



# **JUDICIAL REFORM INDEX**

FOR

# **UKRAINE**

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# **VOLUME II**

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## Introduction

The Judicial Reform Index (JRI) is a tool developed by the American Bar Association's Central European and Eurasian Law Initiative (ABA/CEELI). Its purpose is to assess a cross-section of factors important to judicial reform in emerging democracies. In an era when legal and judicial reform efforts are receiving more attention than in the past, the JRI is an appropriate and important assessment mechanism. The JRI will enable ABA/CEELI, its funders, and the emerging democracies themselves, to better target judicial reform programs and monitor progress towards establishing accountable, effective, independent judiciaries.

ABA/CEELI embarked on this project with the understanding that there is not uniform agreement on all the particulars that are involved in judicial reform. In particular, ABA/CEELI acknowledges that there are differences in legal cultures that may make certain issues more or less relevant in a particular context. However, after a decade of working in the field on this issue, ABA/CEELI has concluded that each of the thirty factors examined herein may have a significant impact on the judicial reform process. Thus, an examination of these factors creates a basis upon which to structure technical assistance programming and assess important elements of the reform process.

The technical nature of the JRI distinguishes this type of assessment tool from other independent assessments of a similar nature, such as the U.S. State Department's *Human Rights Report* and Freedom House's *Nations in Transit*. This assessment will *not* provide narrative commentary on the overall status of the judiciary in a country. Rather, the assessment will identify specific conditions, legal provisions, and mechanisms that are present in a country's judicial system and assess how well these correlate to specific reform criteria at the time of the assessment. In addition, this analytic process will not be a scientific statistical survey. The JRI is first and foremost a legal inquiry that draws upon a diverse pool of information that describes a country's legal system.

## Assessing Reform Efforts

Assessing a country's progress towards judicial reform is fraught with challenges. No single criteria may serve as a talisman, and many commonly considered factors are difficult to quantify. For example, the key concept of an independent judiciary inherently tends towards the qualitative and cannot be measured simply by counting the number of judges or courtrooms in a country. It is difficult to find and interpret "evidence of impartiality, insularity, and the scope of a judiciary's authority as an institution." Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 611 (1996). Larkins cites the following faults in prior efforts to measure judicial independence:

- (1) the reliance on formal indicators of judicial independence which do not match reality, (2) the dearth of appropriate information on the courts which is common to comparative judicial studies, (3) the difficulties inherent in interpreting the significance of judicial outcomes, or (4) the arbitrary nature of assigning a numerical score to some attributes of judicial independence.

*Id.* at 615.

Larkins goes on to specifically criticize a 1975 study by David S. Clark, which sought to numerically measure the autonomy of Latin American Supreme Courts. In developing his "judicial effectiveness score," Clark included such indicators as tenure guarantees, method of removal, method of appointment, and salary guarantees. Clark, *Judicial Protection of the Constitution in Latin America*, 2 HASTINGS CONST. L. Q. 405 – 442 (1975).

The problem, though, is that these formal indicators of judicial independence often did not conform to reality. For example, although Argentine justices had tenure guarantees, the Supreme Court had already been purged at least five times since the 1940s. By including

these factors, Clark overstated . . . the independence of some countries' courts, placing such dependent courts as Brazil's ahead of Costa Rica's, the country that is almost universally seen as having the most independent judicial branch in Latin America.

Larkins, *supra*, at 615.

Reliance on subjective rather than objective criteria may be equally susceptible to criticism. *E.g.*, Larkins, *supra*, at 618 (critiquing methodology which consisted of polling 84 social scientists regarding Latin American courts as little more than hearsay). Moreover, one cannot necessarily obtain reliable information by interviewing judges: "[j]udges are not likely to admit that they came to a certain conclusion because they were pressured by a certain actor; instead, they are apt to hide their lack of autonomy." Larkins, *supra*, at 616.

## **ABA/CEELI's Methodology**

ABA/CEELI sought to address these issues and criticisms by including both subjective and objective criteria and by basing the criteria examined on some fundamental international norms, such as those set out in the *United Nations Basic Principles on the Independence of the Judiciary*; *Council of Europe Recommendation R(94)12 "On the Independence, Efficiency, and Role of Judges"*; and *Council of Europe, the European Charter on the Statute for Judges*. Reference was also made to a Concept Paper on Judicial Independence prepared by ABA/CEELI and criteria used by the International Association of Judges in evaluating membership applications.

Drawing on these norms, ABA/CEELI compiled a series of 30 statements setting forth factors that facilitate the development of an accountable, effective, independent judiciary. To assist assessors in their evaluation of these factors, ABA/CEELI developed corresponding commentary citing the basis for the statement and discussing its importance. A particular effort was made to avoid giving higher regard to American, as opposed to European concepts, of judicial structure and function. Thus, certain factors are included that an American or European judge may find somewhat unfamiliar, and it should be understood that the intention was to capture the best that leading judicial cultures have to offer. Furthermore, ABA/CEELI reviewed each factor in light of its decade of experience and concluded that each factor may be influential in the judicial reform process. Consequently, even if some factors are not universally-accepted as basic elements, ABA/CEELI determined their evaluation to be programmatically useful and justified. The categories incorporated address the quality, education, and diversity of judges; jurisdiction and judicial powers; financial and structural safeguards; accountability and transparency; and issues affecting the efficiency of the judiciary.

The question of whether to employ a "scoring" mechanism was one of the most difficult and controversial aspects of this project, and ABA/CEELI debated internally whether it should include one at all. During the 1999-2001 time period, ABA/CEELI tested various scoring mechanisms. Following a spirited discussion with members of the ABA/CEELI's Executive and Advisory Boards, as well as outside experts, ABA/CEELI decided to forego any attempt to provide an overall scoring of a country's reform progress to make absolutely clear that the JRI is not intended to be a complete assessment of a judicial system.

Despite this general conclusion, ABA/CEELI did conclude that qualitative evaluations could be made as to specific factors. Accordingly, each factor, or statement, is allocated one of three values: *positive, neutral, or negative*. These values only reflect the relationship of that statement to that country's judicial system. Where the statement strongly corresponds to the reality in a given country, the country is to be given a score of "positive" for that statement. However, if the statement is not at all representative of the conditions in that country, it is given a "negative." If the conditions within the country correspond in some ways but not in others, it will be given a "neutral." *Cf. Cohen, The Chinese Communist Party and 'Judicial Independence': 1949-59*, 82 HARV. L. REV. 972 (1969), (suggesting that the degree of judicial independence exists on a continuum from "a completely unfettered judiciary to one that is completely subservient"). Again, as noted above,

ABA/CEELI has decided not to provide a cumulative or overall score because, consistent with Larkin's criticisms, ABA/CEELI determined that such an attempt at overall scoring would be counterproductive.

Instead, the results of the 30 separate evaluations are collected in a standardized format in each JRI country assessment. Following each factor, there is the assessed correlation and a description of the basis for this conclusion. In addition, a more in-depth analysis is included, detailing the various issues involved. Cataloguing the data in this way facilitates its incorporation into a database, and it permits end users to easily compare and contrast performance of different countries in specific areas and — as JRIs are updated — within a given country over time.

Second-round and subsequent implementation of the JRI will be conducted with several purposes in mind. First, it will provide an updated report on the judiciaries of Central and Eastern Europe and Eurasia by highlighting significant legal, judicial, and even political developments and how these developments impact judicial accountability, effectiveness, and independence. It will also identify the extent to which shortcomings identified by first-round JRI assessments have been addressed by state authorities, members of the judiciary, and others. Periodic implementation of the JRI assessment process will record those areas where there has been backsliding in the area of judicial independence, note where efforts to reform the judiciary have stalled and have had little or no impact, and distinguish success stories and improvements in the area of judicial reform. Finally, by conducting JRI assessments on a regular basis, ABA/CEELI will continue to serve as a source of timely information and analysis on the state of judicial independence and reform in emerging democracies and transitioning states.

The overall report structure of second-round and subsequent JRI reports as well as methodology will remain unchanged to allow for accurate historical analysis and reliable comparisons over time. However, lessons learned have led to refinements in the assessment inquiry which are designed to enhance uniformity and detail in data collection. Part of this refinement includes the development of a more structured and detailed assessment inquiry that will guide the collection and reporting of information and data.

Second-round and subsequent JRI reports will evaluate all 30 JRI factors. This process will involve the examination of all laws, normative acts and provisions, and other sources of authority that pertain to the organization and operation of the judiciary and will again use the key informant interview process, relying on the perspectives of several dozen or more judges, lawyers, law professors, NGO leaders, and journalists who have expertise and insight into the functioning of the judiciary. When conducting the second-round and subsequent assessments, particular attention will be given to those factors which received negative values in the prior JRI assessment.

Each factor will again be assigned a correlation value of positive, neutral, or negative as part of the second-round and subsequent JRI implementation. In addition, reports for second and all subsequent rounds will also identify the nature of the change in the correlation or the trend since the previous assessment. This trend will be indicated in the Table of Factor Correlations that appears in the JRI report's front-matter and will also be noted in the conclusion box for each factor in the standardized JRI report template. The following symbols will be used: ↑ (upward trend; improvement); ↓ (downward trend; backsliding); and ↔ (no change; little or no impact).

Social scientists could argue that some of the assessment criteria would best be ascertained through public opinion polls or through more extensive interviews of lawyers and court personnel. Sensitive to the potentially prohibitive cost and time constraints involved, ABA/CEELI decided to structure these issues so that they could be effectively answered by limited questioning of a cross-section of judges, lawyers, journalists, and outside observers with detailed knowledge of the judicial system. Overall, the JRI is intended to be rapidly implemented by one or more legal specialists who are generally familiar with the country and region and who gather the objective information and conduct the interviews necessary to reach an assessment of each of the factors.



One of the purposes of the JRI assessment process is to help ABA/CEELI — and its funders and collegial organizations — determine the efficacy of their judicial reform programs and help target future assistance. Many of the issues raised (such as judicial salaries and improper outside influences), of course, cannot necessarily be directly and effectively addressed by outside providers of technical assistance. ABA/CEELI also recognizes that those areas of judicial reform that can be addressed by outsiders, such as judicial training, may not be the most important. Having the most exquisitely educated cadre of judges in the world is no guarantee of an accountable, effective, or independent judiciary; and yet, every judiciary does need to be well-trained. Moreover, the nexus between outside assistance and the country's judiciary may be tenuous at best: building a truly competent judiciary requires real political will and dedication on the part of the reforming country. Nevertheless, it is important to examine focal areas with criteria that tend toward the quantifiable, so that progressive elements may better focus reform efforts. ABA/CEELI offers this product as a constructive step in this direction and welcomes constructive feedback.

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## **Assessment Team**

The Ukraine JRI 2005 Analysis assessment team was led by Olga Ruda, ABA/CEELI's Judicial Reform Focal Area Deputy Coordinator, with the assistance of Ukraine Program Coordinators Iryna Zaretska and Galyna Polishchuk and Deputy Country Director Gavin Weise. The team received substantial support from ABA/CEELI Kyiv and Washington staff, including Country Director Robert Heuer, Liaison Ray Harding, Program Manager Jennifer Denton-Jafari, and Judicial Reform Focal Area Coordinator Simon Conte. The conclusions and analysis are based on over 60 interviews conducted in Kyiv, Kharkiv, Odessa and Ivano-Frankivsk in December 2005 and review of relevant documents that were adopted through the end of 2005. Records of relevant authorities and individuals interviewed (whose names are kept confidential and whose time and assistance are highly appreciated) are on file with ABA/CEELI.

# Executive Summary

## Brief Overview of the Results

The 2005 Judicial Reform Index (JRI) assessment for Ukraine was conducted at a crucial time. The new democratic government that came to power following the 2004 Orange Revolution is open to considering numerous proposals for reforming the country's struggling judiciary. The basic legal framework for the operation of the judicial system, including the 2002 Law on the Judicial System, remains largely in place, but it has proven insufficient to address the numerous systemic deficiencies, such as external interference in all aspects of the work of the judiciary, dire financial conditions, and lack of transparency in the administration of justice. Yet, despite the fact that the most common and severe problems facing the Ukrainian judiciary are well known, the Ukrainian government lacks a comprehensive conceptual vision for judicial reform.

As illustrated in the Table of Factor Correlations, Ukraine scored positively only on four of the thirty JRI factors (Minority and Gender Representation, Judicial Jurisdiction over Administrative Practice and over Civil Liberties, and Guaranteed Tenure). Fifteen factors received a negative correlation, including most factors related to the independence of judicial decision-making, financial resources and structural safeguards, and transparency of court proceedings and documents. These results are comparable to the performance of other countries in the region where the ABA recently implemented the JRIs.<sup>1</sup>

## Concerns Relating to Judicial Independence

- One of the most serious problems facing the Ukrainian judiciary is ***improper influence in judicial decision-making from a variety of sources***, despite the constitutional and other protections against such interference. The perception of judicial corruption is widespread, and while judges are reluctant to discuss bribery or improper influence from court chairmen and upper-level courts, they are rather straightforward about the interference coming from other branches of government, as well as from prosecutors, advocates, and the media. ***Government officials employ an array of means in their attempts to influence the judicial decisions***, ranging from letters, telephone calls or personal visits to judges or court chairmen to open criticism of specific judicial decisions that diverge from their view of the correct outcome. Ex parte communications, which are not directly prohibited by any legislation, are commonplace. Similarly, ***court chairmen have disproportionate influence over individual judges*** on their courts. Court chairs dominate the judicial selection process, hire and fire court staff, assign cases to judges, and approve their vacation schedules. They also bear the burden of securing supplemental funding to maintain their courts, which makes them susceptible to influence by local or national authorities or commercial interests. Indeed, these external actors may manipulate any given judge without ever contacting him/her, channeling all influence through a court chairman.
- A related issue is ***the overall lack of respect for the judicial decisions and the judiciary in general***, which translates into the low level of public confidence in the judiciary. This attitude may be perpetuated by the constant backlash against the judiciary propelled by criticism from other government officials and negative publicity created by the media. The lack of respect is perhaps best illustrated by the fact that both the government and private parties frequently disregard judicial subpoena orders and other decisions. The ***lack of timely and proper enforcement of judgments*** has become a major crisis. In fact, this issue comes up in the overwhelming majority

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<sup>1</sup> In early 2002, the ABA conducted a previous JRI assessment for Ukraine, which was one of the very first JRIs to be implemented. Since then, the JRI methodology has evolved and has become fully institutionalized, and the assessment of each factor now emphasizes both *de jure* and *de facto* analysis. Consequently, while the 2002 Ukraine JRI is still available and can be found at our website, <http://www.abanet.org/ceeli/publications/jri/home.html>, the 2005 Ukraine JRI should be viewed as a comprehensive stand-alone document. For this reason, the ABA has decided not to include in this report a comparative analysis of the findings of the 2002 and 2006 JRI reports.

of complaints against Ukraine filed with the European Court of Human Rights. The government has even refused to comply with some Constitutional Court decisions regarding unconstitutionality of legal acts. Further, disgruntled litigants frequently utilize available mechanisms for **filing complaints against judges in an attempt to alter judicial decisions through non-procedural means**, including decisions that were reviewed and affirmed by several levels of courts. Nonetheless, many in the judiciary contend that, despite the negative public opinion polls, most court users are satisfied with their performance, as demonstrated by the growing number of cases filed with the courts, the resolution of most civil and commercial disputes in favor of the plaintiffs, and the fact that only a small percentage of judgments are appealed.

- **Judicial independence may be jeopardized throughout all stages of a judge's service**, starting with selection and appointment of judicial candidates through advancement to leadership positions to matters of judicial discipline and removal. Decisions related to judicial appointments, discipline and removal are ultimately dependent on the High Council of Justice, a quasi-judicial constitutional body of 20 members, only four of whom are judges. Frequently, these decisions are not guided by any legally specified criteria or procedures and are often inefficient, non-transparent, highly politicized, and lacking in objectivity. For instance, both the appointment and promotion of judges are thought to rely primarily on personal or business connections, corruption, political loyalties, and other subjective factors, rather than a candidate's professional qualifications or integrity. Similarly, some judges may avoid any responsibility for misconduct if they have influential connections, while in other instances the grounds and procedures for judicial discipline and removal can be manipulated to punish disfavored judges.

## Concerns Relating to the Lack of Adequate Funding

- Another key set of problems relates to the **chronic under-funding of the judicial system**. With the exception of the Constitutional, Supreme, and high specialized courts, the judiciary has almost no influence over the funding amounts allocated to it or over the expenditure of these funds. These issues fall within the competence of the State Judicial Administration, an executive branch agency whose procedures are not transparent to judges. The amounts allocated traditionally cover only about 50% of the judiciary's financial needs, and are often insufficient to cover basic needs, such as office supplies, computers and other equipment, and capital construction. Even these meager funding amounts are not always disbursed in full. As a result, judges must pay for many of these expenses out of their own pockets or resort to "sponsorship" by local authorities or commercial interests, prompting one interviewee to comment that justice has become a beggar. In addition, the **disparity in budgetary status of the Supreme Court and other general jurisdiction courts** leads to friction between the different levels of the judiciary. It should be noted, however, that the 2006 budget provides for a significant increase in funding, which is a promising first step, but significantly more resources will be needed to address the severe under-funding of the judiciary.
- **Judicial salaries are universally regarded as too low**, averaging US\$ 300-450 per month for local and appellate judges, and are insufficient to attract qualified lawyers. The executive branch has near total discretion in determining the actual amounts. A significant increase in judicial salaries was initially scheduled to take effect on January 1, 2006, but this apparently did not occur. By contrast, the leadership of the highest courts received substantial salary raises effective June 1, 2005, and this disparity further aggravates the existing tensions within the ranks of judges. The low level of judicial salaries is seen as the primary reason behind the perceived high levels of corruption in the judiciary, although there is a general agreement that a salary increase alone would not be sufficient to prevent corruption. Judges are also entitled to **a variety of fringe benefits**, most notably state-supplied housing, but these are mostly non-functional and make judges more susceptible to improper influences. Most judges would prefer to have these benefits repealed in exchange for adequate salaries. With regard to non-judicial court personnel, the salary situation is even more severe.

- Lack of resources has also meant that ***it is impossible to provide appropriate facilities to the courts***. Indeed, court buildings appear to be in worse shape than those of most other government agencies, and many lack basic infrastructure such as plumbing or heating. There is insufficient space in terms of the number of offices, forcing most judges to share offices with their assistants or secretaries, or even with other judges. Many courts are also unable to fill the existing vacancies due to lack of space for new judges' offices. Further, most judges use their offices as courtrooms, which, most recently, rendered the courts unprepared to comply with the new procedural rules mandating full audio-recording of trials. Both judges and courthouses have occasionally become targets of security threats because of lack of proper security arrangements. Overall, these conditions make it impossible to command respect for the judicial system. Several government programs have announced their intention to provide the judiciary with adequate facilities, but they are not supported by adequate financial resources.

## Other Concerns

- The ***Constitutional Court***, which has built a reputation as a largely effective and impartial authority on issues related to constitutionality and official interpretation of legislation, ***has been paralyzed and unable to perform its functions since October 2005***. Only five of the eighteen positions on the Court are currently filled, which is insufficient to constitute a quorum for either instituting new proceedings or adjudicating pending cases. The President and the Congress of Judges promptly appointed nine additional justices, but the Parliament, for political reasons, has thus far refused to conduct a mandatory swearing-in ceremony for these justices. Both the international community and the domestic stakeholders have urged the Ukrainian authorities to remedy this situation, all to no avail. As a result, justice (in the words of the Parliamentary Assembly of the Council of Europe) is "held hostage by political interests" and citizens are denied access to constitutional justice.
- The Ukrainian courts are faced with ***overwhelming and ever-growing caseloads***, but the number of judges has remained relatively constant. The proffered reason is the lack of resources to support new judicial positions, which has also been responsible for the high and relatively stable number of vacancies. As a result, each local judge has to deal with, on average, 116 cases per month, but this number may reach as high as 250-300 cases in some courts. Many of these cases relate to petty misdemeanors, such as uncontested minor traffic infractions. Similarly, due to 2002 procedural changes that made it easier to lodge appeals with the Supreme Court, the Court's docket now includes over 50,000 pending civil cassations and a monthly workload of 67 cases per judge. Overall, these caseloads make it difficult for most judges to adhere to procedural mandates that cases be resolved within a reasonable time, resulting in ***major procedural delays and backlogs*** throughout the judiciary.
- Lack of transparency in both court proceedings and documents has long been identified as a problem. Often there are problems with ensuring trials are open to the public and the media due to broad statutory exceptions and the lack of courtroom space to accommodate those wishing to observe a trial. With the exception of judgments of the highest courts, only a very small percentage of judicial decisions are published. ***Lack of public access to judgments*** results in the lack of uniformity in application of the law and poor quality of written opinions. In fact, it is not uncommon for the same case to be considered simultaneously by several courts that may issue contradictory rulings. ***Accurate and reliable trial records are created only in rare instances***, and the recent introduction of mandatory technical recording of all civil and administrative proceedings was short-lived because the judiciary lacked the space and resources necessary to comply with this requirement. Neither judicial decisions nor case files are a matter of public record and are typically available only to parties; others must first obtain a permission from court chairman. On a more positive note, a law providing for publication of all court decisions on the Internet was recently adopted but is yet to come into force.



## Ukraine Background

Ukraine is located in East Central Europe, bordering Russia, Belarus, Poland, Slovakia, Hungary, Romania, and Moldova. The history of Ukraine's early statehood dates back to the medieval Kyivan Rus', a decentralized monarchy that existed in 9-13th centuries. After a period of civil wars against Polish and Lithuanian domination, an autonomous Cossack State headed by a *Hetman* and encompassing a large portion of Ukraine was created and came under protectorate of the Russian Empire in 1654. In the late 18th century, following a series of decrees severely restricting its autonomy, the Cossack State was eventually annexed by Russia. Western areas of Ukraine remained under the Polish domination and later came under the Austro-Hungarian Empire. Ukraine had a brief period of independence in 1917-1921, following which it was once again partitioned between the Soviet Union, Poland, Romania, and Czechoslovakia. By the end of World War II, most of contemporary Ukraine was united within a single republic under the Soviet Union.

Ukraine became independent with the collapse of the Soviet Union in 1991, but "[d]uring the [first] 14 years of independence, Ukraine had remained a hybrid regime in which authoritarian and democratic features coexisted." FREEDOM HOUSE, *NATIONS IN TRANSIT 2005: DEMOCRATIZATION IN EAST CENTRAL EUROPE AND EURASIA*, at 677 (2005). Unwilling to give up the power, the regime of incumbent President Leonid Kuchma, who ruled the country in 1994-2004, put all of its resources to ensure the victory of its "official successor," a Russian-leaning Prime Minister Viktor Yanukovich, during the November 2004 Presidential election. However, as a result of the massive fraud hundreds of thousands Ukrainians took to the streets to peacefully protest the official election results in what became known as the Orange Revolution. The Supreme Court of Ukraine, in a decision in *Yuschenko v. Central Election Commission (CEC)* ultimately declared that the voting results were invalid and failed to reflect the true will of the voters, and ordered a repeat run-off, during which the opposition pro-Western candidate Viktor Yushchenko was elected President. The Orange Revolution brought optimism and "opened a way to positive changes in the political, social, and economic life of Ukraine" (*id.* at 678). However, while there have been significant achievements – most notably in the areas of media independence and freedom of assembly – comprehensive reforms are yet to be implemented. The March 2006 Parliamentary elections, which for the first time will be held according to a proportional system, are expected to be an important litmus test for the country's democratization efforts.

## Legal Context

Ukraine adopted its post-Soviet Constitution on June 28, 1996 (see BULLETIN OF THE VERKHOVNA RADA OF UKRAINE (BVR), No. 30/1996, art. 141) [hereinafter CONST.] The Constitution guarantees basic human rights and mandates the separation of powers into legislative, executive, and judicial branches, and the independence of the judiciary. Ukraine is a unitary state, administratively divided into 24 *oblasts* (provinces), the Autonomous Republic of Crimea (ARC), and the cities of Kyiv and Sevastopol, which are further subdivided into *rayons* (districts) and towns. The Constitution establishes a republican form of government with elements of presidential and parliamentary models. The most powerful position is the President of Ukraine, who serves as the head of state and a guarantor of state sovereignty, the observance of Constitution, and human rights. The unicameral Parliament, Verkhovna Rada of Ukraine (VRU), is the sole legislative body consisting of 450 national deputies. The Cabinet of Ministers of Ukraine (CMU) is the highest body in the executive branch, responsible to the President and accountable to the VRU. It is composed of the Prime Minister who is appointed by the President with the consent of the VRU, as well as ministers who are appointed by the President alone. The Constitution was amended in December 2004 (see BVR, No. 2/2005, art. 44) as part of a compromise with the outgoing government. These amendments do not affect the judiciary, but they attempt to transform Ukraine into a parliamentary form of government, providing for a stronger VRU (which will appoint and dismiss the Prime Minister and most other ministers) while significantly reducing the authority of the President. Due to their perceived controversial nature and alleged violations of procedural guidelines during their adoption, the President, on a number of occasions, had hinted at a possibility of appealing the constitutionality of these amendments before the Constitutional Court of Ukraine.

