the Ukrainian judiciary, it has been largely insulated under the Ukrainian Constitution from oversight as a closed system, from the lowest courts to the High Council of Justice, shielded beyond what is actually necessary or appropriate for judicial independence.

Moreover, Ukrainian criminal law fails to impose appropriate criminal law standards for proper judicial conduct, due to the Ukrainian Constitutional Court's poorly reasoned 2020 decision

declaring as void Article 375 of the Criminal Code that created penalties for judicial misconduct.

After years of corruption within this closed system, the replacement of courts and judges is like the proverbial changing of the deck chairs on the Titanic. What Ukraine's judicial system needs is systemic change to fundamentally revise expectations, improve the conduct of Ukrainian judges, and change the direction of the judicial system by providing oversight of judicial decisions quickly in response to complaints, and by creating criminal law prohibitions on judicial misconduct.

For Ukraine, preventing wrongful court decisions that constitute denials of justice, especially those that dispossess investors, is the most important judicial rule of law improvement to be made.

Too often, complaints about judgments that are travesties of justice make their way through the Ukrainian court system, and sometimes continue until completion of BIT arbitrations (if the dispossessed investors have enough money and time to persist), while the judicially stolen property and businesses disappear into the possession of others, never to be recovered regardless of any eventual court or arbitration outcomes. For most countries, such denial of justice cases are rare, but for Ukraine they are quite common.



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The issuing by Ukrainian judges of a judgment with no genuine legal basis, a “denial of justice” under the BITs, is material misconduct that should constitute a crime. If they fail to suitably revise the judgment in response to the Judicial Ombudsman’s opinion, this should result in prosecution of the responsible judges by the Judicial Ombudsman before the High Anti-Corruption Court of Ukraine.

It should not be necessary to catch any bribes actually being paid in order to prosecute judges for obviously wrongful decisions, especially since catching secret wrongful payments is usually almost impossible. Instead, it should be enough to determine criminal responsibility for such misconduct by focusing on the actual actions of judges.

To facilitate this, Ukraine also needs criminal law penalties for judicial misconduct that can be enforced by the Judicial Ombudsman. This is similar to the rules of criminal liability for professional misbehavior by many other groups, like architects and doctors.

The proposed Ukrainian Judicial Ombudsman would, in response to a complaint by a litigant, initially issue an opinion or reprimand. This would allow the judges to reconsider their wrongful decision, with a prosecution to follow if the decision is not properly corrected.

In Sweden, most decisions that the country’s “Justice Ombudsman” determines to be wrongful are revised by judges voluntarily. In the same way, the Ukrainian Judicial Ombudsman would protect against judicial misbehavior.

To be effective, the Ukrainian Judicial Ombudsman should be someone of the highest legal competence and unimpeachable integrity, capable of quickly analyzing court judgments and writing legal opinions that should command universal respect as being correctly reasoned. There are a number of highly qualified Ukrainian and foreign legal experts knowledgeable in Ukrainian law who could serve Ukraine as its Judicial Ombudsman.

To be clear, the Ukrainian Judicial Ombudsman would not function as another court, but only as a check against judicial misconduct in order to obtain quick reconsideration of wrongful judgments that constitute “denials of justice” in months rather than years, and before the business and property concerned is irretrievably lost.

Ukraine clearly needs new solutions to solve the country’s rule of law problems. Yet another court reorganization or replacement of judges, by itself, will likely achieve no more than previous efforts.

Implementation of the Ukrainian Judicial Ombudsman idea could help move Ukraine from being known as a center for judicial corruption to becoming a model, as Sweden has become, for proper judicial conduct. This would pave the way for investment and enable Ukraine to finally realize its economic potential.

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