Ukraine's legal system is based on the civil law tradition. In the hierarchy of laws, the Constitution has the highest legal force. International treaties ratified by the VRU take precedence over domestic statutes, while the latter in turn take precedence over other official acts issued by the President, the CMU, and other agencies. Judicial precedent is not officially recognized, although there are some quasi-precedential practices. A number of new codes were adopted in recent years, including the Criminal Code, the Civil Code, the Commercial Code and, most recently, the Civil Procedure Code and the Code of Administrative Justice, which took effect on September 1, 2005. However, criminal proceedings are still governed by the Soviet-era Criminal Procedure Code adopted in 1960, while commercial courts hear cases pursuant to the 1991 Commercial Procedure Code. Both Codes have been amended on numerous occasions, but fall short of complying with democratic standards. Generally, the legal framework of Ukraine is in a state of flux, and constant legal changes result in inconsistencies and contradictions between the various laws that are adopted.

Since 1995, Ukraine has been a member state of the Council of Europe. It ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter EUROPEAN CONVENTION] and acceded to the jurisdiction of the European Court of Human Rights (ECHR) in Strasbourg on September 11, 1997. The Constitution recognizes the right of the aggrieved party to appeal for protection to international judicial institutions after exhaustion of domestic remedies.

## History of the Judiciary

The early Kyivan Rus' had its own judiciary, which contained important elements such as trial publicity and adversarial procedures. Although it never took effect, the 1710 Constitution of Pylyp Orlyk was nonetheless historically significant in that it was the first constitution in the world to recognize such modern democratic principles as separation of powers and independent judicial tribunals. Ukraine's judicial system in the pre-Soviet period reflected the systems of the respective colonizing nations. Thus, the judiciary in different parts of Ukraine was at different times influenced by highly formalistic Russian traditions, as well as by more liberal Polish and Austrian traditions. In the Soviet Union, basic principles of organization of the judiciary and court procedures fell within the competence of central authorities in Moscow, with each republic adopting its own laws in accordance with these principles. Ukraine's judiciary during that time was composed of *rayon* and city people's courts, *oblast* courts, and the Supreme Court of the Ukrainian Soviet Socialist Republic, which supervised all lower courts. This system was subordinate to the Supreme Court of the USSR, which could overturn any judicial decision bypassing Supreme Courts of individual republics. In addition, quasi-judicial public arbitration panels attached to the Council of Ministers and oblast executive councils adjudicated disputes between state enterprises and cooperatives.

The ultimate task of the Soviet judiciary was "finding the objective truth" in a dispute, requiring judges to be active in investigating claims. The right to appellate review of decisions was not recognized and was instead substituted by cassation and supervisory review of judgments that entered into force. The prosecutor played the key role in criminal proceedings and had significant influence over the verdict. He could also intervene in civil proceedings at any stage and could protest any court's decision, if doing so was warranted by state interests. The advocate's role was circumscribed, with representation that was more pro forma than real. While procedural laws declared a number of important democratic principles, such as publicity of a trial, the right to a defense counsel, and presumption of innocence in criminal cases, in practice these provisions were often disregarded, particularly where a political interest was at stake. Communist Party officials frequently instructed judges how to decide a particular case, through a system known as "telephone justice." Despite making important strides since independence towards establishing the rule of law, Ukraine's legal and judicial system still reflects aspects of the Soviet legacy.

In 1990, a few months prior to declaring its independence, Ukraine adopted new judicial system legislation that removed its judiciary from the subordination to Soviet-wide authorities. Later, public arbitration panels were transformed into arbitration courts, thus formally becoming part of the judiciary. In an attempt to further streamline the structure and functions of the courts, the government promulgated the Concept Paper on Judicial Reform in 1992, but almost no actions were taken to implement it. The Concept Paper became outdated with the adoption of the Constitution in 1996, which provided for a number of important reforms, such as shifting the power to issue arrest and search warrants from

prosecutor to the judge and creation of appellate courts. Since the implementing legislation did not exist, the Constitution allowed for a 5-year transition period, during which the courts operated as under Soviet times. As none of the competing proposals managed to muster adequate support during this period, in June 2001, the VRU passed a “small judicial reform” that satisfied the minimum mandates of the Constitution, but fell short of the broader reform anticipated. Finally, a comprehensive Law on the Judicial System was passed on February 7, 2002 (see BVR, No. 27/2002, art. 180; *last amended* BVR, No. 35-36/2005, art. 446) [hereinafter LJS] and went into effect on June 1, 2002.

Overall, the pace of judicial reforms in Ukraine has been very slow. An array of presidential advisory commissions have been set up over the years, but failed to produce visible results. Although the Constitution sets forth the basic structure and principles of the judiciary, there is no document that describes detailed conceptual vision as to what shape the reform should take. The new government promised to prioritize sweeping reform of the judicial system, but these statements are yet to be materialized in concrete action.<sup>2</sup>

## Structure of the Courts

Ukraine’s judicial system is comprised of the courts of general jurisdiction and the Constitutional Court of Ukraine (CCU). The Constitution explicitly prohibits establishing any extraordinary and special courts. The courts of general jurisdiction form a unified system organized according to territoriality and specialization and include general courts, specialized commercial and administrative courts, military courts, and the Supreme Court of Ukraine (SCU). While the general structure of the courts must be determined by the laws of Ukraine, individual courts are established and liquidated by the President.

At the lowest tier, there are **local general courts** that exercise first-instance jurisdiction over all civil and most criminal and administrative cases, as well as administrative offenses (petty misdemeanors usually punishable by a fine). Most cases in these courts are heard by an individual judge. As of October 2005, there were 666 local general courts operating at the level of *rayons* and towns, with a total of about 4,000 judges. At least one local court in each oblast has been designated by the government as a **model court**; these will serve as pilots for introducing various reform measures aimed at improving efficiency of the judiciary.

**Appellate general courts** are established in each oblast, as well as ARC and the cities of Kyiv and Sevastopol, and hear appeals on judgments issued by local general courts. They also serve as first-instance courts for the most serious crimes (e.g., punishable by life imprisonment). Each appellate court consists of a civil and a criminal chamber, as well as a presidium that decides on internal organizational matters. They usually hear cases in panels of three judges. As of October 2005, there were about 1,300 judges in 27 appellate courts.

The Law on the Judicial System provided for the **Court of Appeals of Ukraine** and the **Court of Cassation of Ukraine**, although their exact functions were left to be determined by applicable procedural laws. These courts never became operational, and no judges were ever appointed. In December 2003, the CCU found that establishment of the Court of Cassation was unconstitutional. While it did not

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<sup>2</sup> In May 2005, President Yushchenko established a Commission for Judicial Reform, headed by then-Secretary of the National Security and Defense Council, which was charged with developing reform proposals by December 31, 2005; however, no information is available on any actions undertaken by this Commission. Subsequently, in the summer 2005, the President established a permanent advisory National Commission for Strengthening Democracy and Establishing the Rule of Law, headed by the current Minister of Justice. One of its priorities is the development of a new Concept Paper on Judicial Reform. As this JRI report was being finalized, such document was approved by the Commission; however, it will not be analyzed here as it became available after this assessment was completed. It should also be noted that the Commission’s proposals have little buy-in among the judges, as there is not a single sitting judge and only 4 retired judges among its over 30 members.

address the constitutionality of the Court of Appeals, no steps were taken since to either liquidate it or to appoint judges. There will be no further references to these two courts in this JRI.

Specialized courts include commercial courts and administrative courts. **Commercial courts**, which were established in place of former arbitration courts, have jurisdiction over disputes related to contracts and other agreements between business entities; corporate governance, bankruptcy, and intellectual property cases; as well as tax, customs, antitrust and other disputes related to government regulation of business (these latter cases will ultimately be transferred to administrative courts). **Administrative courts** adjudicate public law disputes, such as those related to decisions or actions of central and local government agencies and their officials, civil service, and elections or referenda. Each specialized court system includes 27 local courts operating at the level of each oblast, ARC, and cities of Kyiv and Sevastopol, which conduct first-instance trials; and appellate (regional) courts, which usually cover several oblasts and review appeals on judgments issued by respective local courts. At present, there are 11 appellate regions for commercial courts and 7 appellate regions for administrative courts. The **High Commercial Court (HCC)** and the **High Administrative Court (HAC)** are the highest judicial bodies of specialized courts and serve as intermediate cassation instance for decisions issued by respective lower courts. Appellate and high specialized courts include chambers for adjudicating different categories of cases within their subject matter specialization, as well as presidiums to decide on organizational matters. The high specialized courts also have plenary assemblies consisting of all judges of those courts and chairmen of respective appellate courts, which set broad policies for respective specialized court systems. As of October 2005, there were about 1,000 judges within the commercial courts system. The HAC began functioning in late 2005; however, local and appellate administrative courts are expected to be fully operational by the end of 2006, although they have been formally established.

**Military courts** are not recognized as specialized courts and therefore hold a special place within the system of the general courts. These courts have a relatively small caseload and exercise jurisdiction over military crimes, espionage, any crimes or administrative offenses committed by members of Armed Forces and other military divisions (e.g., State Security Service or Border Control) and, until recently, over civil disputes related to conditions of military service (which made up the bulk of these courts' caseload). There are presently 17 trial-level military courts of garrisons, as well as three regional and a navy military court with appellate jurisdiction. As of October 2005, these courts employed about 100 judges. While all of them must be active military officers, they enjoy the same status as any other judge and may not be asked to perform military service duties other than administering justice. The future of the military courts is currently being debated. Several of them were liquidated at the end of 2004, and most existing proposals provide for eventually liquidating all of these courts.

The **SCU** is the highest body in the system of courts of general jurisdiction. It is the only cassation instance for civil and criminal cases and has extraordinary (second cassation) jurisdiction over commercial and administrative matters. In addition, it is charged with ensuring the uniform application of the law by all courts of general jurisdiction. It currently consists of 95 justices assigned to four Chambers (Civil, Criminal, Commercial, and Administrative) and a Military Panel. It also includes a Presidium, which determines logistical issues, and a Plenary Assembly, which consists of all justices, as well as chairmen and first deputy chairmen of high specialized courts. The Plenary Assembly is no longer authorized to review judgments of lower courts; rather, it acts as a policy-setting body. For instance, it issues explanations on application of the law by the courts and may overturn such explanations issued by high specialized courts; while these explanations do not have precedential authority, they play an important role in guiding lower court judgments.

The **CCU**, which is composed of 18 justices, is the sole body of constitutional jurisdiction in Ukraine. It decides on issues of conformity of laws and other legal acts with the Constitution and provides the official interpretation of the Constitution and laws of Ukraine. Although anyone has the right to file a petition with the CCU requesting the official interpretation of the law, only the President, at least 45 VRU members, the SCU, the Ombudsmen, and Verkhovna Rada of ARC may file a constitutional appeal regarding the constitutionality of a legal act. Laws and other legal acts deemed unconstitutional lose effect as of the date of the Court's decision.

While the Constitution and the LJS provides that people participate in the administration of justices as **jurors** and **people's assessors**, the exact role of the juries is to be determined by procedural laws. Thus far, no attempts have been made to introduce the juries, although Soviet-style people's assessors are still utilized in certain criminal trials at the appellate courts. There is presently little active discussion on these issues, and establishment of juries seems to find little support within the legal community.

Ukraine's judicial administration system is extremely convoluted, with numerous bodies sharing the responsibilities for different aspects of court administration. Thus, the Constitution provides for the **judicial self-governance bodies** to resolve issues of the internal affairs of courts, strengthen the independence of the judiciary, and protect it from external influence. The highest bodies in this system are the Congress of Judges of Ukraine and the Council of Judges of Ukraine (COJ), as the latter's executive arm. They issue decisions mandatory for all judges throughout the country.

The **State Judicial Administration (SJA)** is a central executive branch agency loosely accountable to the COJ. It is charged with providing organizational support to the courts and undertaking financial, material, technical, human resources, informational, and logistical support measures aimed at establishment of conditions for full and proper administration of justice. The SJA includes headquarters in Kyiv as well as 27 regional offices. Its Chairman is appointed and removed by the President upon a recommendation of the Prime Minister and with the consent of the COJ. Established pursuant to the Law on the Judicial System, the SJA took over the functions formerly carried out by the **Ministry of Justice (MOJ)**. Nonetheless, the latter retains certain residual powers, most importantly recommending the establishment and liquidation of the courts. It is also responsible for the enforcement of court judgments.

Issues related to judicial selection, discipline, and removal fall within competence of the High Council of Justice (HCJ) and the qualification commissions of judges. The **HCJ** is a constitutionally mandated quasi-judicial body with advisory role on judicial appointment and removal issues. Its 20 members include three representatives selected by each of the VRU, the President, the Congress of Judges, the Congress of Advocates, and the Congress of Representatives of Higher Legal Educational Establishments and Scientific Institutions, and two representatives appointed by the All-Ukrainian Conference of Employees of the Procuracy. Chairman of the SCU, the Minister of Justice, and the Procurator General are *ex officio* members. **Qualification commissions** administer judicial qualification examinations and attestations and hear disciplinary proceedings against judges. A total of 13 permanent commissions currently function in Ukraine: High Qualification Commission of Judges (HQCJ), 10 circuit qualification commissions of general courts set up within regions covered by specialized appellate courts, a qualification commission of commercial court judges, and a qualification commission of military court judges. In addition, a qualification commission of administrative court judges will soon be established.

## Conditions of Service

### **Qualifications**

A citizen of Ukraine not younger than the age of 25, who has a higher legal education and work experience in the sphere of law for no less than 3 years, has resided in Ukraine for the past 10 years and has command of state language, may be recommended for appointment as a judge. There are additional restrictions that prohibit the following categories of individuals from being appointed as judges: those deemed incompetent by a court decree, those currently under criminal investigation or with a past conviction record that has not been expunged, and those with chronic psychic or other diseases that interfere with performance of judicial functions.

Additional age and experience requirements are provided for judges of higher-level courts. To be appointed to an appellate court, one must reach the age of 30 and have at least 5 years of work experience in the field of law, including 3 years as a judge. Judges of high specialized courts must be at least 30 years of age and have at least 7 years of law-related experience, including 5 years as a judge. The SCU justices must reach the age of 35 and have at least 10 years of legal experience, including 5 years as a judge. Finally, requirements for the CCU justices include having attained the age of 40, professional experience of no less than 10 years, and residence in Ukraine for the past 20 years.

## **Appointment and Tenure**

Anyone who meets the requirements for judicial appointment may apply to a qualification commission and be allowed to sit for a qualification examination. Those who pass the examination are either recommended by the qualification commission to the HCJ for appointment or placed on reserve lists and considered for future vacancies. All candidates recommended by qualification commissions must pass an additional review at the HCJ, which then presents names of successful candidates to the President of Ukraine for a final appointment decision. These judges hold office for 5-year terms.

Judges whose initial tenure has expired may receive permanent tenure following their election by the VRU. The VRU acts upon a recommendation of the HQCJ, which is presented by the SCU or high specialized court chairman. Once elected, judges hold office until the constitutionally mandated retirement age of 65 and may be removed only for cause, as specified by the Constitution.

The President, the VRU, and the Congress of Judges each appoints or elects six justices of the CCU. Prior to assuming office, these justices must take an oath during a special Parliamentary session attended by the President, the Prime Minister, and the Chairman of the SCU. They serve a single 9-year term and may not be reappointed.

Court chairmen are appointed by the President, upon a recommendation of the Chairman of the SCU acting with the consent of the COJ. They serve 5-year terms but can be appointed for repeat terms. The only exceptions include the Chairmen of the SCU and the CCU. The former is elected by secret ballot by the Court's Plenary Assembly, for a maximum of two consecutive 5-year terms. The CCU justices, by secret ballot, elect one of them as a Chairman for a single 3-year term.

## **Training**

Judicial candidates are not required to undergo any special training prior to appointment, although two law schools, Odessa National Law Academy and Yaroslav Mudry National Law Academy in Kharkiv, offer one-year master in law programs geared towards future judges. In addition, judges serving their initial 5-year tenure annually attend two-week trainings seminars at the Academy of Judges (AOJ), a public higher educational institution created pursuant to the Law on the Judicial System.

Similarly, sitting judges are not required to regularly participate in formal continuing legal education courses, although the Code of Professional Ethics of a Judge provides that judges should aspire to maintain their professional competence at a proper level. Judges have an opportunity to participate in numerous seminars organized by a government institutions, NGOs and international donors, including the AOJ, the SCU's Judicial Training Center, appellate courts, a Ukrainian-Swiss Center for Judicial Studies, ABA/CEELI, Council of Europe, Organization for Security and Cooperation in Europe (OSCE), Renaissance (Soros) Foundation, UN Development Program (UNDP), U.S. Agency for International Development (USAID), and others. However, most of these events are organized on an ad hoc basis and there is seemingly little cooperation between different entities that provide such trainings.

The AOJ developed the Concept Paper on the National System for Training of Judges and Court Staff, which provides, *inter alia*, for a mandatory two-year pre-appointment training program for aspiring judicial candidates, as well as month-long continuing legal education (CLE) courses for sitting judges once in 5 years. Thus far, however, the AOJ has been unable to implement these proposals due to the government's neglect of its financial needs.

## Ukraine JRI 2005 Analysis

While the correlations drawn in this exercise may serve to give a sense of the relative status of certain issues present, ABA/CEELI would underscore that these factor correlations possess their greatest utility when viewed in conjunction with the underlying analysis, and ABA/CEELI considers the relative significance of particular correlations to be a topic warranting further study. In this regard, ABA/CEELI invites comments and information that would enable it to develop better or more detailed responses in future JRI assessments. ABA/CEELI views the JRI assessment process to be part of an ongoing effort to monitor and evaluate reform efforts.

### Table of Factor Correlations

Judicial Reform Index Factor		Correlation 2005
<b>I. Quality, Education, and Diversity</b>		
Factor 1	Judicial Qualification and Preparation	Neutral
Factor 2	Selection/Appointment Process	Negative
Factor 3	Continuing Legal Education	Neutral
Factor 4	Minority and Gender Representation	Positive
<b>II. Judicial Powers</b>		
Factor 5	Judicial Review of Legislation	Neutral
Factor 6	Judicial Oversight of Administrative Practice	Positive
Factor 7	Judicial Jurisdiction over Civil Liberties	Positive
Factor 8	System of Appellate Review	Neutral
Factor 9	Contempt/Subpoena/Enforcement	Negative
<b>III. Financial Resources</b>		
Factor 10	Budgetary Input	Negative
Factor 11	Adequacy of Judicial Salaries	Negative
Factor 12	Judicial Buildings	Negative
Factor 13	Judicial Security	Negative
<b>IV. Structural Safeguards</b>		
Factor 14	Guaranteed Tenure	Positive
Factor 15	Objective Judicial Advancement Criteria	Negative
Factor 16	Judicial Immunity for Official Actions	Neutral
Factor 17	Removal and Discipline of Judges	Negative
Factor 18	Case Assignment	Negative
Factor 19	Judicial Associations	Neutral
<b>V. Accountability and Transparency</b>		
Factor 20	Judicial Decisions and Improper Influence	Negative
Factor 21	Code of Ethics	Neutral
Factor 22	Judicial Conduct Complaint Process	Neutral
Factor 23	Public and Media Access to Proceedings	Neutral
Factor 24	Publication of Judicial Decision	Negative
Factor 25	Maintenance of Trial Records	Negative
<b>VI. Efficiency</b>		
Factor 26	Court Support Staff	Neutral
Factor 27	Judicial Positions	Negative
Factor 28	Case Filing and Tracking Systems	Negative
Factor 29	Computers and Office Equipment	Negative
Factor 30	Distribution and Indexing of Current Law	Neutral

## I. Quality, Education, and Diversity

### Factor 1: Judicial Qualification and Preparation

***Judges have formal university-level legal training and have practiced before tribunals or, before taking the bench, are required (without cost to the judges) to take relevant courses concerning basic substantive and procedural areas of the law, the role of the judge in society, and cultural sensitivity.***

#### **Conclusion**

**Correlation: Neutral**

Judges must have formal legal education and prior law-related experience, but this need not include practice before tribunals. Judges of higher-level courts, except those on the CCU, must also have prior judicial experience. The quality of legal education has deteriorated since 1991, and law schools continue to emphasize theory as opposed to practical skills training. In addition, the requirement of law-related experience is not legally defined and may be loosely interpreted. Judges are not required to take special courses before taking the bench, but those serving their initial five-year appointment attend annual two-week programs at the AOJ.

#### Analysis/Background:

“A citizen of Ukraine, not younger than the age of twenty-five, who has a higher legal education<sup>3</sup> and has work experience in the sphere of law for no less than three years, has resided in Ukraine for no less than ten years and has command of state language, may be recommended for the office of judge by the qualification commission of judges.” CONST. 127; LJS art. 59.2; LAW ON STATUS OF JUDGES art. 7.1 (BVR, No. 8/1993, art. 56; *last amended* BVR, No. 1/2006, art. 18). There are additional restrictions that prohibit the following categories of individuals from being appointed as judges: those deemed incompetent by a court decree, those currently under criminal investigation or with a past conviction record that has not been expunged, and those with chronic psychic or other diseases that interfere with performance of judicial functions. LJS art. 59.4; LAW ON STATUS OF JUDGES art. 7.7. Judges of military courts must also be on active military service. LJS art. 60.1.

The Law on Status of Judges sets forth additional age and experience requirements for judges of higher-level courts.

#### **AGE AND EXPERIENCE REQUIREMENTS FOR JUDGES**

<b>Court Level</b>	<b>Minimum Age</b>	<b>Required Legal Experience</b>
Local courts	25	3 years
Appellate courts	30	5 years, including 3 years as a judge
High specialized courts	30	7 years, including 5 years as a judge
SCU	35	10 years, including 5 years as a judge
Specific Chamber	35	3 years on high specialized court, or 5 years on appellate specialized court
CCU	40	10 years

See: CONST. arts. 127, 148; LAW ON STATUS OF JUDGES arts. 7.2-7.4; LJS art. 48.1; LAW ON THE CONSTITUTIONAL COURT OF UKRAINE art. 16 (BVR, No. 49/1996, art. 272) [hereinafter LCC].

<sup>3</sup> Specialized court judges may have “professional training in issues of jurisdiction of specialized courts” in lieu of legal education, provided they reached the age of 30 and have relevant work experience of at least 5 years. CONST. art. 127; LJS art. 59.3. However, this provision has remained dormant due to lack of clear definitions and other practical problems.

The quality of legal education in Ukraine has deteriorated due to the proliferation of law faculties in response to the growing popularity of the field. Until 1991, there were only 6 law schools in the country; the present number exceeds 200, as almost every higher educational institution boasts a law faculty. Law schools graduate about 30,000 students each year. Classes in some of the new schools are often taught by recent graduates or even senior students, as they do not have enough qualified faculty; others are characterized as “diploma mills.” Some schools offer 3-year junior specialist degrees (as opposed to 5-year specialist and 6-year master degrees), which formally qualify as “higher legal education.” There are special problems related to legal education obtained in the several dozen schools operating under the Ministry of Interior (MOI), which emphasize police-biased curricula, and also through correspondence programs (including those offered by many of the top schools) because the diplomas contain no record of which program was completed. In practice, according to the SJA, most judicial candidates are graduates of the 6 “classic” law schools and the MOI institutions, although the HCJ has reportedly seen a number of candidates from lesser-known schools.

Most law faculties continue to emphasize theory, without dedicating sufficient time to practical skills training, which only comprise an estimated 15% of the curriculum. Few schools offer special courses concerning the status and role of judges in the society. The process is based largely on verbatim memorization and recitation of the legal texts rather than on applying the law to specific practical examples. Some universities are beginning to incorporate law clinics into their curricula, while others have mandatory externships placing students for brief periods with various legal sector institutions, including courts. The rigor of these programs depends greatly on the wishes of individual students and the institution to which they are assigned. Further, many of the smaller schools do not have the capacity to offer such programs.

There are also several problems concerning the requirement of “work experience in the sphere of law,” which is not limited to having practiced before the court. No legal definition of what constitutes such experience exists, and it is often interpreted loosely. For example, there are instances when in-house corporate attorneys, law professors, and local government officials with no courtroom experience are recommended as judges. Further, some women take several years of maternity leave after law school, which is registered as “experience” in their work records, and are recommended as judges immediately thereafter. In practice, prosecutors or police officers, including those unable to make a career in law enforcement or those who have retired, comprise the majority of judicial candidates, which translates into a strong accusatory bias of judges. According to a report that surveyed data on judicial candidates for one oblast, 42% were prosecutorial employees, 9% were police officers, and 24% were court or justice department employees. Interestingly, private advocates were included in the catch-all “other” category (8%). See CANADIAN INTERNATIONAL DEVELOPMENT AGENCY & MINISTRY OF JUSTICE OF UKRAINE, CORRUPTION IN UKRAINE: ANALYSIS OF ITS NATURE AND CAUSES at 71 (2005) [hereinafter CIDA & MOJ REPORT]. This trend was confirmed by both the SJA and the HCJ.

Most interviewees also agreed that 3 years is not sufficient to learn the practical skills necessary for a judge. Also, nearly all thought that the minimum age for judicial candidates should be raised to 30-35. According to respondents, a 25-year-old has neither sufficient life experience nor understanding of human psychology, and is unprepared to deal with the stressful nature of a judge’s work. In general, younger candidates are not emotionally mature enough to issue guilty verdicts or advise older parties, and some lack proper communication skills or ability to resist external pressure. Nevertheless, according to the SJA, the bulk of judicial candidates have 3-7 years of professional experience and fall within the 25-30 age group, with many becoming judges at the age of 25.

The law does not require judicial candidates to undergo any special training. However, both the Odessa National Law Academy and Yaroslav Mudry National Law Academy in Kharkiv informally provide training for professional judges. Both offer a one-year master in law program for individuals who meet statutory requirements for judicial office and are recommended by oblast branches of the SJA, according to quotas set for each oblast. In practice, judicial assistants and other court staff are usually recommended. The curricula include in-depth courses on the role of judiciary, specialized procedural issues, logistical issues related to working in courts (e.g., docket management), and practical skills trainings (e.g., moot courts). Courses are frequently taught by judges from different levels of the judiciary. The Odessa program also

requires a mandatory 2-month court internship. The main weakness of these programs, however, is that their graduates do not receive any real advantage over other judicial candidates and are not guaranteed appointment. In some oblasts, there are no graduates of these faculties among the judges. While some respondents argued that the chances for appointment may be somewhat higher after completing these programs, an element of corruption is purportedly involved at the admission stage. As a result, most observers believe these programs have failed to become true judicial schools.

The AOJ was created pursuant to LJS as a public higher educational institution charged with, *inter alia*, training of individuals who meet the requirements for appointment as a judge. See art. 129.2(1). The AOJ was formally established in October 2002 and began functioning in March 2003. However, it has been unable to launch a full-fledged initial training program due to financial constraints, including the lack of facilities, even though such training is envisioned by the AOJ's Concept Paper on the National System for Training of Judges and Court Staff [hereinafter JUDICIAL TRAINING CONCEPT PAPER]. In the meantime, judges serving their initial five-year appointment annually attend 2-week training seminars at the AOJ. These judges comprise a significant segment of the judiciary: according to Chairman of the SCU, 20% of local court judges have been on the bench for less than 3 years. A typical class includes 50 judges who participate in interactive lectures on contemporary legal issues, case studies, mock trials, and hearings at the SCU. The AOJ conducted 11 such sessions for first-time judicial appointees during 2003-2004, in which 585 judges participated. There were also 3 sessions in each of its 7 regional branches during 2005. It also began a series of OSCE-funded week-long trainings for future administrative court judges in 2005. Finally, the AOJ conducts specialized 3-day refresher seminars for judges prior to their permanent election and interview with the VRU's Legal Policy Committee. 465 judges participated in such trainings in 2004, and 365 judges participated in 2005.

A number of appellate courts also have informal mentorship programs to assist newly appointed judges during the first years of their tenure. For example, two judges on Ivano-Frankivsk Oblast Appellate Court meet with new local judges on a weekly basis to train them on procedural issues. Some appellate commercial courts have pre-appointment internships for judicial candidates, allowing them to attend hearings and perform basic procedural tasks.

## Factor 2: Selection/Appointment Process

***Judges are appointed based on objective criteria, such as passage of an exam, performance in law school, other training, experience, professionalism, and reputation in the legal community. While political elements may be involved, the overall system should foster the selection of independent, impartial judges.***

<b>Conclusion</b>	<b>Correlation: Negative</b>
<p>Candidates for first-time judicial appointment must pass a pro forma qualification examination before a circuit qualification commission and be nominated to the President of Ukraine by a quasi-judicial HCJ. All other judges, except the CCU justices, are elected by the VRU upon nomination of the SCU Chairman and the HQCJ. The process is generally regarded as non-competitive, inefficient, lacking transparency, and guided by subjective factors rather than by professionalism and moral character of individual candidates.</p>	

### Analysis/Background:

The Constitution prescribes two distinct procedures for the selection and appointment of general court judges: initial appointment for a 5-year term by the President; and election of all other judges for permanent terms by the VRU. See arts. 128, 85(27); LAW ON STATUS OF JUDGES art. 9. The initial appointment procedure consists of the following steps: application by a judicial candidate to the circuit or specialized qualification commission and oblast branch of the SJA; background check; qualification

examination; submission of materials to the SJA when a vacancy arises, which in turn submits them to the HCJ; preliminary review by the HCJ qualification section; open-ballot vote by the full HCJ session; preliminary review by the President's Secretariat; issue of Presidential Decree on initial judicial appointment; and swearing-in ceremony. See generally CONST. art. 131(1); LJS arts. 60.3, 61.1, 77(1), 91, 94.1-2, 95, 126(4); LAW ON THE HIGH COUNCIL OF JUSTICE arts. 19, 29 (BVR, No. 25/1998, art. 146; last amended BVR, No. 29/2004, art. 369) [hereinafter LAW ON HCJ]; LAW ON STATUS OF JUDGES arts. 8, 10; Decree of the President No. 697/2004, *On Procedure for Reviewing and Preparing Materials Related to Initial Appointment of a Professional Judge* (Official Gazette of Ukraine (OG), No. 26/2004, art. 1693); Decree of the President No. 493/1999, *On Procedure for Taking the Oath by an Initially Appointed Judge* (OG, No. 19/1999, at 227; last amended OG, No. 50/2003, art. 2618).

The procedure for the permanent election of judges includes the following stages: application by a judge whose initial term of office has expired, submitted to the SJA or the Chairman of the SCU or high specialized court; publication of a notice of upcoming judicial election in local and official central media; qualification attestation; review and recommendation on election by the HQCJ; preliminary review by the VRU's Committee on Legal Policy, which submits a non-binding recommendation to the full VRU; and issue of a VRU Resolution on election of a judge following the full session vote. See generally LJS arts. 60.4, 61.1, 84, 87, 92.7, 93; LAW ON PROCEDURE FOR ELECTION AND REMOVAL OF A PROFESSIONAL JUDGE BY THE VERKHOVNA RADA OF UKRAINE arts. 1-14 (BVR, No. 25/2004, art. 354) [hereinafter LAW ON ELECTION AND REMOVAL OF JUDGES]. Both procedures conclude with a formal order admitting a judge into the court by chairman of the respective court. LJS art. 61.4.

The qualification commissions of judges comprise a system made up of the HQCJ, qualification commissions of specialized and military courts, and circuit qualification commissions of general courts established within each circuit covered by specialized appellate courts. Each commission consists of 11 members: 6 judges, two representatives each from the MOJ and the oblast council, and a representative from the Ombudsmen. The HQCJ consists of 13 members: 7 judges, two representatives each from the VRU and the President, and one representative each from the Ombudsmen and the MOJ. Members serve on a voluntary, part-time basis for 3-year terms. See generally LJS arts. 73-76. At least two thirds of the members must be present to constitute a quorum, and half of those present must agree on any decision. *Id.* arts. 79.3, 82.1. Decisions of qualification commissions may be appealed to the HQCJ, and some of its decisions may be appealed to court. *Id.* arts. 83, 84.1(5), 84.2, 85.1.

The HCJ is a quasi-judicial constitutional body responsible for the judicial selection and discipline process. The twenty members include three representatives selected by each of the VRU, the President, the Congress of Judges, the Congress of Advocates, and the Congress of Representatives of Higher Legal Educational Establishments and Scientific Institutions, and two representatives selected by the All-Ukrainian Conference of Employees of the Procuracy. Chairman of the SCU, the Minister of Justice, and the Prosecutor General are *ex officio* members. All members must have a law degree and at least 10 years of experience in the field of law, and serve a 6-year term (except *ex officio* members). CONST. art. 131; LAW ON HCJ arts. 1, 3, 5, 6.

Anyone who meets the requirements for initial judicial appointment may apply to a qualification commission and be allowed to sit for a qualification examination. The application must be accompanied by copies of a passport, law school diploma, work record, and an income tax return for previous year. The background check includes obtaining certificates from police and medical authorities regarding an applicant's criminal record, mental health, and competence. After an applicant's background has been verified, he/she is allowed to take a qualification examination, intended to determine a candidate's knowledge and level of professional qualification, and the degree of his/her readiness to become a judge. The exam consists of a written assignment followed by an oral interview. The take-home written portion includes writing a research paper on a prescribed topic and drafting certain procedural documents. Based on this examination, and taking into account candidate's professional knowledge and personal or moral character, the qualification commission may recommend a candidate for judicial appointment. Those who passed the examination but did not receive a recommendation due to lack of vacancies are placed on a reserve list (kept separately for each oblast) and will be considered for vacancies that arise in the next three years.

The HCJ qualification section conducts a preliminary review of a candidate recommended for judicial appointment by a qualification commission. The review usually includes an interview with a candidate. Candidates are then brought before the full HCJ session, where they can be further interviewed by any of its members, and failure to answer any question may be sufficient to reject a candidate. The HCJ decisions can be appealed to court, but respondents were not aware of any such instances. The President is not bound by this recommendation and may refuse the appointment of any candidate. Successful candidates must take an oath of office before the President, chairmen of the high courts, the HCJ and the SJA, and the Minister of Justice. However, the President may delegate that the swearing-in ceremony be held before judicial and executive leaders of a respective oblast (which is usually the case in practice).

Judges whose initial tenure has expired must be recommended for permanent election, unless there are circumstances preventing such recommendation. They must first pass a qualification attestation, conducted in a form of an oral interview with the HCCJ aimed at evaluating their performance during their initial term. The Chairman of the SCU or high specialized court submits the HCCJ's recommendation to the VRU, which must be accompanied by the same supporting document as required for initial appointment, and a report on judge's performance during his/her initial tenure. This report must include information on number and categories of cases reviewed by a judge; number of reversed judgments and reasons for reversals; and number of disciplinary proceedings and sanctions against a judge. The VRU's Committee on Legal Policy then conducts a preliminary review of a candidate, which may include review of any public complaints against the candidate and an interview that may touch upon a variety of legal issues as well as specific cases decided during his/her initial tenure. All candidates, regardless of the Committee's recommendation, are brought before the full Parliamentary session, where they can be further questioned by any deputy. This is followed by an open ballot vote of the VRU on permanent election of a judge.

There is an almost universal consent that circuit qualification commissions are overwhelmingly ineffective. Commission members sit on the commissions in addition to performance of their regular duties, which means that their review of candidates is superficial at best. Occasionally, they fail to screen out candidates who do not meet age or legal experience requirements, or have prior criminal conviction records. In the absence of any uniform rules guiding the selection of judicial candidates and the evaluation of their skills, each commission develops its own approach and criteria. Each has its own list of research topics and oral interview questions, which may apply to any area of the law. They rarely review candidates' research papers thoroughly. In fact, few candidates write their own papers, choosing instead to download them from the Internet or purchase from shadow businesses that specialize in writing such reports. The oral interview is likewise subjective, non-transparent, and a mere formality. Overall, this results in the approval of poorly qualified nominees. In fact, some of the candidates reviewed by the HCJ are reportedly unaware of basic concepts covered by first-year law school curricula or recent legal developments, such as adoption of new codes. According to the HCCJ, about 10% of judges standing for permanent election are unable to answer basic questions related to substantive or procedural law during their interviews with the HCCJ.

These inefficiencies have meant that in practice, the judicial selection process is highly subjective and almost completely dependent on the chairmen of the respective courts. Most believe that the key criteria for judicial appointment are a candidate's personal or business connections, bribery, and other subjective factors rather than his/her professional qualification or integrity. Also, no formal rules guide the selection of candidates from reserve lists, so court chairmen typically screen these lists once a vacancy arises and pre-approve candidates who are then formally recommended for appointment by qualification commissions. Moreover, they are not restricted to those candidates already on reserve lists and may suggest that a candidate of their choice take the examination and be recommended for appointment ahead of those who spent several years on reserve lists. Indeed, the majority of respondents agree that it is easy to get onto a reserve list but difficult to get out of it. Most court chairmen defend this practice, contending that they recommend the most qualified candidates; however, in the absence of examination grades or candidate rankings, it is impossible to prove this argument. This argument certainly fails to justify why many judicial assistants or other court staff, who took low paying jobs with the hopes of one

day becoming judges, are sometimes unable to achieve this goal after spending 10 or more years on reserve lists, while those with as little as 3 years of some legal experience are being appointed immediately after passing the examination. It should also be noted that this process is perceived as more corrupt in commercial courts.

Additional problems are posed by the HCJ's role in judicial appointment process. Judicial and non-judicial respondents alike have criticized its composition, which provides for only 4 judges on a 20-member body. This obviously violates international standards on judicial independence and is a vehicle for improper political or other interference in judicial affairs. Because the HCJ members perform their duties on a part-time basis, they frequently have no time to properly review each candidate. Further, interview questions are reportedly highly theoretical and may focus on controversial legal issues with no definitive answers, or on narrow topics of particular scholarly interest to the HCJ members. Judges frequently referred to the fact that the current Minister of Justice (regarded as one of the top experts on European law) asks every candidate questions related to the European Convention and relevant ECHR case-law, to which many are unable to respond correctly. Nonetheless, despite its reported inefficiencies and high degree of politicization, some observers believe that the HCJ is a useful filter as it rejects about 20% of judicial candidates, mostly due to their low level of competence. See, e.g., CIDA & MOJ REPORT at 69.

These procedural flaws have unfortunately led to opportunities for the selection of "pocket" judges. A recent study documented the phenomenon of a "proxy judges," whereby politicians, businesspeople, or others, through abovementioned systemic flaws in the selection process, facilitate judicial appointment of dependent individuals who then exert their influence to pass judgments desired by their sponsor. See *id.* at 70. However, despite this grim picture, some non-judicial respondents believe it is still possible to become a judge without resorting to corruption or connections, particularly in rural areas, where there is rarely more than one candidate per vacancy.

There are no legally prescribed time limits within which the President or the VRU must act when appointing or electing judges. In practice, they often may take as long as 6-18 months after receiving the nominations. Some deputies refuse to vote in judicial elections under various pretexts, allegedly taking revenge against judges for specific decisions that may have affected their interests. This has also resulted in wasting the scarce resources allocated to the judiciary, as judges cannot be automatically removed from office upon expiration of their initial appointment and must receive salaries while their election is pending; at the same time, they may not hear cases during this period.

Between 2003 and October 2005, qualification commissions of general, commercial, and military courts recommended, respectively, 1,485, 220, and 16 candidates for initial appointment, while the President appointed 990 judges for five-year terms. During this period, the HQCJ recommended 1,016 judges for permanent election, while the VRU elected 1,593 judges.

In 2004, 533 candidates took qualification examinations, with the passage rate of 92.7% (494 candidates). The HCJ reviewed 400 candidates recommended by qualification commissions, nominating 340 (85%) for appointment, and 362 new judges were appointed by the President. In 2005, the HCJ reviewed 506 candidates recommended by qualification commissions and nominated 405 (80%) for appointment. Of 552 judges recommended for permanent election in 2004, 469 were elected by the VRU, including 195 appellate court judges and 258 local court judges.

### Factor 3: Continuing Legal Education

***Judges must undergo, on a regular basis and without cost to them, professionally prepared continuing legal education courses, the subject matters of which are generally determined by the judges themselves and which inform them of changes and developments in the law.***

<b>Conclusion</b>	<b>Correlation: Neutral</b>
<p>Judges are not formally required to participate in regular CLE courses. The AOJ offers ad hoc courses on a variety of issues and has developed a Judicial Training Concept Paper that will require judges to participate in month-long CLE courses once in 5 years, although full-fledged the implementation of these provisions is hampered by insufficient government funding. Judges also participate in seminars conducted by a host of other public entities, NGOs, private organizations, and donors. These trainings are not organized in any systematized manner, but judges often have significant input in determining their subject matters.</p>	

#### Analysis/Background:

There is no obligation for Ukrainian judges to regularly participate in formal CLE courses, although the Code of Professional Ethics of a Judge seems to require a judge to “maintain his/her professional competence at a proper level.” See art. 5. In addition, there is a practice that judges undergo 2-week internships with immediate higher court once in 5 years, and many judges comply with this requirement. Participation in other trainings depends on the diligence of an individual judge. For example, some judges believe that CLE is limited to on-the-job training.

The LJS created the AOJ, a public higher educational institution charged with, *inter alia*, continuous training of judges. See art. 129.2(2). It was formally established by Presidential Decree No. 918/2002 in October 2002 and began operating in March 2003. In addition to the Kyiv headquarters, in 2004, 7 regional branches were established in cities that are home to the major (“classic”) law schools, enabling faculty from these schools to teach at the AOJ. There are over 70 adjunct trainers for the AOJ, which mostly include experienced sitting and retired judges, as well as law professors, who participated in special train-the-trainers sessions on interactive teaching methodologies. The AOJ is a member of the Council of Europe Lisbon Network for the Exchange of Information on the Training of Judges and Prosecutors and of the International Organization for Judicial Training, and works closely with a number of international donors, such as US, Canadian and French Embassies, UNDP, OSCE, and Renaissance (Soros) Foundation.

A fundamental obstacle that prevents functioning of the AOJ is that the government has, thus far, neglected its financial needs. In 2003-2005, AOJ received, respectively, UAH 0.8 million (US\$ 116,000), UAH 2.7 million (US\$ 540,000), and UAH 1.3 million (US\$ 260,000).<sup>4</sup> For comparison, the 2005 budget of the Academy of Procuracy was 5 times higher than the AOJ’s, while that of the Academy of State Tax Administration was 56 times higher. The 2006 budget raises the AOJ allocations to UAH 8 million (US\$ 1.6 million); however, this will be insufficient for the planned reconstruction of its facilities in Kyiv or at the regional levels, or for building accommodations for out-of-city trainees. In addition, the AOJ does not yet have its own building. In January 2005, the CMU legally transferred a building belonging to the Ministry of Industrial Policy, but the latter refuses to comply with this order. As a result, the AOJ has been renting a lecture hall from Kyiv National Taras Shevchenko University, paying for it from its budget. It is also unable to pay salaries to trainers, although judges continue to receive their regular salaries when on AOJ assignments.

<sup>4</sup> In this report, Ukrainian hryvnia are converted to United States dollars at the average rate of conversion at the time when the JRI interviews were conducted (US\$ 1.00 = UAH 5.00).

Despite these difficulties, the AOJ is making efforts to improve the existing system of judicial education and continuous training. It prepared training modules and curricula, trained the trainers, and developed materials for future programs. It also produced the Judicial Training Concept Paper, which outlined its vision for the future. According to the latter, sitting judges will be required to participate in month-long courses at the AOJ once every 5 years. In the meantime, the AOJ's work revolves mainly around short-term ad hoc courses that are reportedly very popular among judges. The AOJ has conducted over 30 sessions on topics as diverse as intellectual property, securities, mediation, juvenile justice, restorative justice, judiciary-media relations, workload management, overview of new codes, as well as train-the-trainer seminars. Over 1,200 judges attended these sessions, including over 700 in 2005 alone. As part of a two-year joint program with UNDP, AOJ conducted a series of 8 train-the-trainer seminars for commercial court judges and staff, dedicated mostly to judicial skills training and case management issues. As a result, 68 of the 586 participants were selected as trainers. The AOJ is also implementing a joint project with the Ukrainian Legal Foundation and the Renaissance (Soros) Foundation to train appellate court judges on the European Convention and the ECHR case-law. The program, which includes 6 sessions, is intended to provide intensive comprehensive courses on individual articles of the Convention and relevant case-law applying each article. The goal is to have one judge on each appellate court as a Convention expert who would serve as a consultant for other judges within the oblast.

Starting in 2005, AOJ introduced a bottom-up approach in designing its annual training plans. In October of each year, it solicits recommendations from all court chairmen, who provide their suggestions after consulting with the judges, as well as international donors and other stakeholders. Based on this input, AOJ prepares a training schedule for each category of trainees. The Academic Board, consisting of the AOJ's leadership and professors and representatives of high courts, must approve this schedule in December. In January of the current year, the final schedule is sent to each court, so that judges can review it in advance and plan their individual schedules accordingly.

The SCU also maintains a Judicial Training Center (JTC). The JTC's main task is to provide trainings to appellate court judges during their regular internships at the SCU. These trainings usually consist of 25-30 lectures, spread over 10 days, on some of the most problematic or novel issues related to substantive and procedural civil and criminal law. In addition, the JTC conducts ad hoc seminars jointly with various international donors, such as ABA/CEELI, International Research and Exchanges Board (IREX), OSCE, Swiss Development and Cooperation Agency, and USAID. Some of the past workshops included corporate governance and investor rights, juvenile justice, issues under the European Convention (e.g., freedom of the speech and right to privacy), and regional seminars on the new Civil Procedure Code (CivPC) and Code of Administrative Justice (CAJ). These seminars comprise by far the most significant part of the JTC's training portfolio, apparently due to insufficient government funding. Thus, annual state budget allocations for the JTC in 2003-2006 ranged between UAH 54,000 (US\$ 10,800) and UAH 105,000 (US\$ 21,000). The annual training program is approved by the JTC's Board, consisting mainly of the SCU and appellate court judges, with input from donors and, reportedly, judges who participated in the seminars. Information on the recent JTC activity, which was supplied by the Center, is summarized in the following table.

#### PERFORMANCE OF THE SCU'S JTC

Year	10-day trainings for appellate judges		Trainings supported by international donors	
	No. of events	No. of participants	No. of events	No. of participants
<b>2003</b>	7	75	75	3,514
<b>2004</b>	4	85	24	1,150
<b>2005</b>	17	255	58	3,125
<b>TOTAL</b>	<b>28</b>	<b>415</b>	<b>157</b>	<b>7,789</b>

Similarly, many appellate courts organize monthly trainings for local court judges within their jurisdiction, for which they prepare advance schedules and solicit input on topics in a manner similar to AOJ. For example, most judges in Kyiv reportedly block the last Wednesday of each month to participate in these seminars. However, some appellate courts conduct such training only for their own judges. The HCC and appellate commercial courts also organize ad hoc seminars on each type of their subject matter

jurisdiction. The HAC is planning to establish its own training center; in the meantime, it is conducting a series of regional seminars for local and commercial court judges on the new CAJ, funded by the German Foundation for International Legal Cooperation (IRZ).

Judges have the option to participate in numerous seminars organized by non-governmental institutions. Among these, Center for Judicial Studies, a charitable NGO founded jointly by Ukrainian and Swiss judges, is relatively well-recognized, in part due to its close ties with the SCU's JTC. Because it conducts trainings in cooperation with several donors, such as the Swiss Development Agency, French and Dutch Embassies, and the Council of Europe, the curriculum is almost exclusively donor-driven, although the SCU reportedly takes part in approving the topics. Topics have included, *inter alia*, judicial independence and ethics, role of the judiciary in pretrial investigation, judicial precedent, judiciary/media and judiciary/executive relations, anticorruption, humanization of criminal justice, enforcement of judgments, overview of new Civil and Commercial Codes, and the European Convention. All trainings are interactive and include both theoretical and practical components, and target mainly appellate and more senior local court judges. The CCU, the SCU, and appellate courts judges who participated in train-the-trainers sessions, as well as international experts, serve as trainers.

In addition, a number of organizations, for instance ABA/CEELI, OSCE, and Institute for Applied Humanitarian Studies, cooperate with the SCU and the HAC to organize judicial trainings on election law and administrative justice. Similarly, the MOJ is currently sponsoring a series of 70 regional seminars on application of the new CAJ in election-related disputes, in anticipation of the parliamentary elections in March 2006. Judges also participate in seminars organized by numerous other government agencies and private organizations.

Despite the myriad opportunities available for judges to increase their professional level, these are “totally ad hoc and inadequate. ... Efforts by NGOs, donors, and others to fill gaps is [sic] laudable, but falls [sic] short of systematic approach to judicial training.” See DAVID BLACK & RICHARD BLUE, CONCEPT PAPER ON RULE OF LAW STRENGTHENING AND ANTI-CORRUPTION IN UKRAINE: RECOMMENDATIONS FOR USAID ASSISTANCE at 8 (May 2005) [hereinafter BLACK & BLUE CONCEPT PAPER]. Indeed, there appears to be little coordination between different entities that provide judicial trainings, although the AOJ attempts to put all such programs under its control. In 2004, it even managed to send a controversial, albeit unsuccessful, letter to all court chairmen, signed by Chairmen of the SCU and the SJA, suggesting that trainings by other organizations, unless pre-approved by AOJ, may be duplicative, inconsistent, and simply distract judges from their work, and that judges should only be allowed to participate in such programs outside of regular business hours. Nevertheless, most judges reported that, despite excessive workloads, they rarely refuse to participate in CLE seminars, especially those related to new categories of cases or practical skills or providing an opportunity to interact with their colleagues, and would like to see more such events in the future.

#### **Factor 4: Minority and Gender Representation**

***Ethnic and religious minorities, as well as both genders, are represented amongst the pool of nominees and in the judiciary generally.***

<b>Conclusion</b>	<b>Correlation: Positive</b>
<p>The law provides for equal rights of representatives of both genders, as well as ethnic and religious minorities in the judicial selection and appointment process. While no official statistics are available, women appear to be well represented, although there are admittedly many more men in leadership positions and within the highest courts. Likewise, there are reportedly many judges representing various ethnic minorities.</p>	

## Analysis/Background:

Ukrainian legislation guarantees the equality of all judicial candidates in the selection and appointment process, irrespective of their origin, social and property status, racial or ethnic background, gender, political or religious views, or other grounds. See LJS art. 60.2; LAW ON STATUS OF JUDGES art. 8.2. These provisions are reportedly always respected in practice, although no official statistics on the gender and ethnic composition of the judiciary are available.

According to most respondents, women make up about 60% of judges in local and appellate courts. However, most felt that very few women hold administrative positions in the judiciary (such as court chairmen and their deputies). Similarly, there are only a few women judges in the highest judicial bodies. For example, there were only 3 women of the 22 people ever appointed as the CCU justices prior to 2005, and there is only one woman among those recently appointed by the President and the Congress of Judges to fill the current vacancies. Similarly, there are only 15 female judges among the 82 judges of the SCU, and no women among deputy chairmen of the Court or chairmen of its chambers. Although there are no women among deputy chairmen or chairmen of the chambers in the HCC, women are much better represented among the judges in general: among the 79 judges, 36 are females. Among the 41 HAC judges elected as of January 2006, 14 are women. Finally, among the 77 members of the COJ, only 8 are women. Although there are reportedly a lot of female judges on the oblast-level courts, only two out of 27 oblasts have women chief judges, and five oblasts have female chairpersons of local commercial courts. Traditionally, more women seem to be assigned to civil chambers of appellate courts, while more men are assigned to criminal chambers. None of the respondents attributed this situation to gender discrimination, although no one could name any specific reason.

The majority of the population in Ukraine identifies themselves as ethnic Ukrainians (almost 78% according to the 2001 census). While Russians constitute the largest ethnic minority (approximately 17%), the assessment team was unable to receive information as to their percentage among the judges. Nevertheless, the interview responses suggest that there are no issues with representation of other ethnic and religious minorities. For example, Luhansk oblast and ARC are both reported to have significant Tatar populations, who, according to respondents, appear to be well represented at different levels of the judiciary and some even hold administrative positions (such as an ethnic Tatar chairman of Luhansk Appellate Commercial Court). Similarly, Odessa oblast, which purports to have representatives of 116 various ethnic groups, has a number of ethnic Russian, Armenian, Bulgarian, Georgian, Greek, and Jewish judges, both in districts where they form a majority of the population and throughout different levels of the judiciary. For instance, there are two Bulgarian judges on the Oblast Appellate Court.

The only apparent statutory restriction is that all judicial candidates must have command of the Ukrainian language (see CONST. art. 127; LJS art. 59.2; LAW ON STATUS OF JUDGES art. 7.1), which does not appear to be an impediment to judicial appointment. This is related to a rule whereby all court proceedings and documents must be prepared in the state language, although there is an exception in criminal proceedings that allows to conduct trials in a language spoken by the majority of the population in a given area. See LJS art. 10; CIVIL PROCEDURE CODE art. 7 (BVR, No. 40-42/2004, art. 492; *last amended* BVR, No. 52/2005, art. 562) [hereinafter CIVPC]; CRIMINAL PROCEDURE CODE art. 19 (BVR, No. 2/1961, art. 15; *last amended* BVR, No. 12/2006, art. 105) [hereinafter CRIMPC]; CODE OF ADMINISTRATIVE JUSTICE art. 15 (BVR, No. 35-37/2005, art. 446; *last amended* BVR, No. 1/2006, art. 16) [hereinafter CAJ]. Nevertheless, Russian language is conventionally used in all court proceedings, particularly in the southern and eastern regions of the country, where most people speak Russian as their first language.

## II. Judicial Powers

### Factor 5: Judicial Review of Legislation

***A judicial organ has the power to determine the ultimate constitutionality of legislation and official acts, and such decisions are enforced.***

<b>Conclusion</b>	<b>Correlation: Neutral</b>
<p>The CCU is the sole judicial body authorized to determine the ultimate constitutionality of legislation. The CCU is typically perceived as acting fairly and independently, although standing before it is limited and individuals can only petition the CCU to request official interpretation of the legislation rather than to determine its constitutionality. Decisions of the CCU are mandatory and usually respected in practice, but the government is able to find ways around certain rulings. Presently, the CCU has been unable to exercise its functions since October 2005, due to the VRU's refusal to conduct a swearing-in ceremony for recently appointed judges.</p>	

#### Analysis/Background:

The CCU is “the sole body of constitutional jurisdiction [which] decides on issues of conformity of laws and other legal acts with the Constitution of Ukraine and provides the official interpretation of the Constitution of Ukraine and laws of Ukraine.” CONST. art. 147. It consists of 18 justices, with the President, the VRU, and the Congress of Judges each appointing six of them for a single 9-year term. *Id.* art. 148. The CCU exercises the following functions: deciding on issues of conformity with the Constitution (constitutionality) of laws and other legal acts of the VRU, the President, the CMU, and Verkhovna Rada of the ARC; official interpretation of Constitution and the laws; and providing opinions on the constitutionality of international treaties and on the observance of the Presidential impeachment procedure set forth by the Constitution. *Id.* arts. 150-151; LCC art. 13. Finally, the CCU provides opinions on the conformity of proposed amendments to the Constitution with the constitutionally specified requirements. CONST. art. 159.

Standing before the CCU depends on the type of issue that is being addressed. Only the President, no less than 45 VRU members, the SCU, the Ombudsmen and Verkhovna Rada of ARC may file a constitutional appeal regarding the constitutionality of a particular act. CONST. art. 150; LCC art. 40. The President or the CMU may file an appeal regarding constitutionality of international treaties, while the VRU may file an appeal related to Presidential impeachment and constitutional amendment procedures. LCC art. 41. Any government or local self-governance agency may file an appeal requesting official interpretation of the legislation, and any individual or legal entity may file a constitutional petition requesting such interpretation if it is necessary for protection of their constitutional rights. *Id.* arts. 41-43. This means that individuals or courts of general jurisdiction do not have standing to apply to the CCU on matters involving constitutionality of legislation. However, if a general court in the course of the proceedings has doubts as to the constitutionality of certain laws, it may suspend the proceedings and apply to the SCU, which will then apply to the CCU. LJS art. 47.2(4); LCC art. 83; CivPC art. 8.3; CAJ art. 9.5. Such instances are rare in practice, and even when they do happen, the SCU usually refuses to file an appeal. There is also a higher threshold of admissibility for requests for official interpretation of legislation submitted by individuals as opposed to the government entities. The latter must demonstrate “a practical necessity” in having an official interpretation, while the former must present proof of lack of uniform application of a law by courts or other government agencies, which may result in violation of their rights. LCC arts. 93-94. Since judgments and other legal information is not readily accessible to many individuals, this burden may be difficult to meet. In some instances justices looked for such conflicts on their own if they felt that that an individual was raising a particularly important issue. Nevertheless, lack of individual standing to petition the CCU directly means that it is not a fully effective mechanism for protecting individual rights.

Once a constitutional appeal or a constitutional petition is filed with the CCU, it is assigned to one of three standing panels of judges, which decides whether the formal proceedings should be instituted. LCC arts. 46-49. This decision may be reviewed by the full CCU during its regular session. *Id.* art. 50. There were instances when the CCU has, in fact, overruled a panel decision denying the formal proceedings. Once proceedings are instituted, a case is assigned to a rapporteur, who is responsible for conducting research and preparing a draft decision. PROCEDURAL REGULATIONS OF THE CONSTITUTIONAL COURT §§ 13, 27 (adopted by CCU Decision of March 5, 1997; OG, No. 20/1997, at 87; *last amended* on Nov. 26, 2003) [hereinafter CCU PROCEDURAL REGULATIONS].

Based upon the results of proceedings, the CCU, as a general rule, issues decisions, or opinions in matters related to constitutionality of international treaties, impeachment and constitutional amendment procedures. LCC arts. 61-62. Legislation is “deemed to be unconstitutional, in whole or in part, in the event that [it] do[es] not conform to the Constitution..., or if there was a violation of the procedure established ... for review, adoption, or the entry into force.” CONST. art. 152; LCC art. 15 (which provides an additional ground – if legislation was issued by a body that did not have constitutional authority to do so). In addition, if the CCU finds, in the course of proceedings, that other legal acts (which were not the subject of constitutional appeal) do not conform to the Constitution, these acts are also deemed unconstitutional. LCC art. 61.

Decisions of the CCU “are mandatory for execution throughout the territory of Ukraine, ... final and shall not be appealed.” CONST. art. 150; LCC art. 69. This means that acts deemed unconstitutional “lose legal force from the day the Constitutional Court ... adopts the decision on their unconstitutionality.” CONST. art. 152. In other words, the CCU decisions have, for all practical purposes, precedential value. Although the CCU’s decisions are usually respected in practice, the government has been able to find ways around some decisions on unconstitutionality of certain laws, complying only with those decisions it deems favorable and disregarding the others. For instance, the CCU has issued a number of essentially repetitive decisions on partial unconstitutionality of annual budget laws, including those related to the judicial budgets. Nevertheless, every subsequent budget law includes the same language as that which was deemed unconstitutional. In another example, the government, in a matter that was pending before the ECHR, failed to inform it about a relevant decision by the CCU. Unfortunately, no legally specified mechanisms are available to the CCU to compel the government to comply with its decisions.

Few highly politicized cases reportedly come before the CCU, and the CCU is typically perceived as acting fairly and independently when issuing its decisions. However, it has been criticized sharply in a number of notorious decisions issued in late 2003. These included affirming constitutionality of draft constitutional amendments that were supported by the Presidential Administration but regarded by independent domestic and international experts as a significant step backwards in the establishment of the rule of law,<sup>5</sup> and interpreting the Constitution as allowing then-President Leonid Kuchma to run for office for the third time.<sup>6</sup>

Overall, in the course of 9 years of its existence, the CCU received a total of 559 constitutional appeals (259 related to constitutionality and 300 requesting official interpretation) and 1,123 constitutional petitions. This included, *inter alia*, filings by the President (52), the VRU members (242), the Ombudsmen (9), government agencies (99) and local self-governments (118), the SCU (13), individuals (869), and legal entities (254). The CCU issued 70 decisions on constitutionality of legislation and 69 decisions regarding official interpretation of the laws, and 456 orders denying the formal institution of proceedings. It reviewed the constitutionality of 240 legal acts, including 164 laws and other VRU acts, 41 Presidential acts, and 1 international treaty; of these, 73 were deemed unconstitutional in whole or in part. 69 official interpretations of legislation resulted from applications and petitions by the President (9), the VRU members (15), the CMU (1), the SCU (2), government agencies (16) and local self-governments (3), individuals (10), and legal entities (13). Many individuals also mistakenly believe that the CCU is the

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<sup>5</sup> In particular, these drafts provided for replacing direct popular election of the President with his election by the VRU, in violation of other Constitutional norms. For a critical analysis of this decision, see Bohdan A. Futey, *Rule of Law in Ukraine: A Step Forward or Backward?*, 60 THE UKRAINIAN QUARTERLY 57 (2004).

<sup>6</sup> See *id.* for a critical analysis of this decision.

highest appellate jurisdiction in the country, and have filed 3,497 “appeals” against general court judgments with it since 1997. See generally Mykola Selivon (CCU Chairman), *The Constitutional Court of Ukraine: 9th Anniversary*, 4 BULLETIN OF THE CONSTITUTIONAL COURT OF UKRAINE (2005).

Despite these achievements, on October 18, 2005, the CCU found itself paralyzed and unable to perform the functions designated by the Constitution. On that day, the constitutionally prescribed tenure of 9 justices expired, and the CCU was left with only 5 justices (there were 4 pre-existing vacancies). This number is insufficient for either instituting formal proceedings (as these must be approved during a regular session attended by at least 11 justices, the majority of which must vote in favor) or for adjudicating pending cases (which must be reviewed during a plenary session attended by at least 12 justices, 10 of which must vote in favor of any decision). See LCC arts. 50-51.<sup>7</sup> To the credit of the President and the Congress of Judges, they promptly appointed three and six justices each per their constitutional quota, which is sufficient to constitute a quorum. However, LCC requires that, before assuming office, justices take an oath during a special VRU session in the presence of the President, the Prime Minister, and the SCU Chairman, which must take place within 1 month of appointment. See art. 17. For reasons of purely political nature, the VRU has, so far, refused to conduct this swearing-in ceremony, or to elect 4 justices per its quota. Apparently, the VRU is interpreting its right to control swearing-in of the justices as a veto power against appointees of the President and the Congress of Judges. This is constitutionally impermissible and may be interpreted as tantamount to usurpation of power by the legislature. Most observers agree that the real reason behind this situation is that the CCU may revisit the recent constitutional amendments attempting to transform Ukraine into a parliamentary republic, which took effect on January 1, 2006. Subsequently, the VRU also issued a number of other high-profile decisions of questionable constitutionality, including a January 10, 2006 vote of no confidence in the CMU, which the President has appealed to the CCU. In fact, representatives of several political parties, such the Regions of Ukraine (led by last year’s runner-up in Presidential election Viktor Yanukovich) and the Communist Party, publicly confirmed these reasons, stating that they will block attempts at a swearing-in ceremony due to their distrust of the President and a belief that the CCU is fully dependent on him.

The current situation around the CCU has been at the forefront of domestic and international attention. The Parliamentary Assembly of the Council of Europe (PACE) in its October 5, 2005 Resolution No. 1466 called upon the Ukrainian authorities “to ensure that the composition of the [CCU] ... is renewed without undue delay after the expiration of the term of office of its justices.” See § 13.2. Likewise, the Venice Commission and the PACE Monitoring Committee issued declarations denouncing “the unacceptable delay for the renewal of the composition” of the CCU that has “held [justice] hostage to political interests” and left the country in a political and legal vacuum. See Declarations of Dec. 15, 2005, Dec. 16, 2005, and Jan. 24, 2006. Some Ukrainian politicians, as well as international experts, have even urged the President as the guarantor of the Constitution to arrange a special swearing-in ceremony, such as a live televised ceremony in the presence of designated government officials. Nevertheless, as of late January 2006, these calls have gone unheeded, with the CCU remaining inoperative, and citizens denied access to constitutional justice, while most observers agree that the CCU is unlikely to be reanimated until after the March 2006 Parliamentary election.

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<sup>7</sup> The possibility of such a situation was forewarned of as early as two months prior to its occurrence. See Bohdan A. Futey, *Crisis in the Constitutional Court of Ukraine: A Court Without Judges?*, 34 YURYDYCHNY VISNYK UKRAINY (2005).

## Factor 6: Judicial Oversight of Administrative Practice

***The judiciary has the power to review administrative acts and to compel the government to act where a legal duty to act exists.***

<b>Conclusion</b>	<b>Correlation: Positive</b>
<p>A new CAJ, while not regarded as perfect, enhances the judiciary's power to review administrative acts and to compel the government to act where a legal duty exists. A network of specialized administrative courts has been formally established and the number of administrative disputes is expected to grow once these courts become operational. Courts are rarely biased in favor of the government in adjudicating administrative disputes, although there are at times problems with enforcing such decisions.</p>	

### Analysis/Background:

The Constitution guarantees everyone “the right to challenge in court the decisions, actions or omissions of bodies of state power, bodies of local self-government, officials and officers.” See art. 55. In addition, “[e]veryone has the right to compensation, at the expense of the State or bodies of local self-government, for material and moral damages inflicted by unlawful decisions, actions or omissions of bodies of state power, bodies of local self-government, their officials and officers during the exercise of their authority.” *Id.* art. 56.

A new CAJ was adopted in July 2005 and took effect on September 1, 2005. It provides that any decisions, actions or inaction on behalf of government agencies, local self-governments and their officials (collectively referred to as “government entities”) can be appealed to the administrative courts, which exist to protect the rights of individuals and legal entities from violations by government entities. CAJ art. 2. Jurisdiction of administrative courts extends to all public law disputes. *Id.* art. 4. These disputes include, *inter alia*, disputes related to government’s decisions, action or inaction; civil service (appointment and removal); and disputes related to elections or referenda. *Id.* art. 17. This means that administrative courts have jurisdiction to review legality, but not constitutionality, of decisions of the President and central executive authorities. A government entity whose decision is appealed must publish notice of the pending appeal in the same manner as the original decision, specifying the time and place of scheduled hearing. *Id.* arts. 171.3-4. Anyone can appeal to administrative courts directly on the basis of the Constitution, and courts cannot refuse to consider an appeal for reasons of incomplete, unclear, conflicting or missing implementing legislation. *Id.* art. 8. This means that an individual who believes his rights were violated by a government entity may apply for protection to the administrative court. *Id.* art. 104. There are two levels of local administrative courts. Thus, if acts of local self-governments are disputed, local general courts serve as administrative courts. They also have concurrent jurisdiction with circuit administrative court over disputes against local executive authorities. All other administrative disputes fall within the jurisdiction of circuit administrative courts, except certain election disputes which are decided in the first instance by the HAC. *Id.* art. 18. Upon a plaintiff’s request, court staff must assist him/her with preparing the complaint. *Id.* art. 105.2. In ruling on an administrative dispute in favor of a plaintiff, the court may find a government decision invalid, compel the defendant entity to undertake a specified act or abstain from undertaking a specified act, or to reimburse the damages caused by its unlawful act. *Id.* art. 162.2. The CAJ places the burden of proving of the legality of a disputed act on the defendant government entity. See art. 71.2.

Despite these obviously progressive new rules, most judges view the CAJ with a degree of frustration. It was signed into law by the President only three weeks prior to its effective date, and most local and appellate judges were not aware about its adoption until then. As a result, they had very little time during which to familiarize themselves with the CAJ. Perhaps the most important problem posed by the CAJ, which was cited by both commercial and general courts, is the lack of clarity with respect to allocating the subject matter jurisdiction between different types of courts, particularly when read in conjunction with other procedural codes. Some provisions may be interpreted to imply, for example, that both an

administrative and a commercial court have jurisdiction over a certain dispute (e.g., this is common with tax and land disputes, which border on commercial and administrative fields of law). The HAC has reportedly refused to accept jurisdiction over some cases decided by local and appellate courts pursuant to CAJ, essentially preventing full appellate review in those cases, causing the appellate courts to reverse and remand these judgments for newly discovered circumstances (i.e., need to apply different procedural rules). Neither the HAC nor the SCU have so far issued any formal guidance or interpretations on applying these conflicting provisions. While both Courts have acknowledged the problem, they believe they are unable to provide such guidance at this time since very few cases have been decided under the new Code. They also complained about the lack of cooperation on the part of the HCJ, which refused to support the initiative in developing joint interim guidelines in September.

According to the LJS, administrative courts were to be established within 3 years of the effective date of LJS. See TRANSITIONAL PROVISIONS § 3.16. To formally comply with this requirement, in October 2002 the President issued a Decree No. 889/2002, establishing the HAC with 65 judges. In addition, pursuant to a Decree No. 1417/2004 of November 2004, a network of lower administrative courts was set up, consisting of 27 circuit administrative court (one court in each oblast) and 7 regional appellate courts. While it was initially expected that appellate region boundaries will coincide with those of commercial appellate courts (of which there are currently 11), this did not happen due to political and financial constraints.

In practice, the implementation of these decrees has been slow at best. Thus, HAC judges are elected in small groups. The first 9 judges were elected in early 2004, and an additional 9 judges were chosen a year later; overall, 28 judges had been elected and an additional 17 were pending confirmation at the time of the JRI interviews. The Chairman has not been appointed until December 2004. Because the Court could not begin officially functioning until then, while newly appointed judges had to resign from their previous jobs, they were forced to spend a year on an unpaid leave. The Court held its first hearings on October 28, 2005, and presently reviews about 60 cases per week. As of late 2005, a total of 14,668 cassation cases were filed with the HAC, resulting in an average monthly workload of about 400 cases per judge. A total of 2,378 cases were admitted, of which 428 were resolved. Lower-level administrative courts thus far exist only on paper, although about 30 judges have already been elected. It is expected that the system will be operational by the end of 2006. In the meantime, local general and commercial courts will exercise the jurisdiction of circuit administrative courts. CAJ, TRANSITIONAL PROVISIONS § 4-5. The slow progress with establishment of administrative courts is explained by the lack of funding, which apparently depends, at least in part, on lack of political will. For instance, the SJA estimated that establishment of circuit and appellate administrative courts would require, respectively UAH 45.7 million (US\$ 9.1 million) and UAH 40.6 million (US\$ 8.1 million), but the 2005 budget allocated only UAH 16.8 million (US\$ 3.4 million) (36.8%) and UAH 5.2 million (US\$ 1 million) (12.8%) for these purposes. The 2006 budget provides for only slighter higher amounts of UAH 23.7 million (US\$ 4.7 million) and UAH 10.3 million (US\$ 2 million).

Once established, administrative courts will likely face a very heavy caseload. The number of cases to review the legality of administrative acts has been steadily increasing. It reportedly grew 38 times since 1992. An estimate conducted in 2004 suggested that 12% of the caseload of general courts and 8% of the caseload of commercial courts can be classified as administrative cases. At the same time, according to the HAC, its experience to date suggests that these figures are closer to 30% and 40-60%, respectively. Some judges also predict that there will be more complaints against administrative acts of the central government now that they can be appealed directly to administrative courts. For example, a recent high-profile dispute where the former Prosecutor General successfully appealed the President's decree removing him from office was reviewed pursuant to CAJ. See Factor 20 for details.

Both general and commercial courts are reportedly fair and rarely attempt to favor the government agencies in deciding on administrative disputes. This perception is supported by the following Table.

## CASES INVOLVING REVIEW OF GOVERNMENT ADMINISTRATIVE ACTS (thousand)

	2003	2004	2005 (Jan.-June)
<b>Complaints filed with courts</b>	45.3	76.4	22.1
<b>Cases where judgment was issued</b>	36.4	55.4	8.8
<b>Cases resolved in favor of plaintiffs</b>	31.9	48.3	6.3
<b>as % of all completed cases</b>	<b>87.6%</b>	<b>87.1%</b>	<b>71.6%</b>

*Source:* Department for Summarizing Court Practice and Analyzing Application of the Law, SCU, ANALYSIS OF PERFORMANCE OF GENERAL JURISDICTION COURTS IN 2003 (BASED ON JUDICIAL STATISTICS DATA); Department for Summarizing Court Practice and Analyzing Application of the Law, SCU, ANALYSIS OF PERFORMANCE OF GENERAL JURISDICTION COURTS IN 2004 (BASED ON JUDICIAL STATISTICS DATA); Department for Summarizing Court Practice and Analyzing Application of the Law, SCU, ANALYSIS OF PERFORMANCE OF GENERAL JURISDICTION COURTS IN THE FIRST SIX MONTHS OF 2005 (BASED ON JUDICIAL STATISTICS DATA) [hereinafter collectively referred to as SCU, ANALYSIS OF COURTS PERFORMANCE IN 2003, 2004, AND THE FIRST SIX MONTHS OF 2005].

At the same time, there are occasional problems with enforcing decisions issued against the government agencies, which may be indignant about them and believe that the judiciary, as a branch of government, must support the government's interests. For example, during 2005 several top officials criticized the courts for issuing too many judgments against tax authorities, alleging that the government loses huge sums each year as a result of such judgments and that courts, therefore, should not complain that the government fails to provide them with sufficient resources. In addition, government counsel usually attempt to exhaust all levels of appeals even if they privately agree with a lower court's judgment, due to fear of losing their jobs for losing the case. Further, some agencies reportedly have internal instructions mandating their officials not to comply with "illegal court decisions." It should be noted that there is little public tolerance for this type of behavior.

### Factor 7: Judicial Jurisdiction over Civil Liberties

***The judiciary has exclusive, ultimate jurisdiction over all cases concerning civil rights and liberties.***

<b>Conclusion</b>	<b>Correlation: Positive</b>
<p>The judiciary has exclusive, ultimate jurisdiction over all cases concerning civil rights and liberties and often acts efficiently in protecting these rights. The Constitution also guarantees everyone the right to seek recourse before the ECHR after exhausting all available domestic remedies, and many Ukrainians have successfully lodged complaints with the Court. Domestic courts are growing more familiar with international human rights standards and are less cautious about applying these standards in their judgments.</p>	

#### Analysis/Background:

The Constitution extends the jurisdiction of the courts "to all legal relations that arise in the State." See art. 124. It also prohibits "[t]he creation of extraordinary and special courts." *Id.* art. 125. This means that courts of general jurisdiction are competent to hear all cases concerning civil liberties. Specifically, the Constitution states that "[h]uman and citizens' rights and freedoms are protected by the court." See art. 55. In addition, because constitutional norms have direct effect, "[a]ppeals to the court in defense of the constitutional rights and freedoms of the individual and citizen directly on the grounds of the Constitution of Ukraine are guaranteed." *Id.* art. 8. Chapter II of the Constitution enumerates a number of important civil and political rights and freedoms. These include, *inter alia*, equality before the law (art. 24), right to life (art. 27), right to respect of human dignity (art. 28), right to freedom and personal inviolability (art. 29), right to privacy in one's home, correspondence, and personal and family life (arts.

30-32), freedom of expression (art. 34), freedom of association (art. 36), right to participate in administration of state affairs, including through electoral process (art. 38), and right to assembly (art. 39).

An important illustration of the judicial jurisdiction in cases concerning civil liberties includes the authority of the courts to sanction detention. According to the Constitution, “[n]o one shall be arrested or held in custody other than pursuant to a substantiated court decision....” See art. 29; see *also* CRIMPC art. 14. Law enforcement officials “may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by a court within seventy-two hours” in exceptional cases of an urgent necessity to prevent or stop a crime, and everyone has the right to challenge his/her detention in court at any time. CONST. art. 29. In practice, the number of pretrial detentions has reportedly decreased significantly since 2001 when the judiciary took over from the prosecutors’ offices the right to sanction these detentions. Almost 74,000 pretrial detentions were sanctioned in 2000. The number on pretrial detentions sanctioned by Ukrainian courts since 2003 is presented in the Table below.

**PRETRIAL DETENTION IN UKRAINE (thousand cases)**

	<b>Requests filed by the police</b>	<b>Requests granted by the courts</b>	<b>%</b>
<b>2003</b>	62.1	55.6	89.5
<b>2004</b>	52.9	47.8	90.4
<b>2005 (Jan.-June)</b>	26.2	23.5	89.7

*Source:* SCU, ANALYSIS OF COURTS PERFORMANCE IN 2003, 2004, AND THE FIRST SIX MONTHS OF 2005.

Nevertheless, as the above figures illustrate, the courts still authorize pretrial detention in the vast majority of cases requested by the police. In summarizing the judiciary’s practice in applying preliminary detention in criminal cases, the SCU found that courts still commit errors in reviewing such police requests. In frequent cases, courts do not have sufficient time to properly review the request, because they are filed immediately before the expiration of the constitutionally prescribed 72-hour time limit. Common errors include failure to secure the participation of a defense advocate in court hearings, to comply with the statutorily prescribed terms for deciding on such requests, to properly substantiate the sanction on pretrial detention, and to explain the appeal process. See *generally* SCU, *Court Practice in Applying Preliminary Detention* (Feb. 1, 2005), in 6 BULLETIN OF THE SCU (2005).

The judiciary also played an important role in protecting the electoral rights of the citizens in the course of the 2004 Presidential election campaign. Throughout the year, the courts received 133.5 thousand complaints alleging violation of electoral rights, 97% of which were filed by individual voters alleging voter list irregularities. The courts reviewed 131.5 thousand cases, of which 127.8 thousand (97.1%) were resolved in favor of the voters. See SCU, ANALYSIS OF COURTS PERFORMANCE IN 2004. Undoubtedly the most important of these was the SCU’s decision of December 3, 2004 on the opposition candidate Viktor Yushchenko’s appeal of official results of a run-off vote that pronounced the incumbent regime’s candidate Viktor Yanukovich a winner. In a decision that marked a turning point in the Orange Revolution and made headlines throughout the world, the SCU declared the voting results invalid and failing to reflect the true will of the voters due to widespread instances of fraud and violations of the election legislation, ordering a repeat run-off. See *Yushchenko v. CEC*; for a detailed analysis of this decision see Bohdan A. Futey, *Legal Analysis: Ukraine’s Supreme Court Decision*, THE UKRAINIAN WEEKLY (Dec. 12, 2004). That voting ultimately brought election victory to Mr. Yushchenko. As a result of this ruling, the confidence in the ability of the courts to protect individual rights increased significantly. This is evidenced by the data that over 71 thousand of the election-related complaints were filed following this historic decision.

The Constitution also provides that “[a]fter exhausting all domestic legal remedies, everyone has the right to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions...” See art. 55. Ukraine ratified the European Convention and acceded to the jurisdiction of the ECHR in September 1997. Since then, the ECHR has seen a steady increase in the number of applications filed against Ukraine. According to the Ukrainian government’s estimates as of October 2005, there are currently about 15,000 applications against Ukraine filed with the ECHR, although some non-governmental sources estimate that perhaps as many as 30,000-40,000 applications against Ukraine

are filed annually. According to the ECHR's official data, 2,457 applications against Ukraine were lodged in 2005, of which 1,698 were found inadmissible, 269 referred to the government, and 133 declared admissible. See ECHR, SURVEY OF ACTIVITIES 2005, available at <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+surveys+of+activity>. As of October 2005, a total of 419 cases were pending review at the MOJ after they were referred by the ECHR. The overwhelming majority of these cases concern issues related to lack of enforcement of judgments, procedural delays, and violation of property rights. According to the MOJ, these issues are raised in about 90% of all cases referred to the Government of Ukraine. There are also a significant number of claims related to accusatory bias in criminal cases and inhumane detention conditions. The ECHR issued 119 judgments in cases that named Ukraine as a respondent state in 2005, 14 judgments in 2004, and 6 in 2003. About 60 of these judgments found the breach of rights guaranteed by the European Convention by the Ukrainian authorities. See Press Release of the MOJ (Oct. 5, 2005).

There are indications that Ukrainian judges are gradually becoming more familiar with the international legal standards, including the European Convention and the ECHR case law; however, they rarely cite these standards in their decisions. Only the CCU's decisions regularly contain references to international law and judgments of international judicial bodies, including the ECHR. The SCU has likewise cited the European Convention in its 2004 election rulings. With respect to other courts, NGOs and other organizations that sponsor judicial trainings believe that most judges by now seem to have a pretty solid understanding of selected provisions of the European Convention, for instance of Article 6 (Right to a Fair Trial). However, judges still lack a comprehensive understanding of all Articles, and often interpret them not in the manner intended by the ECHR. Advocates apparently often present arguments that are based on European standards, and judges are no longer ignoring such arguments but are starting to apply them in their decisions. Most judges have copies of the Convention, and many subscribe to journals or purchase books that publish ECHR decisions. A number of judges interviewed responded that they peruse the European Convention and the ECHR judgments when writing the decisions without necessarily including a direct citation. At the same time, some local judges complained that there are no incentives for them to cite to the European standards, because there were several instances when appellate courts reversed their decisions containing such references. However, appellate judges contend that they reverse only those judgments where local judges failed to properly interpret provisions of the European Convention or the ECHR case law.

Judges will possibly become less cautious about applying the international standards in their judgments with the adoption of the new CAJ, which provides that courts must be guided by principles of the rule of law and take into consideration the ECHR case law. See art. 8. In addition, many observers believe that a summary resolution of the Plenary Assembly of the SCU would compel the judges to use the international standards more freely and serve as guidance for judges. Two years ago, the SCU has reportedly drafted such a resolution, summarizing the application of the European Convention and other international norms by the Ukrainian courts and pointing out the key deficiencies. However, the final adoption of this resolution has so far been postponed, allegedly due to political factors.<sup>8</sup>

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<sup>8</sup> It should also be noted that, as this JRI report was being finalized, the VRU adopted LAW ON ENFORCEMENT OF JUDGMENTS AND APPLICATION OF CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS (Feb. 23, 2006) (see OG, No. 12/2006, art. 792), which is aimed at introducing the European human rights standards into the Ukrainian court practices; however, the impact of this Law cannot yet be evaluated.

## Factor 8: System of Appellate Review

***Judicial decisions may be reversed only through the judicial appellate process.***

<b>Conclusion</b>	<b>Correlation: Neutral</b>
<p>Judicial decisions may be reversed only through the judicial appellate and cassation process. The law provides for broad rights to appeal a judgment, but decisions in certain criminal cases are entitled only to a more limited cassation review rather than a full appellate review, and specialized court decisions are subject to double cassation. As a result of procedural changes making it easier to file a cassation with the SCU, the SCU has found itself unable to cope with its backlog of over 50 thousand civil cassations, thus denying full access to justice in civil cases.</p>	

### Analysis/Background:

The Constitution “ensur[es] complaint of a court decision by appeal and cassation.” See art. 129(8); see *also* LJS art. 12. Appellate review involves the revision of both factual circumstances and application of the law, while cassation review is more limited and is only concerned with improper application of the law rather than the factual assessment. No one can be denied the right to have his/her case heard by a first-instance, appellate, or cassation court. LJS art. 6.4; CAJ art. 6.3. Anyone whose rights or duties were affected by a court decision, including non-parties, may file an appeal or a cassation. CIVPC arts. 13, 292, 324, 353; CAJ arts. 13, 185, 211, 236. However, in commercial cases, the right to file an appeal (but not a cassation) is limited to parties. COMMERCIAL PROCEDURE CODE arts. 91, 107 (BVR, No. 6/1992, at 56; *last amended* BVR, No. 1/2006, art. 1) [hereinafter COMPC]. In criminal cases, appeals or cassations may be filed only by defendants, victims, their representatives, and prosecutors. CRIMPC arts. 348, 384. Finally, decisions of the CCCU “are final and shall not be appealed.” CONST. art. 150.

Local general courts exercise first-instance jurisdiction over all civil and most criminal and administrative cases, as well as administrative offenses, with certain exceptions. LJS art. 22; CIVPC art. 107; CRIMPC art. 33; CAJ art. 18. Local commercial courts try all cases within the jurisdiction of commercial courts, such as disputes related to contracts and other agreements between business entities; corporate governance, bankruptcy, and intellectual property cases; as well as tax, customs, antitrust and other disputes related to government regulation of business (although the latter will subsequently be transferred to administrative courts). LJS art. 22; COMPC arts. 12-13. Local administrative courts adjudicate most public-law disputes. LJS art. 22; CAJ art. 18; see *also* Factor 6 for more details. Judges on first-instance courts hear cases individually. LJS art. 13; CIVPC art. 18.1; CRIMPC art. 17; CAJ art. 23; COMPC art. 4<sup>6</sup>. However, disputes involving acts by the President, the CMU, and central executive authorities and their officials, other particularly complicated administrative disputes, and criminal cases punishable by over 10 years of imprisonment are heard by three-judge panels. CAJ art. 24; CRIMPC art. 17.

Appellate general courts consist of civil and criminal chambers that hear appeals on judgments of local general courts. CIVPC art. 291; CRIMPC art. 356. These courts also conduct first-instance criminal trials for crimes related to national security or punishable by life imprisonment. CRIMPC art. 34. Appellate administrative and commercial courts hear appeals on, respectively, decisions of local administrative and commercial courts. CAJ arts. 20.2, 184; COMPC art. 92. Appellate courts review cases in panels of three judges, except first-instance criminal trials that are heard by panels of three professional judges and two people’s assessors. CIVPC art. 18.3; CRIMPC art. 17; CAJ art. 24.3; COMPC art. 4<sup>6</sup>.

The HAC and the HCC are the highest judicial bodies of specialized courts and serve as cassation courts for decisions issued by respective local and appellate courts. CONST. art. 125; CAJ art. 210; COMPC art. 108. The former is also an appellate jurisdiction for decisions issued by Kyiv City circuit administrative court. CAJ art. 20.3. The HAC sits in panels of five judges. *Id.* arts. 24.4-5. The HCC conducts cassation reviews in panels of three or greater odd number of judges. COMPC art. 4<sup>6</sup>.

The SCU is “the highest judicial body in the system of courts of general jurisdiction,” conducting cassation review and extraordinary review of cases. CONST. art. 125; LJS art. 47.2(1). It has extraordinary jurisdiction (essentially, second cassation) in administrative and commercial matters. CAJ arts. 20.4, 235; COMPC art. 111<sup>14</sup>. It is also the only cassation instance for civil and criminal cases, conducting both regular and extraordinary review, as well as cassation review of appellate courts’ first-instance criminal judgments.<sup>9</sup> CIVPC arts. 18.5, 323, 353; CRIMPC arts. 383, 385. The latter are heard by three-judge panels. CRIMPC arts. 17, 394. Extraordinary cassations are reviewed by two thirds (but no less than 5) of judges on, respectively, Civil, Criminal, or Administrative Chambers, and by all judges on Commercial Chamber. CIVPC arts. 18.5, 357.2; CRIMPC art. 400<sup>10</sup>; CAJ arts. 24.6, 241; COMPC art. 111<sup>17</sup>.

Notice of appeal in administrative and civil cases must be filed with the first-instance court within 10 days from the issue of judgment, which must be followed, within 20 days, by a full appeal, with a copy sent to the appellate court. CIVPC arts. 294, 296; CAJ art. 186. Appeals in criminal and commercial cases must be filed with the first-instance court within, respectively, 15 and 10 days from the issue of judgment. CRIMPC art. 349; COMPC arts. 85, 91, 93. Appellate court is not bound by the allegations and arguments contained in the appeal and may analyze additional evidence. CIVPC art. 303; CAJ art. 195; COMPC art. 101. In criminal proceedings, however, it may only review those factual circumstances or additional evidence alleged in the appeal. CRIMPC art. 365. Appellate court may affirm or modify the judgment of the first instance court, as well as reverse it and either issue a de novo judgment or remand the case for a new trial by the first instance court. Grounds for each of these actions are set forth by respective procedural codes. See CIVPC arts. 307-311; CRIMPC arts. 366-367, 373-374, 378; CAJ arts. 198-204; COMPC arts. 103-104. Decisions of the appellate court take immediate effect.

A cassation must be filed within a month of the effective date of an appellate court’s decision (2 months in civil cases). It is filed directly with the cassation court in civil and administrative cases, or through a court whose decision is being appealed in criminal and commercial cases. CIVPC arts. 325, 327; CAJ art. 212; CRIMPC arts. 386-387; COMPC arts. 109-110. Like appellate court, cassation court is not bound by allegations and arguments contained in the complaint; however, it may not review factual circumstances or analyze evidence, but is concerned only with the alleged improper application of substantive or procedural law or erroneous legal assessment of the circumstances by a lower court. CIVPC arts. 324.2, 335; CRIMPC art. 395; CAJ arts. 211.3, 220; COMPC art. 111<sup>7</sup>. Cassation court may affirm the judgments of both lower courts, modify or reverse the judgment of one of the lower courts simultaneously affirming the judgment of the other court, as well as reverse both lower courts’ judgments and either issue a de novo judgment or remand the case for a new appellate or first-instance hearing. CIVPC arts. 336-341; CRIMPC arts. 396-398; CAJ arts. 224-229; COMPC arts. 111<sup>9</sup>-111<sup>10</sup>.

Depending on the type of proceedings, grounds for extraordinary cassation review may include: different application of the same law in similar cases by one or several cassation courts; application of an unconstitutional law by a cassation court; violation of substantive or procedural criminal rules that had a significant impact on the outcome; or conclusion by an international judicial body that a judgment violates international obligations of Ukraine. CIVPC art. 354; CRIMPC art. 400<sup>4</sup>; CAJ art. 237; COMPC art. 111<sup>15</sup>. Petition for extraordinary review is filed directly with the SCU, within a month of discovery of grounds giving rise to such review, or a month from the issue of judgment by the HCC. For criminal cases, there are a number of timeframes depending on the grounds for review, including some petitions that have no time limit. CIVPC art. 355; CRIMPC art. 400<sup>6</sup>; CAJ arts. 238-239; COMPC art. 111<sup>16</sup>. Extraordinary review is instituted with the agreement of three justices on a 7-justice panel in civil and administrative cases, one justice on a 3-justice panel in commercial cases, and a unanimous consent of 5-justice panel in criminal

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<sup>9</sup> LJS also provided for the Court of Appeals of Ukraine and the Court of Cassation of Ukraine. See arts. 18, 25.6; CHAP. 6. Theoretically, the former was to have appellate jurisdiction over first-instance judgments of appellate courts, while the latter was to become the first cassation instance for civil and criminal judgments. These courts were formally established pursuant to Presidential Decree No. 889/2002, but never became operational, and no judges were appointed. In 2003, the CCU found the Court of Cassation to be unconstitutional. See Decision No. 20-rp/2003 (Dec. 11, 2003) (OG, No. 51/2003, art. 2705). While this decision did not address the constitutionality of the Court of Appeals, no steps were taken since to either liquidate it or appoint judges.

cases. CIVPC art. 356; CRIMPC arts. 400<sup>7</sup>, 400<sup>9</sup>; CAJ art. 240; COMPC art. 111<sup>17</sup>. Decisions of the SCU issued at the extraordinary review stage are not subject to appeal.

Procedural codes also provide for a special form of review of judgments that came into effect, for newly discovered circumstances, if petitioner was unaware of such circumstances at the time of initial proceedings. Petition for such review may be filed with any court within a certain period of discovering such circumstances (typically 1 month in administrative, 2 months in commercial, 3 months in civil, and 1 year in criminal cases). See *generally* CAJ PART IV, CHAP. 4; COMPC CHAP. XIII; CIVPC PART V, CHAP. 4; CRIMPC CHAP. 32.

In practice, only a small percentage of judgments issued by the Ukrainian courts are appealed each year, and an even smaller percentage are reversed.

### APPELLATE AND CASSATION PROCEEDINGS IN UKRAINIAN COURTS

	Total number of judgments	Appeals		Cassations (regular)		App./cass. as % of all judgments	Reversals as % of all judgments
		Filed	Reversed /modified	Filed	Reversed /modified		
<b>2003</b>	<b>1,633,000</b>	<b>131,300</b>	<b>41,200</b>	<b>40,300</b>	<b>6,000</b>	<b>10.5%</b>	<b>2.9%</b>
<i>Civil</i>	1,275,100	61,300	23,300	19,200	1,200	6.3%	1.9%
<i>Criminal</i>	168,000	31,800	8,400	13,300	852	26.8%	5.5%
<i>Comm.</i>	189,900	38,200	9,500	7,800	3,900	24.2%	7.1%
<b>2004</b>	<b>1,836,700</b>	<b>197,800</b>	<b>46,400</b>	<b>74,300</b>	<b>9,600</b>	<b>14.8%</b>	<b>3.0%</b>
<i>Civil</i>	1,488,000	115,400	27,200	27,900	1,200	9.6%	1.9%
<i>Criminal</i>	181,900	40,900	8,800	18,300	926	32.5%	5.3%
<i>Comm.</i>	166,800	41,500	10,400	28,100	7,500	41.7%	10.7%
<b>2005 (Jan.-June)</b>	<b>769,800</b>	<b>102,600</b>	<b>24,500</b>	<b>64,500</b>	<b>5,200</b>	<b>21.7%</b>	<b>3.9%</b>
<i>Civil</i>	598,700	59,900	14,400	42,500	639	17.1%	2.5%
<i>Criminal</i>	84,200	21,100	4,500	5,400	619	31.5%	6.1%
<i>Comm.</i>	86,900	21,600	5,600	16,600	3,900	44.0%	10.9%

Source: SCU, ANALYSIS OF COURTS PERFORMANCE IN 2003, 2004, AND THE FIRST SIX MONTHS OF 2005.

According to respondents, there are a few practical problems related to the system of appellate review. First, there is no uniform structure of the courts, resulting in a three-tiered system of general courts and a four-tiered system of specialized courts. This means that specialized court judgments are subject to a double cassation by a respective high specialized court and the SCU, which some commercial court judges aptly referred to as “an all-Ukrainian know-how.” This arguably made court practice less clear, as there were instances when the SCU reinstated an appellate decision reversed earlier by the HCC. According to the SCU, this results from the fact that some HCC judgments apply the same law differently in similar cases. Indeed, the SCU reviewed 340 HCC judgments in the first half of 2005, reversing 296 of them, including 75 due to lack of uniformity in application of the law (in 2004, it reversed 465 of the 541 judgments under review, including 140 due to this reason). An additional structural concern stems from the first-instance jurisdiction of appellate courts in some criminal cases (on average, 1,500 cases per year). These cases only receive cassation review at the SCU. Although such review is reportedly close to true appellate review, many disagree with this finding. As a result, they argue some criminal defendants are denied a right to meaningful appeal.

Another problem is that many general appellate courts are only starting to adjust to their power to issue de novo judgments, and instead remand cases to first instance court. In 2004-2005, de novo judgments were issued in about 30% of reversed civil and 7% of reversed criminal judgments, while about 13,000 (45%) and 2,500 (30%), respectively, were remanded. Many local judges complained that this practice simply contributes to their ever-increasing backlogs. Likewise, the ECHR held in a number of cases against Ukraine that significant procedural delays were a result of multiple remands of the same case to a

first instance court. Nevertheless, some judges felt that this trend is starting to reverse and their appellate courts are remanding fewer judgments.

An additional issue is that some judges may independently seek guidance on resolution of certain cases from their “superiors” on immediate higher courts in order to reduce the chances of reversal if a judgment is appealed. *See also* CIDA & MOJ REPORT at 78. Reportedly, having too many reversals may result in disciplinary sanctions against a judge or loss of bonuses, although the law explicitly prohibits disciplining a judge for reversed judgments, unless he/she intentionally violated the law or duty of diligence and this resulted in serious consequences. LAW ON STATUS OF JUDGES art. 31.2. *See also* Factor 17 for details.

Perhaps the most problematic issue related to the review of court judgments is that procedural changes introduced in 2002 have essentially left open the doors to lodging a cassation with the SCU, a problem that has been particularly acute for the Court’s Civil Chamber. As a result of these changes, as of late 2005, there were over 52,000 civil cassations pending at the Court, an increase from about 30,000 cassations pending at the end of 2003 – even though 10,000 cases were transferred to the HAC in 2005 pursuant to CAJ Transitional Provisions. The SCU’s hallways are filled with cabinets containing these case files. Average monthly workload of each justice grew from 51 cases in 2003 to 63 in 2004, and to 67 in 2005, while many judges believed that it is possible to afford proper review to about 20 cassations per month without breaching the procedural rules. Given the rate of filings and the fact that there are only 20 judges on the Civil Chamber, about 300 cassations are automatically backlogged every day. Many believe this problem is an artificial one and can be solved by creating civil and criminal cassation courts (i.e., establishing a four-tiered system of general courts) and making the SCU’s review discretionary rather than mandatory, although there are opponents of this view. Regardless, nearly everyone agrees that the existing situation is tantamount to denying full access to justice in civil cases.

## **Factor 9: Contempt/Subpoena/Enforcement**

***Judges have adequate subpoena, contempt, and/or enforcement powers, which are utilized, and these powers are respected and supported by other branches of government.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Negative</i></b>
<p>Procedural laws provide judges with extensive subpoena and contempt powers, but they are rarely utilized due to cumbersome procedures, poor cooperation on the part of law enforcement authorities charged with assisting the courts in carrying out these powers, and lack of financial resources. Judges have no statutory authority over enforcement of their decisions, which is a responsibility of the MOJ’s State Enforcement Service (SES). Lack of timely enforcement of judgments is a major problem and is often raised in complaints against Ukraine filed with the ECHR.</p>	

### Analysis/Background:

Individuals demonstrating contempt of court, both in the course of court proceedings and outside of the courtroom, and of showing disrespect toward the judge are brought to legal liability. CONST. art. 129; LAW ON STATUS OF JUDGES art. 14. Contempt of the court includes persistent failure to appear in court by parties, witnesses, victims, experts, or translators; failure, by anyone, to obey orders of a judge or violation of courtroom order; or any other actions that suggest obvious disrespect of the court or established rules. These actions are punishable by a fine or an administrative arrest of up to 15 days. CODE ON ADMINISTRATIVE OFFENSES art. 185-3 (BVR, No. 51/1984, art. 1122; *last amended* BVR, No. 13/2006, art. 110).

On paper, procedural laws provide judges with sufficient subpoena and contempt powers. Thus, judges may subpoena parties, witnesses, advocates, or prosecutors to appear in court, as well as material evidence necessary for proper adjudication of a dispute, if those who possess such evidence fail to

submit it to court without valid reasons. CIVPC arts. 74, 93; CAJ arts. 33, 271; COMPC art. 38. To qualify as a proper subpoena, summons must be sent by registered or courier mail with return receipt. CIVPC arts. 74.5, 76; CAJ arts. 33.3, 35. A duly subpoenaed party, witness, criminal victim, expert or translator must appear before the court and testify truthfully, unless he/she notified the court in a timely manner about inability to appear due to valid reasons. CIVPC arts. 50.2-3, 53.3, 54.3, 55.4, 77.2; CRIMPC arts. 70, 72, 77; CAJ arts. 65.5-6, 67.3, 68.4. If a duly notified witness or criminal victim fails to appear, the court may either continue proceedings in his/her absence or recess until he/she is forcibly brought before the court. CIVPC arts. 94, 170; CRIMPC arts. 70, 72, 280, 290, 292; CAJ arts. 129, 272. This order is executed, with reimbursement of the associated costs by an individual subjected to forcible appearance. CIVPC, art. 94.1; CAJ art. 272. The court may also fine a criminal witness for failure to appear, in the amount of up to 50% of statutory minimum salary. CRIMPC art. 70. If an advocate or a prosecutor fails to appear in criminal hearings, the court must postpone the trial and notify appropriate disciplinary authorities. *Id.* art. 289. In other proceedings, trial may only be postponed upon a party's request. CIVPC art. 169.2; CAJ art. 128.2.

The court must also postpone the trial upon the first instance of a failure to appear by a duly subpoenaed plaintiff, regardless of the reasons, or if a case file contains no proof of summons delivery confirmation to a party. CIVPC art. 169; CAJ art. 128.1; COMPC art. 77. In civil cases, the court may issue a default judgment against a properly notified defendant who fails to appear without valid reasons or notifying the court of the reasons. CIVPC arts. 169.4, 224. However, if a defendant appeals this judgment to the same court within 10 days, presenting proof of valid reasons or his/her possession of evidence essential for proper resolution of the case, the court must reverse this judgment. *Id.* arts. 228, 232. Participation of a criminal defendant during court hearings is mandatory, unless he/she is outside Ukraine and is evading appearance, or defendant requests that hearing for a crime not punishable by imprisonment be conducted in his/her absence. CRIMPC art. 262. Otherwise, the trial must be suspended. *Id.* art. 280. The court may also order forcible appearance by a criminal defendant or a party in an administrative dispute. *Id.* art. 288; CAJ art. 272.

Presiding judge has the duty to take all measures necessary to ensure order in the courtroom. CIVPC art. 160.4; CRIMPC art. 271; CAJ art. 123.3. To assist judges with this duty, court bailiffs were introduced. LJS art. 132; *see also Temporary Statute of the Court Bailiffs Service and Organization of Their Work* (SJA Order No. 51/2004; OG, No. 18/2004, art. 1297) and *Instruction on Securing Courtroom Order by Court Bailiffs and Their Cooperation with Law Enforcement Agencies* (SJA Order No. 182/04; OG, No. 44/2004, art. 2923). Their participation is mandatory in civil proceedings. CIVPC art. 49. In other instances, these functions are delegated to court session secretaries. CAJ art. 64. Everyone present in a courtroom must maintain proper order and obey the orders of a presiding judge without objections. CIVPC art. 162.3; CRIMPC art. 271; CAJ art. 134.2. Those who violate the order may be given a warning and removed from a courtroom for subsequent violations. CIVPC art. 92.1; CRIMPC art. 272; CAJ art. 270. In addition, misconduct on the part of prosecutors or advocates must be reported to the immediate higher prosecutor, the MOJ, and the qualification commission of advocates. CRIMPC art. 272.

In practice, these extensive provisions have apparently failed to command respect of judges' orders by parties, advocates, prosecutors, and witnesses. In 2004, about 30,000 civil and criminal trials were postponed due to failure to appear on the part of advocates, and over 5,600 criminal trials were postponed due to absence of prosecutors. During the first six months of 2005, 11,400 criminal and 15,800 civil trials were postponed due to failure to appear by advocates, prosecutors, witnesses, or victims. There is also little cooperation on the part of law enforcement authorities with respect to enforcing courts' orders on forcible appearance. As of October 2005, courts issued about 31,500 such orders, but only 54% were enforced. According to the police, the main reason for this is that individuals subject to forcible appearance respond that they have no money to travel to court. However, in 2004, 7,300 criminal hearings were also delayed due to police failure to deliver criminal defendants under pretrial detention. At the same time, courts do not fully utilize their available powers to punish those guilty of contempt. For example, 13,100 individuals were fined for failure to appear in 2002, but this number has since decreased sharply. In 2003, only 3,700 such fines were imposed in civil proceedings, and only 1,000 in criminal proceedings. In 2004, 1,300 fines were ordered in criminal cases. As of June 2005, 4,000 individuals were fined in civil trials, and 873 individuals in criminal trials. In 2005, courts also

notified disciplinary authorities for prosecutors and advocates of their misconduct in 1,100 criminal and 1,300 civil trials, but more than half of these notices went unanswered. Similarly, the SCU submitted numerous requests to the High Qualification Commission of Advocates to analyze the reasons behind their failure to comply with court orders, but received no responses.

Judges usually blame this poor record on a conflicting legal framework that is not supported by adequate financial resources. For example, they may hear a case in a party's absence or issue an order on forcible appearance only if a case file contains proof of service, which is only possible if it was sent via registered mail. However, their budgets never provide for such postage, which means that courts must use regular mail and rely on good faith of the recipients. In some cases, parties voluntarily take on the duty to ensure that their witnesses report to the court. However, there are numerous instances when those acting in bad faith argue that they did not receive proper notice of hearings or constantly bring medical or other records certifying to valid reasons for failure to appear (for example, a common practice where parties or their representatives continuously take turns calling sick). As it is usually impossible to verify the validity of such arguments, a judge's only available option is to reschedule the trial. Some judges reported that parties may delay civil trials by up to 18 months by simply following the procedural rules. Another issue is that some local prosecutors' offices reportedly assign only one prosecutor to represent the government in all criminal cases within the district, resulting in scheduling conflicts between different judges on the same court. In addition, successful enforcement of forcible appearance orders reportedly may rest upon good personal relationship between a court chairman and a local prosecutor or police chief. Finally, many local judges are reluctant to hear cases in the absence of parties or other participants, as appellate courts frequently reverse and remand judgments in such cases on formalistic grounds, such as lack of return receipt. Indeed, during January-June 2005, 10% of all successful appeals and 30% of remanded judgments were issued on this ground.

Judges' powers over conduct of non-parties who violate order in the courtroom are reportedly even weaker. Courts rarely impose penalties against such individuals, due to overly formalistic procedure and difficulties with enforcement. These individuals rarely register when entering the courthouse or provide false identity and address information. Further, a judge may not hold such offenders in contempt immediately following the breach; instead, review of this issue must be assigned to a different judge. Because other judges have excessive workloads and the limitations period for such sanctions is very short, most judges choose not to overburden their colleagues with these additional cases.

Final judicial decisions are mandatory for execution throughout the entire territory of Ukraine, and failure to comply with them may result in liability as provided by law. CONST. arts. 124, 129(9); LJS art. 11; CIVPC art. 14; CAJ arts. 7.1(7), 14; COMPC arts. 4<sup>5</sup>, 115. Judges are responsible for monitoring the timely execution of their judgments. LJS arts. 23(3), 27(3), 40(3). However, "organization of enforcement of court judgments" falls within the sphere of responsibility of the MOJ, whose SES is charged with "timely, full and impartial enforcement of judgments." See Statute of the Ministry of Justice of Ukraine § 3 (approved by Decree of the President of Ukraine No. 1396/97; OG, No. 2/1998, at 14; *last amended* OG, No. 51/2005, art 3186) [hereinafter *MOJ Statute*]; see also LAW ON STATE ENFORCEMENT SERVICE art. 1 (BVR, No. 36-37/1998, art. 243; *last amended* BVR, No. 33/2005, art. 431); LAW ON ENFORCEMENT PROCEEDINGS art. 2 (BVR, No. 24/1999, art. 207; *last amended* BVR, No. 13/2006, art. 110). A judge may obligate a government entity that lost an administrative dispute to report to court about execution of judgment within a specified period. CAJ art. 267. Individuals may also challenge the actions of SES officers with a court that issued a judgment in question (see LAW ON ENFORCEMENT PROCEEDINGS art. 85) but the procedure is too cumbersome in practice. As a result, judges have no real power to control the enforcement of their judgments.

Failure of the SES officers to properly enforce court judgments has been recognized as a major problem by the Ukrainian government. This issue also comes up in the overwhelming majority of complaints against Ukraine filed with the ECHR. The number of enforcement proceedings has increased greatly over the past years, due to growing number of cases decided by the courts. Thus, the number of pending enforcement proceedings increased from 5.1 million in 2003 to over 8 million in 2004. As of July 1, 2005, there were 4.2 million pending enforcement proceedings. At the same time, almost 50% of judgments are not enforced within prescribed statutory periods. Slightly under 5 million proceedings were completed in

2004 (61.5%), and 1.5 million proceedings were completed as of July 2005. Efforts by SES officers are more laudable in some regions (e.g., Kyiv City, ARC, Dnipropetrovsk, and Mykolayiv), where up to 80% of all judgments were enforced on time in 2004. By contrast, only 37.2% of pending enforcement proceedings was completed in Donetsk oblast. As of mid-2005, the backlog of unexecuted judgments carried over UAH 33 billion (US\$ 6.6 billion) in arrears. Even judges themselves face problems with enforcement of judgments issued in their favor. See Factor 11 for additional details.

### JUDICIAL CONTROL OF THE ENFORCEMENT OF JUDGMENTS

	Complaints filed with courts	Judgments issued by courts	Judgments in favor of petitioners	
			Total	% of all judgments
2003	12,900	6,100	3,600	59
2004	12,200	7,100	4,500	63
2005 (Jan.-June)	10,600	5,100	3,800	75

Source: SCU, ANALYSIS OF COURTS PERFORMANCE IN 2003, 2004, AND THE FIRST SIX MONTHS OF 2005.

Many observers believe that one of the problems behind the existing enforcement of judgments crisis is that SES is severely underfunded. SES officers have few legal protections and are underpaid, receiving between UAH 600-1,000 (US\$ 120-200) per month, although a recent amendment entitles them to a bonus of UAH 85-510 (US\$ 17-102) for each timely executed judgment. It is allegedly difficult for some enforcement officers to reject the offers of bribes in exchange for deliberately prolonging the proceedings. Another major issue is SES understaffing. Although the number of enforcement proceedings has increased threefold since 1999, the number of SES officers remained largely unchanged at about 7,000. In 2004, their average monthly workload was 103 proceedings per month, a 20% increase since 2003 and twice the number an officer is physically able to complete. Low salaries do not allow hiring qualified personnel and result in numerous vacancies, reaching up to 60% in some offices. SES officers also complained about overly formalized and inflexible enforcement procedures and lack of cooperation on the part of other agencies (e.g., tax authorities). Additional issues are posed by a 2001 LAW ON MORATORIUM AGAINST FORCIBLE SALE OF PROPERTY (see BVR, No. 10/2002, art. 77; last amended BVR, No. 2/2005, art. 31), which prohibits any disposition of property belonging to enterprises with at least 25% government share. As a result, it has been impossible to collect over UAH 10 billion (US\$ 2 billion) in judgments against bankrupt state-owned companies. Finally, lack of imminent consequences for failure to fulfill SES officers' orders means that, essentially, a debtor can choose whether to comply with a specific judgment.

## III. Financial Resources

### Factor 10: Budgetary Input

*The judiciary has a meaningful opportunity to influence the amount of money allocated to it by the legislative and/or executive branches, and, once funds are allocated to the judiciary, the judiciary has control over its own budget and how such funds are expended.*

<b>Conclusion</b>	<b>Correlation: Negative</b>
<p>The judiciary has only limited ability to influence the amounts allocated to it or to control how such funds are expended, as judicial budgets are drafted and funds are administered by the SJA, an executive branch agency. The amounts allocated traditionally cover only about 50% of the judiciary's needs, although the 2006 budget provides for a significant increase in funding. Judges must pay for many expenses out of their own pocket or resort to "sponsorship" by local authorities or commercial entities. The highest judicial bodies are responsible for their own budgets, but the government does not always fully take into account their budgetary requests.</p>	

## Analysis/Background:

Ukrainian laws place on the government the duty to ensure full and timely financing and proper conditions for the judiciary. See CONST. art. 130; LJS art. 118; LAW ON STATUS OF JUDGES art. 3.3. Courts can be financed only from the State Budget, which must allocate funding for the judiciary as a separate line item. CONST. art. 130; LJS arts. 18.4, 120.1; BUDGET CODE OF UKRAINE arts. 85, 87 (BVR, No. 37-38/2001, art. 189; *last amended* BVR, No. 9-11/2006, art. 96). These allocations are broken down into sub-items for general and specialized courts, and for local and appellate courts. All higher courts have separate line item allocations. Once allocated, these amounts cannot be reduced during the current fiscal year.

The CCU, the SCU, and high specialized courts are responsible for drafting their own budgets and administering the funds once they were approved by the VRU. LJS arts. 41(11), 50(11); LCC art. 31. For all other courts, these functions are performed by the SJA, whose performance is in turn monitored by the COJ. LJS arts. 120, 126.8. Since 2004, the SJA's budgetary process has been guided by Uniform Norms for Financial Provision of General Courts (approved by the COJ in May 2003), which are communicated to each court chairman and are subject to review once in three years. *Id.* art. 120.4. Theoretically, this process should accommodate the budgetary needs of each individual court. Each local general court submits its request to the oblast branch of the SJA, which passes a summarized oblast-level request to the SJA headquarters. Appellate courts and all specialized courts submit their requests directly to the SJA headquarters. The SJA then compiles these requests and forwards one general request to the Ministry of Finance. According to the SJA, it does not revise the amounts requested by individual courts but simply sums it up. However, the Ministry of Finance and the CMU are free to, and routinely do, reduce this amount (with the exception of "protected" expenses, such as salaries and purchase of necessary supplies) before submitting draft budgets to the VRU.

### JUDICIAL SYSTEM BUDGET (million UAH)

	2003	2004	2005	2006	2006/2005 increase, %
Local general courts	213.7	281.1	446.1	701.4	57.2
Appellate general courts	78.5	164.3	225.8	287.0	27.1
Local commercial courts	58.1	63.5	82.6	119.3	44.4
Appellate commercial courts	31.0	34.5	49.8	74.4	49.4
Local administrative courts	n/a	n/a	16.8	23.7	41.1
Appellate administrative courts	n/a	n/a	5.2	10.3	98.1
Military courts	7.7	9.4	14.7	24.6	67.3
<b>Subtotal: SJA budget</b>	<b>401.0</b>	<b>585.8</b>	<b>937.6</b>	<b>1,368.1</b>	<b>45.9</b>
SCU*	26.1	45.4	61.6	76.8	24.7
HCC	13.4	38.5	63.8	66.5	4.2
HAC	6.0	n/a	4.9	38.7	689.8
CCU	14.8	19.4	29.6	37.8	27.7
<b>Total judicial system budget</b>	<b>461.4</b>	<b>689.2</b>	<b>1,195.1</b>	<b>1,608.0</b>	<b>34.5</b>
in million US\$ equivalent	87.7	130.9	239.0	321.6	--
<b>Total State Budget appropriations</b>	<b>55,907.5</b>	<b>72,215.7</b>	<b>114,564.2</b>	<b>137,081.1</b>	<b>19.7</b>
<b>% dedicated to judiciary</b>	<b>0.83</b>	<b>0.95</b>	<b>1.04</b>	<b>1.17</b>	<b>--</b>

\* Available for administration of justice by the SCU; an additional UAH 97.5 million (US\$ 19.5 million) and UAH 20 million (US\$ 4 million) were allocated in 2005 and 2006, respectively, for reconstruction of the SCU's building.

Source: LAW ON STATE BUDGET OF UKRAINE FOR 2003, Annex 3 (BVR, No. 10-11/2003, art. 86; *last amended* BVR, No. 16/20054, art. 236); LAW ON STATE BUDGET OF UKRAINE FOR 2004, Annex 3 (BVR, No. 17-18/2004, art. 243; *last amended* BVR, No. 5/2005, art. 122); LAW ON STATE BUDGET OF UKRAINE FOR 2005, Annex 3 (BVR, No. 7-8/2005, art. 162; *last amended* BVR, No. 7/2006, art. 85); LAW ON STATE BUDGET OF UKRAINE FOR 2006, Annex 3 (BVR, No. 9-11/2006, art. 96).

The amounts allocated to the judiciary traditionally covered less than 50% of the overall needs (37% in 2003, 41% in 2004, and 53% in 2005), although the 2006 budget apparently takes into account the SJA's (but not the higher courts') request in full. For instance, the 2005 HAC budget covered only 8.4% of the funding needs. Despite the significant increase in the judicial system budget for 2006, the amount available to the judiciary is still, reportedly, two times lower than for the procuracy and three times lower than for the tax agencies. Further, these allocations continuously make up around 1% of the total budgetary expenditures, despite the growing revenues. Some judges suggested that since the government only covers 40-50% of the financial needs of the judiciary, this means it is consciously permitting that justice is administered at only 40-50% of the overall demand.

Once the budget is approved, the SJA sets the annual cost allocation and monthly spending schedule for each oblast, which is presented to each court in the reverse order for collection of the budgetary requests. Pursuant to these schedules, the State Treasury must transfer the requisite amounts to individual accounts of each higher court, as well as to the accounts of the SJA's oblast branches by the 10th day of each month. LJS art. 121. These branches are responsible for financing the actual expenses of each court per request of court chairmen, unless a court has the status of legal entity (which allows to have a separate bank account). *Id.* art. 122. By law, every court in Ukraine does have such status. *Id.* art. 130.7. In practice, however, none of the local courts was granted such status, since the law requires a legal entity to have an accountant, and the government has not created these positions in local courts. As a result, while general appellate and all specialized courts receive their allocations to their own bank accounts and are free to spend them without the SJA's involvement, local courts generate their purchase orders and submit invoices to an oblast branch of the SJA, which then pays to the vendors. While most judges reported that SJA usually pays according to the invoices in a timely manner, at least a couple suggested that there were instances when an SJA officer refused to honor a court's purchase order. In addition, some judges countered the SJA's claim that it reduces the allocations in the same percentage for all oblasts, stating that this percentage frequently depends on the personal relationships between a court chairman and an oblast SJA head. Further, these allocations are not distributed evenly throughout the year. For example, 30% of the 2005 appropriations were disbursed during the first half of the year and 70% during the second half.

The amounts allocated to the judiciary are often insufficient to cover basic needs, such as office supplies, furniture, equipment, or capital constructions. The situation has certainly improved over the past several years. For example, courts no longer ask parties to provide paper, pens, envelopes or other basic office supplies (although some judges suggested that the 2006 budget would not sufficiently cover the postal expenses). Nevertheless, judges are still forced to pay for many expenses out of their own pocket. Many courts still do not have sufficient furniture, and new judges are frequently offered a choice of using old broken desks or bringing in their own. Some courts do not have sufficient funding to pay for utilities, resulting in service disruptions. In addition, most appellate court judges, as opposed to local court judges, did not feel that their financial situation had improved visibly over the past several years.

Overall, as the situation was aptly described by several judges, justice in Ukraine has become a beggar and continues to function "not because of the government's support but in defiance of lack of such support." Most judges are not familiar with how the budgetary process works at the SJA or the Ministry of Finance levels. In addition, because budgetary requests of individual courts are never considered in full, most judges and court chairmen seemed disinterested in putting any serious effort into this process. Because money is allocated as a single line item for all local courts, it may look like a significant amount, but this amount is minuscule if divided by the number of courts. For example, one local court in Kyiv, which has 27 judges, received, in addition to salary allocations, UAH 530 (US\$ 106) for the entire 2005 to cover the its current expenses related to the administration of justice. See *Government Does not Need a Strong Court: Interview with Chairman of Solomensky District Court of Kyiv*, 31 YURIDICHESKAYA PRAKTIKA (2005). As a result of constant under-funding, many court chairmen still resort to local authorities and various commercial entities to "sponsor" certain expenses.

Despite these issues, there is near-universal consent that the judicial budgets are prepared and administered more efficiently under the SJA than under the MOJ, since the SJA does not need to divide its efforts between supporting the judiciary and other agencies. Most courts are seeing less interference

with their work and no misallocations of funding. Starting from 2003, the budgeted allocations are disbursed almost in full. Nevertheless, many judges feel that control of the judicial budgets by the SJA, an executive agency (albeit loosely accountable to the COJ) is a vehicle for executive control of the judiciary. Another negative feature relates to disparate budgetary status of the SCU and other higher courts with that of other general jurisdiction courts. This results in frictions between the different levels of the judiciary, and sometimes leads to an impression that the SCU, which has an independent budget, is indifferent to financial problems of other courts.

The judiciary believes that one of the ways to ensure its financial independence is to allow the courts to retain proceeds from state duty collected by them in all civil, administrative, and commercial proceedings. The amounts of state duty, as well as exemption, are regulated by a 1993 DECREE ON STATE DUTY (BVR, No. 13/1993, art. 113; *last amended* BVR, No. 16/2006, art. 134). At present, these proceeds are transferred to the State Budget. See art. 6. Although courts have repeatedly asked to be allowed to retain these receipts, this has not found political support.

### STATE DUTY COLLECTED BY UKRAINIAN COURTS

	Civil cases		Commercial cases			TOTAL	
	UAH mln.	US\$ mln., equivalent	UAH mln.	Other (US\$ thousand, equivalent)	Total (US\$ mln., equivalent)	UAH mln.	US\$ mln., equivalent
<b>2003</b>	21.3	4.0	52.1	61.3	10.0	73.7	14.0
<b>2004</b>	49.9	9.5	49.3	55.0	9.4	99.5	18.9
<b>2005 (Jan.-June)</b>	26.7	5.3	29.0	23.5	5.8	55.8	11.1

Source: SCU, ANALYSIS OF COURTS PERFORMANCE IN 2003, 2004, AND THE FIRST SIX MONTHS OF 2005.

Although COMPC, as well as new CIVPC and CAJ provide for filing and other court fees, these will have to be regulated by a separate law, and courts will continue to collect state duty until that happens. Commercial courts collect also “fees for informational and technical support of proceedings,” a flat fee of UAH 118 (US\$ 24) payable by parties in addition to the state duty and retained by the courts. COMPC art. 47<sup>1</sup>. These receipts are used mainly to maintain the internal network of commercial courts supported by the Judicial Information Center.

## Factor 11: Adequacy of Judicial Salaries

***Judicial salaries are generally sufficient to attract and retain qualified judges, enabling them to support their families and live in a reasonably secure environment, without having to have recourse to other sources of income.***

### **Conclusion**

**Correlation: Negative**

Judicial salaries are dependent on the wishes of the executive and are generally deemed insufficient to attract qualified lawyers or to enable judges to adequately support their families, although they may compare favorably to salaries of other government officials. Low salaries are also seen as the primary reason behind the perceived widespread corruption in the judiciary. In addition, judges are entitled to a variety of fringe benefits, most notably state-supplied housing, but these are mostly non-functional and make judges more susceptible to improper influences. Judicial salaries were initially scheduled to increase significantly effective January 1, 2006, but these changes are yet to take effect.

### Analysis/Background:

Judicial salaries are determined pursuant to the Law on Status of Judges and other legislative acts. Their amounts must be sufficient to ensure financial independence of judges and cannot be reduced. LJS art.

123.1. According to the Law, judicial salaries consist of base salary, bonuses, and additional monetary allowances for qualification rank, length of service, and other increments. LAW ON STATUS OF JUDGES art. 44.1. Base salaries are set as a percentage of the base salary of the SCU Chairman and cannot be less than 50% of the latter. Further, a judge's base salary cannot be less than 80% of the base salary of a chairman of that court. *Id.* art. 44.2.

However, effective base judicial salaries are dependent on the wishes of the President and the CMU. They are currently set pursuant to a series of 2005 Resolutions of the CMU: No. 513, No. 514, and No. 516 (June 30, 2005) (see OG, No. 27/2005, arts. 1548, 1549, 1551; *last amended* OG, No. 1/2006, art. 1), which set salaries for chairmen and deputy chairmen of the highest courts and was effective retroactively to June 1, 2005; and No. 865 (Sept. 3, 2005) (see OG, No. 36/2005, art. 2195; *last amended* OG, No. 1/2006, art. 31), which sets salaries for all other judges. The latter Resolution was initially expected to take effect on January 1, 2006. According to these resolutions, base salaries are calculated by multiplying a minimum salary of UAH 322 (US\$ 64) per month by a coefficient that depends on level of a court and position of a judge; however, they are not subject to subsequent recalculation if the minimum salary increases. As shown in the table below, these salaries would represent a significant increase over the previously effective base salaries (about UAH 600 (US\$ 120) per month for local judges and UAH 800 (US\$ 160) per month for appellate judges). Nevertheless, because of the different effective dates of these resolutions, they arguably contradict the Law on Status of Judges, which means that any judge may appeal their legality to an administrative court and demand back pay from June 1. In addition, there is an inexplicable differentiation between the salaries of general and specialized local court judges.

#### BASE SALARIES OF UKRAINIAN JUDGES PER 2005 CMU RESOLUTIONS

Categories of Courts and Judges		Minimum salary multiplier	Base salary, UAH/month	Base salary, US\$ equivalent
CCU	Chairman	15	4,830	966
	Deputy chairman	13.8	4,446	889
	Secretary of panel	12.5	4,025	805
	Justice	12	3,864	773
SCU	Chairman	15	4,830	966
	First deputy chairman	13.8	4,446	889
	Deputy chairman	13.4	4,315	863
	Chairman of chamber	12.5	4,025	805
	Deputy chairman of chamber; secretary of Plenary Assembly	12.2	3,928	786
	Justice	12	3,864	773
High Specialized Courts	Chairman	13	4,186	837
	First deputy chairman	12	3,864	773
	Deputy chairman	11.8	3,800	760
	Deputy chairman of chamber; secretary of Plenary Assembly	11.5	3,703	741
	Judge	11	3,542	708
Appellate Courts (General and Specialized)	Chairman	10.5-11.5	3,381-3,703	676-741
	First deputy chairman	10-11	3,220-3,542	644-708
	Chairman of chamber	9.5-10.7	3,059-3,445	612-689
	Deputy chairman of chamber	9-10.5	2,898-3,381	580-676
	Judge	8.5-9.8	2,737-3,156	547-631
Local Specialized Courts	Chairman	10-11	3,220-3,542	644-708
	Deputy chairman	9-10	2,898-3,220	580-644
	Judge	8-9	2,576-2,898	515-580
Local General Courts	Chairman	8.5-9.5	2,737-3,059	547-612
	Deputy chairman	8-9	2,576-2,898	515-580
	Judge	7.5-8	2,415-2,576	483-515

Judges who were assigned to a qualification rank receive monetary allowance in addition to their base salary. LAW ON STATUS OF JUDGES art. 40.2. These amounts are set by Decree of the President No. 1048/1999 (OG, No. 34/1999, at 110; *last amended* OG, No. 51/2003, art. 2664) and range between UAH 275 (US\$ 55) per month for the fifth (lowest) qualification rank to UAH 400 (US\$ 80) per months for the highest qualification rank (increasing in UAH 25 (US\$ 5) increments per rank). Additional allowance for length of service is calculated in the following percentage of monthly base salary plus qualification rank allowance: 3-5 years – 10%; 5-10 years – 15%; 10-15 years – 20%; 15-20 years – 25%; 20-25 years – 30%; over 25 years – 40%. LAW ON STATUS OF JUDGES art. 44.4

Until recently, judges were entitled to other allowances established by at least six unpublished Presidential decrees, marked “For Official Use Only”. Some criteria for these bonuses included: particular achievements, performance of particularly difficult work, particular intensity of work, performance of additional functions, participation in legal expertise of laws, and participation in CLE trainings. Combined, these allowances totaled up to 255% of base salaries, and up to 285% for court chairmen and their deputies. See 2 NATIONAL INDEPENDENT JUDICIAL ASSOCIATION INFORMATION BULLETIN 38 (2005). In practice, base salary made only an estimated 10% of a judge’s take-home pay, while the various bonuses made up 55%. However, because many of these legal acts were not in agreement with each other, this allowed the Ministry of Finance to interpret them differently, which meant that judicial budgets rarely provided for these bonuses in full. In a positive development, all of these decrees were repealed by Decree of the President No. 46/2006 (Jan. 21, 2006; OG, No. 4/2006, art. 148), which took effect on January 1, 2006.

Nevertheless, at least some judges are still entitled to additional bonuses. Thus, Chairmen and Deputy Chairmen of the CCU, the SCU, and high specialized courts are entitled to allowances for particularly difficult conditions of work (50%), having a Ph.D. degree (15-20%) or a title of “honored lawyer” (15%), as well as for special nature of work and intensity (90-100%). See Resolution of CMU No. 1309/2005 (Dec. 31, 2005; OG, No. 1/2006, art. 31). In addition, all court chairmen may award unspecified bonuses to judges, but only if there are leftover money in the salaries fund.

According to the SJA estimates, as of January 1, 2006, average monthly judicial salaries (including additional allowances) will amount to UAH 4,160 (US\$ 832) for local court judges (UAH 1,500 (US\$ 300) in 2005) and UAH 5,050 (US\$ 1,010) for appellate court judges (UAH 2,300 (US\$ 460) in 2005). Judges confirmed the information as to 2005 averages in their interviews with assessment team. However, new judges with two years of experience made as little as UAH 1,000 (US\$ 200) per month. It should be noted that most judges interviewed did not believe (as it later turned out, justly so) that their proposed salary raises would in fact go into force as of January 1.

The low level of judicial salaries is seen as the primary reason behind the perceived excessive corruption in the judiciary, although most respondents believed that a salary increase alone would not be sufficient to prevent corruption. Further, although salaries may compare favorably to those, for instance, of prosecutors, they are deemed inadequate to attract young qualified lawyers or successful private advocates, although many observers believe that a starting salary equivalent to US\$ 1,000 per month should be sufficient to interest younger lawyers. However, despite the low salaries, there are apparently no instances of mass exodus of judges for higher-paid jobs. Many judges also receive official outside income, for instance, for lecturing at various law school or for publishing research papers or books.

Problems with non-payment of salaries to judges no longer exist, and judges now receive their salaries in a timely manner. However, over 3,000 judges have successfully sued the Ministry of Finance since 2001 to collect salaries and other benefits that were not paid to them in earlier years, for a total of UAH 20 million (US\$ 4 million). However, judges were unable to enforce these judgments, as enforcement officers cited lack of budgetary allocations for this purpose; as of early 2005, UAH 15 million (US\$ 3 million) was still outstanding. Judges of Donetsk and Poltava appellate courts even filed claims related to this problem with the ECHR. As a result, the 2004 budget earmarked UAH 1 million (US\$ 200,000), which paid for 175 judgments, while the 2005 budget provided UAH 9.5 million (US\$ 1.9 million), paying for 1,159 judgments dating back to 2001-2002. The 2006 budget likewise allocated UAH 9.5 million (US\$ 1.9 million), and the SJA is hopeful to settle all judgments dating to 2002-2003.

Judges are also entitled to a variety of fringe benefits, such as free rides in public transportation, 50% discounts on utility payments, free medical care, and annual passes to government-owned sanatoriums. LAW ON STATUS OF JUDGES arts. 44.8-13. In addition, within 6 months of appointment, judges should be provided with separate housing. This is arranged by local executive authorities (by CMU for the CCU, the SCU, and high specialized court justices). If housing is not provided within this time, a court may purchase housing for a judge at the expense of the State Budget, with subsequent reimbursement by local authorities. *Id.* art. 44.7; see also generally PROCEDURE FOR PROVIDING HOUSING TO JUDGES OF APPELLATE AND LOCAL COURTS OF UKRAINE (approved by Resolution of CMU No. 707/2005; OG, No. 31/2005, art. 1874).

In practice, local authorities frequently refuse to comply with this duty, citing lack of resources. As a result, over 1,500 judges still lack the housing they are entitled to. The 6-month deadline is rarely adhered to. For instance, in mid-2004, 199 judges were expecting their housing for over 5 years, including 69 judges for over 9 years. About UAH 20 million (US\$ 4 million) was allocated for this purpose in 2004-2005 budgets, allowing the purchase of housing for 540 judges, and an additional UAH 86 million (US\$ 17 million) was earmarked in 2006. However, many judges find this “benefit” to be “one of the most humiliating experiences of their lives.” Judges frequently have to resort to their connections with local authorities to receive housing in time. They also see it as a way for exerting influence on them, for example through a local government’s decision on the location of an apartment that is provided. Other fringe benefits are similarly non-functional. For example, when judges attempt to apply for utility payments discounts, officers in utility companies threaten them with disconnecting the service to a court. Understandably, most judges would prefer to have the law amended and repeal these benefits in exchange for adequate judicial salaries that would allow them to purchase their own housing or, alternatively, to obtain guaranteed access to interest-free mortgages co-signed by the government.

## Factor 12: Judicial Buildings

***Judicial buildings are conveniently located and easy to find, and they provide a respectable environment for the dispensation of justice with adequate infrastructure.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Negative</i></b>
<p>Most judicial buildings do not meet basic space and safety requirements for the dispensation of justice, and many have no plumbing, heating or other infrastructure. Lack of office space makes it difficult to fill the existing judicial vacancies, while insufficient number of courtrooms frequently leads to trial delays and, most recently, rendered the courts unprepared to comply with the new procedural rules mandating full audio-recording of trials. Several government programs declared a goal of providing the judiciary with adequate facilities, but they are not supported by adequate financial resources.</p>	

### Analysis/Background:

The SJA is charged with organizing and financing the construction and repair of courthouses and other facilities. LJS art. 126(13). Expenses related to capital repairs, reconstruction and construction of new court buildings are financed exclusively through the SJA. *Id.* art. 122.2.

Most courthouses in Ukraine do not meet basic technical and operational safety requirements. According to various government sources, of the 766 buildings of general courts, only 55 fully meet international standards for the administration of justice in terms of space and construction design. 209 courts have sufficient space but need reconstruction, which is prevented by lack of funding, while 313 courts have insufficient footage. 283 courts received new buildings since 2003, but about 80% of these either need reconstruction or have insufficient space, while some are completely unsuitable for exploitation. 174 courthouses have depreciated their technical capacity. Overall, about 30% of courthouses have fully

inadequate conditions, including 36 that pose a public safety hazard. Despite these problems, the central government has traditionally covered about 10% of the judiciary's capital construction needs, although some courts are able to secure additional support of local governments. Other courts, such as Odessa Oblast Appellate Court, rely on private sponsors to help with renovations.

There is an overwhelming agreement that the judiciary's buildings are worse than those of any other government agencies, and their conditions make it impossible to command respect of the judicial system. Even in the capital, only one of Kyiv's 10 local courts (Obolonsky District Court) has adequate conditions. Kyiv City and Oblast Appellate Courts and municipal police and fire departments are all housed in one building, although Kyiv City Appellate Court is soon expected to move into a new building. The SJA estimated that UAH 248 million (US\$ 49.6 million) is necessary to create adequate environment in all local courts in Kyiv.

Elsewhere, many courts are located in former factory dormitories, buildings abandoned by state-owned utility companies as unsuitable for use, or kindergartens. They often have leaking roofs, malfunctioning electrical wiring or no plumbing, use wood for heating or have no heating at all, or are infested with rodents. In one local court, a courtroom ceiling recently collapsed in the middle of the trial. Several courts are located in buildings that date to early 20th century and have not undergone major renovations since then (for example, Kyiv Oblast Appellate Commercial Court is housed in what originally served as a horse stable). Many courts received buildings of a bankrupt bank *Ukraina*, but these were built as banking offices and do not have proper arrangements for the administration of justice. Some courts, such as Kyiv Appellate Commercial Court, are located in three buildings in different parts of the city, with an eviction action pending with respect to one of the buildings. Similarly, at the time of JRI interviews, the HAC occupied several offices in the MOJ building and buildings of two liquidated military courts, with some judges working from home. The HAC was initially offered a building with sinking floors, rotting ceilings, and burst-open radiators. In early 2005, its Chairman arranged for rent of premises from a former military plant *Arsenal*, but the government failed to provide funds for renovations until November 2005. The HAC formally moved into this building at the end of December. Most local administrative courts already have buildings that need to be reconstructed, but they cannot formally take possession of these until their chairmen are appointed.

Most courts have insufficient space in terms of the number offices and courtrooms. Judges often share offices with their assistants or secretaries, or even with other judges. This is true even in the new HCC building where a beautiful atrium makes for inefficient space utilization, forcing judges to share offices with their colleagues. Most offices in Kyiv Oblast Appellate Court are shared by two judges; however, there are two offices used by 6 judges each, while the largest courtroom was converted into a common office for judicial assistants (currently 26). While many judges on other appellate courts have their own offices, they also have a lot of vacancies, so judges would have to start sharing offices as these vacancies are filled. Although all SCU justices have individual offices, court staff offices are occupied by as many as 8-9 people. Many judges on lower courts also have to repair their own offices or purchase their furniture, although these are occasionally provided by the government.

In addition, most judges use their offices as courtrooms. According to the SJA, there are only 1,857 courtrooms for over 4,000 local court judges in Ukraine. One courthouse in Odessa oblast reportedly does not have a single courtroom, and even the SCU has only three courtrooms for 95 judges. Only a handful of courts have a separate courtroom assigned to each judge (for instance, Ivano-Frankivsk City Court, where courtrooms also serve as offices of court session secretaries). As a result, criminal trials and some multi-party civil trials get priority for the use of courtrooms. On the other hand, if parties in civil cases request to have the trial audio recorded, they have to wait for extended periods before a courtroom becomes available, as it is impossible to install recording equipment in judges' offices. See also Factor 25 for additional details. It should be noted that the new procedural codes require all cases to be heard "in a specially equipped facility – a courtroom." CivPC art. 158.3; CAJ art. 122.4. To get around this rule, judges sometimes post a sign "Courtroom" on their office doors during hearings. Courts often install cages for criminal defendants and benches for parties in judges' offices, but sometimes there is no space for advocates to put out their files. Further, if several judges use the same office, one needs to come

outside and interrupt his/her work while the other conducts hearings or writes judgments, since otherwise it is impossible to preserve the secrecy of deliberations room.

Many courthouses have unfriendly environment for the users of the judicial system. It is common for them to lack separate rooms for attorney-client conferences, prosecutors, witnesses, or criminal defendants. There are no rooms for reviewing case files and making copies. Some courts have one table in registrars' offices for use by advocates, making it impossible to maintain confidentiality. Most courts located in multi-floor buildings do not have elevators and are not accessible for persons with disabilities. Finally, advocates expressed frustration about the fact that restrooms in courts are often locked, and only court chairman or his/her secretary has keys

Perhaps the most painful illustration of the government's neglect of the judiciary is Darnytsky District Court in Kyiv. Following the February 2004 explosion (see Factor 13 for additional details), a portion of the building had half-collapsed. Some first floor offices were destroyed completely and vacated; however, judges in the second floor offices were told to remain there, despite the lack of heating. A construction expert certified that the entire building is hazardous and unsuitable for use or reconstruction. In May 2004, Kyiv City Council allowed the court to complete construction of an old school abandoned since 1995, which has sufficient space. The project would cost an estimated UAH 46 million (US\$ 9.1 million), but the SJA has since consistently responded that no funds are available. Thus, 20 judges were scattered between 5 different buildings, including the "non-hazardous" section of the old courthouse. In April 2005, judges issued a statement that they will cease administering justice until they are promised a new building; in practice, this meant that while they continued registering new cases and reviewing documents, they did not conduct hearings. In response, the government allowed 9 judges to move into a building of the district tax police, while other judges remained in the damaged building. The new building has three courtrooms that are used by the entire court. Reportedly, several other buildings were offered but their occupants (including both private companies and other government agencies) refuse to move out; further, none of these options has sufficient space.

Commercial court buildings are typically better than those of other courts. Reportedly Odessa and Donetsk Appellate Commercial Courts have the best courthouses, built in large part due to the support of respective oblast governors. However, as many as half of all local commercial courts reportedly have inadequate conditions.

The new government declared that creating adequate working environment for courts is among its top priorities. In his speech during November 2005 Congress of Judges, President Yushchenko outlined his vision for having a palace of justice in each oblast center within 5 years. Each courthouse would consist of three isolated blocks, with separate entrances into courtrooms: a closed block for judges, a public block for administration of justice, and a block for keeping criminal defendants in secure conditions. To implement this model, the CMU approved the Concept Paper of State Program for Providing Adequate Buildings to Courts for 2006-2010 (see Order No. 459/2005, Nov. 16, 2005; OG, No. 46/2005, art. 2899), to be funded from the State Budget "given the real financial ability of the government." An estimated UAH 2 billion (US\$ 400 million) (i.e., UAH 400 million (US\$ 80 million) annually) would be required to implement this Program; however, the 2006 budget provides only for UAH 35 million (US\$ 7 million), including UAH 20 million (US\$ 4 million) for reconstruction of the SCU's building and UAH 5 million (US\$ 1 million) for Dnipropetrovsk Appellate Commercial Court. Consequently, there is an understandable skepticism that this program will, like its 2002-2006 predecessor (see Resolution of CMU No. 692/2001; OG, No. 26/2001, art. 1176), remain largely a declaration on paper. To date, such design is attempted only in a few courts, such as the model Ivano-Frankivsk City Court, which has separate isolated blocks for judges and court staff and a public block that includes courtrooms, a registrar's office, and a reference unit; however, judges do not yet have separate entrances into courtrooms.

## Factor 13: Judicial Security

**Sufficient resources are allocated to protect judges from threats such as harassment, assault, and assassination.**

<b>Conclusion</b>	<b>Correlation: Negative</b>
<p>The law provides for the SJA, in cooperation with the court police, to ensure the safety of judges and security of courthouses, but sufficient resources are not allocated for these purposes. Lack of proper security arrangements occasionally results in both courthouses and judges becoming objects of security threats.</p>	

### Analysis/Background:

The State ensures the personal security of judges and their families. CONST. art. 126. Judges, their family members and their property are under special protection from the state. Any crime against a judge's life, health, property, threats of murder, violence or destruction of property, insult or slander of a judge, as well as similar actions against a judge's close relatives (parents, spouse, or children), if these actions are done in connection with a judge's professional activity, are punishable according to law. LAW ON STATUS OF JUDGES art. 42. Specifically, threats or violence against judges or their close relatives are punishable by imprisonment of up to 12 years. CRIMINAL CODE arts. 346, 377 (BVR, No. 25-26/2001, art. 131; *last amended* BVR, No. 12/2006, art. 1050 [hereinafter CC]). Intentionally destructing a judge's property is punishable by imprisonment of up to 5 years, or up to 12 years if it was committed by arson, explosion of other dangerous means or resulted in death or other significant consequences. *Id.* art. 378. Murder or attempted murder of a judge is punishable by imprisonment of 8-15 years or life imprisonment. *Id.* art. 379. Law enforcement authorities must take all measures to ensure a judge's security upon receiving a request from a judge. LAW ON STATUS OF JUDGES art. 42. Failure to act upon this request in a timely manner, if this resulted in serious consequences, is punishable by imprisonment of up to 5 years. CC art. 380.

The SJA is charged with providing for the security of judges in cooperation with judicial self-governance bodies and law enforcement authorities. LJS art. 126(12). Maintenance of order inside the court buildings and providing the security of the courts and judges is the function of the court police. *Id.* art. 133.1. In 2005, the SJA also promulgated Rules on Admission of Individuals and Vehicles into Courts, jointly with the MOI. See Joint Order No. 102/765 (Sept. 12, 2005; OG, No. 44/2005, art. 2817). Specialized court police units *Gryfon* were formally established by the MOI, to which they are subordinated. See Order No. 1390/2003 (Nov. 19, 2003; OG, No. 51/2003, art. 2725). Nevertheless, their de facto establishment has been slow, largely due to lack of funding. It has been estimated that UAH 107.5 million (US\$ 21 million) annually is needed to maintain such units in all courts. However, the budgetary allocations during 2003-2005 amounted to UAH 15 million (US\$ 3 million), UAH 23 million (US\$ 4.7 million), and UAH 26 million (US\$ 5.1 million), respectively. The 2005 allocation was sufficient to support only 37% of the statutory number of 9,612 *Gryfon* officers. In some oblasts, *Gryfon* units have been set up only for courts located in oblast centers. The situation is better in several Western oblasts, where many courts are provided with round-the-clock security, although all courts should have had such security by the end of 2003 pursuant to State Program for Organizational Support of the Activities of the Courts for 2003-2005 (approved by Resolution of CMU No. 907/2003; OG, No. 25/2003, art. 1197; *last amended* OG, No. 10/2004, art. 585) [hereinafter PROGRAM FOR ORGANIZATIONAL SUPPORT OF THE COURTS]. Even the existing court police officers are underpaid, receiving about UAH 300-400 (US\$ 60-80) per month, and do not always receive their salaries on time. In addition, because *Gryfon* units are employed and fully funded by the MOI, the SJA has little control over their performance. In practice, these officers are frequently used for purposes other than providing security to courthouses, such as escorting police cargoes or providing security to commercial facilities. They do not have sufficient powers to prevent access to courthouses by individuals suspect as security threats and were only recently

authorized to search those entering the courts. The SJA's requests to transfer *Gryfon* units from the MOI system to the judiciary have so far remained unanswered.

The SJA is taking additional measures to ensure security in the courts, but most have been limited due to insufficient financing. For example, it allocated UAH 5,000 (US\$ 1,000) per court to install fire and security alarms, which was sufficient to install alarms only in the registrars' offices and archives, and in some court chairmen's offices. Metal detector frames were installed and 24-hour security is available in all but two local courts in Kyiv, although some visitors reportedly refuse to pass through these, claiming this violates their right to an open court. The SJA is also planning to provide enhanced security to all courts during the March 2006 Parliamentary elections. In addition, 234 judges were placed under state protection as of October 2005 pursuant to a 1993 LAW ON STATE PROTECTION OF EMPLOYEES OF COURTS AND LAW ENFORCEMENT AUTHORITIES (BVR, No. 11/1994, art. 50; *last amended* BVR, No. 14/2006, art. 116), compared to 298 judges in 2004 and 286 judges in 2003. 202 judges also were provided with other personal security arrangements, such as issuance of a weapon (49 judges) and warning of an imminent threat (55 judges). Court police usually take these measures upon a request of a judge who may feel threatened in a particular case, although in some instances, for example if a judge is presiding over an organized crime or other high-profile trial, they may be initiated by a court chairman.

According to the SJA, as of November 2005, out of 732 courts, 685 (93%) had some security arrangements. Of these, court police units were stationed in only 247 courts and 116 courts had security provided through other agencies, while 322 courts only had security alarms (however, 95 of these were not connected to dispatchers due to lack of funding). 47 local courts had no security arrangements at all. No courthouses have separate entrances for judges, although judges in Ivano-Frankivsk City Court occupy a separate locked floor of the building that is not accessible even by court support staff. Security arrangements are typically limited to checking the visitors' identification and recording their names in a special log, but in some facilities visited by the assessment team the guard was not visible anywhere near the entrance, so anyone could freely walk into a court.

As a result of lack of proper security arrangement for courthouses and judges, both occasionally become objects of security threats. For instance, case files or evidence may sometimes be stolen from the courts. The SJA received 50 notifications of security threats to judges in 2005, 55 notifications in 2004, and 73 notifications in 2003. In practice, there are threats and occasional physical attacks against judges, during both trials and judges' office hours, as well as in judges' homes. Some judges are intimidated psychologically during major criminal trials attended by groups of "criminal-looking visitors." Some women judges in smaller towns are reportedly afraid to stay at work in the evenings, when no security is available. Despite the number of reported threats, since 1991 there were only about 50 criminal investigations of attacks against judges related to their professional activities. These crimes included insults, threats or violence against judges, destruction of judges' property, and murder or attempted murder of judges. Nonetheless, most judges reported that they have no reasons to fear for their safety, as long as they believe that their decisions are just.

There have also been several more serious security threats to the courthouses. In fact, in May 2004, there was arson in Irpin City Court in Kyiv oblast, which resulted in major damages and destroyed about 80% of the court's archives. But by far the most notorious incident in recent years occurred in February 2004 in Darnytsia District Court in Kyiv. A 1.5-kilogram TNT bomb was exploded in a court's restroom, wounding 14 court staff, student interns and visitors, and destroying half of the building's façade, which rendered the building unsuitable for further use or subsequent reconstruction (although, as described above in Factor 12, the court still continues to administer justice in that building). Four individuals were subsequently arrested and charged, initially, with attempted murder, which was then reclassified into criminal hooliganism and later into terrorism. All were convicted of terrorism in 2005 by another district court in Kyiv, and the appeal was pending at the time of the JRI interviews. Further, the court's employees are arguably under a continuous security threat. Since the court is now located in several buildings, they must travel back and forth to pick up and return case files to the registrar's office; no security arrangements are provided to them during these trips.

The CCU, the SCU, and the HCC have separate security arrangements, which appear to be adequate. Further, commercial courts apparently control access to courts more strictly than other courts. It was reported that in order to enter a commercial court building, one must usually request an advance pass from a judge or a court employee. Even general court judges occasionally experience difficulties with passing through security in commercial courts.

## IV. Structural Safeguards

### Factor 14: Guaranteed tenure

*Senior level judges are appointed for fixed terms that provide a guaranteed tenure, which is protected until retirement age or the expiration of a defined term of substantial duration.*

<b>Conclusion</b>	<b>Correlation: Positive</b>
<p>Judges of general jurisdiction courts are initially appointed for five-year terms, after which they may receive permanent tenure until the constitutionally mandated retirement age of 65. The CCU justices serve nine-year terms and cannot be reappointed. Prior to that, judges can only be removed from office for constitutionally specified grounds.</p>	

#### Analysis/Background:

According to the Constitution, “[j]udges hold office for permanent terms, except judges of the [CCU], and judges appointed to the office of judge for the first time.” See art. 126; see also LJS art. 16. In practice, this means that judges appointed for the first time hold office for a five-year term, while those who are subsequently elected by the VRU may hold office until the “attainment of the age of sixty-five,” which is the constitutionally mandated retirement age. The CCU justices are appointed for nine years without the right of appointment to a repeat term. CONST. art. 148. Prior to that, professional judges can only be removed from office on the basis of one of the grounds specified in the Constitution.

The law provides that judges are entitled to retirement, which is recognized as one of the legal guarantees of judicial independence. LAW ON STATUS OF JUDGES art. 11.1. Right to retirement is available to all judges who held office for at least 20 years or need to resign earlier due to health considerations. *Id.* art. 43. To be eligible for retirement, a judge must submit a personal resignation statement addressed to the body that elected or appointed him/her no later than one month prior to the attainment of the age of 65. Otherwise, a judge’s powers are terminated within one month of him/her reaching the age of 65 without the right to judicial retirement benefits. *Id.* art. 15.3. Retired or resigned judges retain their title, the highest qualification rank they were assigned, and all guarantees of immunity and social protection. *Id.* art. 43; LJS art. 89.3. Upon retirement, judges are entitled to a tax-free severance payment in the amount equivalent to their monthly salary multiplied by the number of years of service. They can also elect to receive a monthly pension or tax-free monthly annuity payments in the amount of 80% of the salary of a judge occupying an equivalent position, which can be increased or prorated in certain circumstances. However, judges who were removed from office for commission of an intentional crime are not entitled to these protections. Similarly, judicial retirement, as well as benefits and immunity, can be terminated if a judge commits an act incompatible with the title of a judge, is found guilty of a crime, or loses the Ukrainian citizenship. See LAW ON STATUS OF JUDGES art. 43.

Although the permanent judicial tenure appears to be largely respected in practice, there have been a number of instances under the previous government when judges were removed from office under allegedly fabricated pretenses of violating the oath of office. In addition, VRU members frequently petition the HCJ requesting the removal of individual judges. According to the HCJ, it usually regards these requests as political pressure against the judges and thus rarely heeds to them. Nonetheless, a number of judges feel that the very fact that such petitions exist threatens their independence.

One of the proposed judicial reform measures that the new government is currently attempting to push through would require all sitting judges to take a qualification attestation, dismissing all those who fail it and filling the vacancies through an open competition. This is presented as a means to raise the professional and cultural level of the judiciary and to bring more practicing advocates into the system. Judges are understandably skeptical about these proposals, which they see as a way of taking revenge against undesired judges or turning judges into scapegoats for all problems that exist in the society. In addition to pointing their unconstitutionality, judges also argue that if all sitting judges are removed, there would be no one left to teach newly appointed judges, resulting strong negative consequences on the quality of justice. Non-judicial respondents also felt that such proposals are aimed at making judges more cautious in their decision making. Nonetheless, most judges also believe that there is no need for them to feel threatened of such examination since, if conducted according to objective criteria, it would likely reveal that only a couple of judges in each oblast are unfit. However, many judges thought that having several “probationary” appointments (i.e., two five-year appointments instead of one, followed by election for life) might be beneficial for raising the qualification level of judges.

Because the tenure of the CCU justices is limited, some retired justices feel that it would be useful to introduce some legal mechanisms to guarantee their employment following its expiration. Specifically, some justices who held other judicial offices prior to appointment to the CCU would prefer to have an opportunity to return to their previous posts, and although some have, informally, attempted to “test the ground” for doing so, their requests were denied. Eventually, the majority of retired CCU justices succeed in finding jobs within academia.

## Factor 15: Objective Judicial Advancement Criteria

***Judges are advanced through the judicial system on the basis of objective criteria such as ability, integrity, and experience.***

<b>Conclusion</b>	<b>Correlation: Negative</b>
<p>Promotion of judges to a higher qualification rank is guided by objective criteria, such as length of service and professional competence, but is usually seen as a formality. By contrast, appointment to court chairman and deputy chairman positions, which is a more important type of career advancement, is not governed by any legally specified criteria. Although the COJ must consent to each nominee, the final appointment decisions are at the discretion of the President, which means that political loyalties are key. The procedure is regarded as non-transparent and highly politicized, with some candidates waiting for years until their appointment is confirmed, and others going through the entire process in a matter of days.</p>	

### Analysis/Background:

There are two main options for career advancement available to Ukrainian judges: promotion to a higher qualification rank and appointment to administrative positions in a court (i.e., chairman or deputy chairman). Judges may also be promoted to higher-level courts according to the same procedure as is established for regular appointments (see Factor 2); that is, a tenured local court judge who wishes to be transferred to an appellate court must once again undergo the full election process before the VRU.

Qualification commissions conduct qualification attestation of sitting judges and promote them to higher ranks. LJS art. 77(2). The HQCJ conducts qualification attestation of sitting judges of the SCU and high specialized courts. *Id.* art. 84(3). Qualification attestation is mandatory for judges applying for election or transfer to higher-level courts; newly appointed judges, who must be assigned a qualification rank within 6 months of initial appointment; and judges who have spent a specified length of time within a particular qualification rank. *Id.* art. 87.2; LAW ON STATUS OF JUDGES art. 39. There are six qualification ranks based

on the level of professional knowledge, length of service, and level of the judiciary. See LJS art. 88; LAW ON STATUS OF JUDGES art. 40. To be eligible for promotion to a higher rank, a judge must spend at least 3 years in the fifth (the lowest) and fourth ranks, and at least 5 years in the third and second ranks, unless early promotion is justified by a judge's qualification level. LJS art. 89.

Qualification attestation consists of the following steps. First, chairman of the respective court (or chairman of immediate higher court, for court chairmen) prepares a professional reference outlining business and moral qualities and evaluating the professional level of a judge in question. *Id.* art. 90.3-4. A copy is provided to a judge in question and to a qualification commission. A judge is then invited for an oral qualification interview with the qualification commission. The interview is intended to test a judge's substantive knowledge in basic areas of the law and procedural rules, as well as his/her judicial skills. Specifically, judges standing for promotion to the next qualification rank are questioned about their key achievements and nature and complexity of their cases, and may be asked to analyze relevant case law within their areas of specialization. Interviews with judges standing for election to a higher-level court are used to determine whether a judge's knowledge of legislation, court practice, and legal analysis is sufficient to enable him/her to take such higher position. *Id.* art. 92. If a judge fails the interview, qualification commission may decide to re-interview him/her within 6 months, and if it again determines that a judge is unsuitable for position, it may recommend his/her removal. *Id.* art. 94; LAW ON STATUS OF JUDGES art. 41. This decision may be appealed to the HQCJ, whose decision may be appealed to court for procedural violations. LJS arts. 95.1, 95.6; LAW ON STATUS OF JUDGES art. 39.5.

In practice, qualification attestation and promotion to higher rank is believed to be guided by objective criteria, although the attestation itself is usually seen as a mere formality. In the course of 2003-2005, a total of 1,879 judges were promoted to higher qualification ranks by circuit qualification commissions. In addition, 558 judges were promoted by the qualification commission of commercial courts, and 91 judges were promoted by the qualification commission of military courts.

By far a more important type of career advancement is appointment to administrative positions in courts. The Constitution specifies only the procedure for appointment of the Chairmen of the CCU and the SCU. The CCU justices elect one of them as a Chairman for a single three-year term by secret ballot. CONST. art. 148; LCC art. 20. The Chairman of the SCU is elected by the Plenary Assembly of the SCU by secret ballot. CONST. art. 128. He can hold office for a maximum of two consecutive five-year terms. LJS art. 51. Deputy chairmen are elected in the same manner upon a nomination of the Court's Chairman and with the consent of the COJ. *Id.* art. 52.

Chairmen and deputy chairmen of all other courts are appointed for a five-year term by the President, upon a recommendation of the SCU Chairman acting with the consent of the COJ (these functions are performed by chairmen of high specialized courts and respective councils of judges for administrative positions with specialized courts). *Id.* art. 20.5. They can be appointed for repeat terms. *Id.* arts. 24.4, 28.3. Chairmen of appellate courts nominate candidates for chairmen of local courts to the Chairman of the SCU. *Id.* art. 28(10); see also *Regulation on the Manner for Reviewing Issues Related to Appointment of Judges to Administrative Positions in General Courts (Except the Supreme Court of Ukraine) and Removal from These Positions* § 2 (approved by Decree of the President No. 1425/2003; OG, No. 50/2003, art. 2619; last amended OG, No. 13/2004, art. 887) [hereinafter *Regulation on Appointment of Court Chairmen*]. Candidates for chairmen of appellate and high specialized courts are selected by the SCU Chairman independently. *Regulation on Appointment of Court Chairmen* § 5. The COJ then holds hearings on each nomination, during which it may receive non-binding opinions from the SJA and the HCJ. If it refuses to approve a certain nomination, the Chairman of the SCU may nominate the same individual one additional time. *Id.* § 6. The Chairman of the SCU then recommends the approved candidates to the President. *Id.* § 7. The staff of Presidential Secretariat conducts a preliminary review of submitted materials and an interview with each nominee. *Id.* § 10. However, the President is not bound by the recommendation and may refuse to appoint any candidate, although he may not appoint a candidate who has not been approved by the COJ. *Id.* § 11. Indeed, of the 296 candidates recommended by the COJ in 2004, only 222 were confirmed, and only 40 of the 158 nominees were appointed in 2003.

This procedure is generally regarded as non-transparent, lacking any objective criteria, and highly politicized.<sup>10</sup> Many, including some judges, argue that appointment of court chairmen by the President goes against his constitutional powers and represents undue influence on the judiciary. Most believe that the key criteria for appointment to administrative positions within the judiciary are loyalty to the Presidential administration and other political factors. These issues persist despite the election of a new government and the magnitude of pressure is, according to some sources, at times greater than under the previous administration. In addition, local authorities frequently attempt to influence this process, by contacting the President's office or the SCU with letters in which they "strongly recommend or object to" the appointment of specific individuals, or by sponsoring discrediting media campaigns against them. Judges on a court in question and local councils of judges rarely have influence in this process, although they may be formally consulted. For instance, it is possible to for a judge from one oblast to be appointed to a court chairman position in another oblast, or for a recently appointed judge to be selected to an administrative position passing over other, more experienced judges on that court.

In addition, the law does not establish any limits on how long the President's office may take to issue a final decision on a given candidate. As a result, some candidates may wait for years until their appointment is confirmed, while others go through the entire procedure, literally, in a matter of days. Each sixth local court in Ukraine was headed by an "acting chairman" as of August 2005. See *Through the Judiciary to the Rule of Law: Interview with Vasyl Maliarenko*, 35 YURYDYCHNY VISNYK UKRAINY (2005). According to the data by the VRU's Committee on Legal Policy, as of June 2005, two judges were awaiting confirmation to administrative positions since 2003, and 45 judges since 2004, the delays to which the President's office was unable to provide any objective explanation. Similarly, it took over a year to appoint the HAC Chairman, and many judges now predict that appointment of administrative court chairmen will be similarly politicized. In an opposite example from June 2005, chairman of Pechersky District Court in Kyiv was appointed in 6 days, including 3 holidays, in a process that also included his transfer from a different oblast. See *A Court at the Power Crossroads*, 27 MIRROR WEEKLY (2005).

Court chairmen have broad administrative powers, which include organizational management of a court's activities and representing the court in relations with other government and local authorities and with individuals and legal entities. LJS arts. 24, 28, 41, 50. Among others, they dominate the judicial selection process, hire and fire court staff, assign cases to judges, approve their vacation schedules, and award bonuses, thus making them real "bosses" of a court. They also bear the burden of securing supplemental funding to maintain their courts. With these numerous duties, some court chairmen dedicate their efforts to full-time court management and no longer perform the basic judicial function of administering justice, despite the legal requirement to the contrary (see *id.* art. 20.6). In addition, these duties make them more susceptible to various forms of outside influence. Consequently, many believe that in order to diminish the lucrative value of court chairmen positions, their roles should be limited to purely logistical. Nevertheless, most court chairmen defended their existing functions, and some even went as far as to suggest that judges work best under "a managed democracy."

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<sup>10</sup> See Bohdan A. Futey, *The Judiciary and the Rule of Law*, 40 MIRROR WEEKLY (2005) (analyzing this procedure and presenting possible options to consider for the manner of appointment of court chairmen).

## Factor 16: Judicial Immunity for Official Actions

*Judges have immunity for actions taken in their official capacity.*

<b>Conclusion</b>	<b>Correlation: Neutral</b>
<p>The Constitution recognizes judicial immunity, but it extends only to detention of judges, which requires the consent of the VRU. Such consent is no longer required in order to institute criminal proceedings against judges, which can be done by any police officer or prosecutor; indeed, judges are concerned that these powers are routinely abused. Nevertheless, it should be noted that non-judicial respondents felt that judges have sufficient immunity and may sometimes misuse their immune status.</p>	

### Analysis/Background:

Judicial immunity is recognized as one of the legal guarantees of judicial independence. CONST. art. 126; LAW ON STATUS OF JUDGES art. 11.1. Judicial immunity extends to a judge's home, office, vehicle, communication means, correspondence, personal property, and documents. LAW ON STATUS OF JUDGES art. 13.1. A judge may not be detained upon a suspicion that he/she committed a crime or forcibly brought before any government body in cases related to administrative offenses, and, if detained, must be released immediately upon presenting his/her identification. *Id.* art. 13.3. Criminal cases against judges are tried in first instance by an appellate court designated by Chairman of the SCU, and cannot be tried in the same court where a judge in question sits. *Id.* art. 13.5-6.

An early version of the Law on Status of Judges provided that criminal proceedings against judges may not be instituted without the consent of the VRU. Nevertheless, in 1999, this provision was amended, purportedly to conform to the language of the Constitution, which states that "[a] judge shall not be detained or arrested without the consent of the [VRU], until a verdict of guilty is rendered by a court." See art. 126; see also LAW ON STATUS OF JUDGES art. 13.2 (as amended in 1999); LCC art. 28. This new language means that, in practice, any police official or other investigative officer may institute criminal proceedings against a judge. Judges believe that this procedure unduly restricts their constitutional independence and makes them even less protected than was the case under the Soviet system, when the consent of the Presidium of VRU was required to investigate judges. Interestingly also, judges appear less protected than private advocates, as criminal proceedings against the latter can be instituted only by an oblast-level prosecutor. See LAW ON ADVOCACY art. 10 (BVR, No. 9/1993, art. 62; last amended BVR, No 1/2006, art. 18). In 2004, the SCU requested the CCU to provide an official interpretation of article 126 of the Constitution and the revised text of article 13.2 of the Law on Status of Judges, but the latter did not clearly address the constitutionality of this provision. The CCU merely held that while immunity is an important constitutional element of judicial independence and cannot be restricted, the existing provisions of the Law on Status of Judges, when read in conjunction with a constitutional prohibition on influencing the judges in any manner, are a sufficient guarantee of judicial immunity. See *Re Independence of Judges as a Component of Their Status* (Decision No. 19-rp/2004, Dec. 1, 2004; OG, No. 49/2004, art. 3220).

While there are reportedly very few requests to the VRU to sanction the detention of judges (most of which are usually granted), judges express serious concerns about the fact that law enforcement authorities routinely abuse their powers and initiate criminal investigations against judges. Officially, however, the number of formal criminal investigations against judges is low (8 instances in 2004 and 7 in 2005). By law, judges can be prosecuted for a number of general official offenses, such as abuse of power, fraud, negligence, or bribery (CC arts. 364-368), as well as for a number of crimes that are specific to the judiciary, most notably issuing a knowingly unjust verdict or decision (*id.* art. 375). In practice, the previous government frequently attempted to use these provisions to prosecute judges who issued politically unpopular decisions going against the wishes of top officials. For example, a judge who initiated a criminal investigation against President Kuchma was himself prosecuted and eventually dismissed as a judge, and judges who ruled in favor of then-opposition politician Yulia Tymoshenko were

subjected to harassment. While most judges who believed they were wrongly accused ultimately succeeded in challenging these investigations in courts, they were required, in the meantime, to submit to interrogations, spending hours in the police or prosecution quarters, or to permit searches in their offices, often resulting in seizure of case files and other materials in pending cases.

There are also frequent allegations by advocates and others who feel that judges, through abusing their immune status, have turned into “a caste of untouchables.” Judges, understandably, fervently deny such allegations, although they concede that there may be rare exceptions.

The CCU justices have an additional guarantee of immunity, in that they cannot be held responsible for the results of voting or statements made in the course of proceedings, unless these actions may be classified as insult or slander. LCC art. 28.

## Factor 17: Removal and Discipline of Judges

***Judges may be removed from office or otherwise punished only for specified official misconduct and through a transparent process, governed by objective criteria.***

<b>Conclusion</b>	<b>Correlation: Negative</b>
<p>The law specifies both the official misconduct and the detailed procedural rules for removing judges from office or otherwise punishing them. However, the process is inefficient and non-transparent, and many of the removal and discipline grounds are vague and lack legal definitions, and are therefore open to arbitrary interpretation. This allows some judges to avoid any responsibility, while others are disciplined as a means of reprisal. Judicial discipline and removal decisions ultimately rest with the quasi-judicial HCJ, while the HQCJ plays almost no role in this process.</p>	

### Analysis/Background:

Judges may be removed from office by the same body that appointed or elected them upon a recommendation of the HCJ, and may be subjected to other discipline only upon a decision of qualification commissions of judges or the HCJ. Grounds for disciplinary responsibility of judges include violating the law in the course of the administration of justice; violating rules against combining the judicial office with other positions, except teaching or research; and breaching one of the legally specified judicial duties. LAW ON STATUS OF JUDGES art. 31. Judicial duties include comprehensive, objective, and timely resolution of cases; preserving confidentiality of closed judicial proceedings; abstaining from any conduct or acts that discredit the judiciary or cause doubts as to a judge’s objectivity, impartiality, and independence. *Id.* art. 6. Significantly, reversals of judgments are only grounds for discipline if a judge intentionally violated the law and this resulted in serious consequences. *Id.* art. 31.

Circuit and specialized qualification commissions serve as disciplinary authorities for local court judges, while the HQCJ serves as disciplinary authority for appellate court judges, and the HCJ serves as such authority for the SCU and high specialized court judges. CONST. art. 131; LJS art. 98; LAW ON HCJ art. 3. These bodies may begin disciplinary proceedings against judges within 2 months of receiving a formal complaint from one of the entities that have the right to initiate disciplinary review: VRU members, the Ombudsmen, Chairman of the SCU or high specialized court, Minister of Justice, chairmen of oblast councils of judges, or members of the COJ. LJS arts. 77(3), 79.1, 97.2. Disciplinary proceedings may not be instituted based on a complaint that does not state the facts of alleged judicial misconduct or an anonymous complaint. Further, the right to initiate disciplinary review may not be abused by means of attempting frivolous complaints or exerting pressure on judges. *Id.* arts. 97.3-4; LAW ON STATUS OF JUDGES art. 34.2.

Upon receiving a formal complaint, chairman or other member of the qualification commission reviews the alleged facts of misconduct, and the commission decides whether to institute formal disciplinary proceedings. This review usually includes obtaining written explanations from a judge and review of court records and other information that can be received from anyone. A judge in question must be invited to the disciplinary hearings and be allowed to submit a rebuttal; however, the hearing will not be postponed due to a judge's failure to appear. LJS arts. 99.1; LAW ON STATUS OF JUDGES art. 35. Disciplinary decision is made by a majority of qualification commission members present during the hearing. It must be motivated and include, *inter alia*, factual circumstances of a misconduct, rebuttal by a judge, information on personal character of a judge, evidence considered, and the type of disciplinary sanction, if any, imposed against a judge. LJS art. 100. Disciplinary proceedings conducted by the HCJ follow a largely similar pattern, with the exceptions that proceedings may be instituted only upon a petition of the HCJ members (who may do so on the basis of complaints they receive); preliminary review of alleged judicial misconduct is conducted through the disciplinary section; and disciplinary decision is made by secret ballot by a majority of all HCJ members. See *generally* LAW ON HCJ arts. 19, 38-42.

Judges can be subjected to two types of disciplinary sanctions: reprimand and demotion by one qualification rank, and a qualification commission may also petition the HCJ to remove a judge from office. Only one sanction can be imposed per each count of misconduct. Sanctions must be commensurate with nature of misconduct and take into account individual circumstances, prior conduct of a judge, and degree of guilt. There is a limitation period of 6 months within discovery of misconduct, excluding the time when a judge was on leave, and, for the HCJ sanctions, 1 year within the actual date of misconduct during which a judge may be sanctioned. See *generally* LJS arts. 89.6, 100.3, 100.5; LAW ON STATUS OF JUDGES arts. 32, 36.1; LAW ON HCJ arts. 37, 42-43. Disciplinary record is expunged if a judge is not subjected to another sanction within a year. LAW ON STATUS OF JUDGES art. 36.2; LAW ON HCJ art. 44. Further, a judge may appeal a decision by a qualification commission imposing disciplinary sanctions to the HCJ. LJS art. 101; LAW ON STATUS OF JUDGES art. 35.5; LAW ON HCJ arts. 3, 46. In that instance, its disciplinary section conducts a preliminary review, after which a judge in question is brought before the full HCJ session to provide a rebuttal. Following this hearing, the HCJ may affirm, reverse, or modify a qualification commission's decision. LAW ON HCJ arts. 45-46.

Grounds for removal of judges from office are set in the Constitution. Most of these are so-called general grounds, such as expiration of the term of office, reaching the age of 65, inability to remain in office due to health reasons, or termination of citizenship. Judges may also be removed on "special" grounds, if they violate the rules against combining the judicial office with other positions, are found guilty of a crime by a court verdict, or breach the oath of office. Finally, a judge may be removed upon submitting a voluntary resignation. CONST. art. 126; LAW ON STATUS OF JUDGES art. 15.1; LCC art. 23. Proceedings before the HCJ, which must pre-approve all judicial removals, may be instituted upon a request by qualification commissions or the HCJ members (which may be based on reviewing public complaints on judicial conduct), or a resignation request submitted by a judge. LAW ON HCJ art. 30; CONST. art. 131; see also LAW ON ELECTION AND REMOVAL OF JUDGES art. 17. In the latter instance, the HCJ must verify that a judge is acting out of his own will and without any outside pressure. If a judge is alleged to violate the rules against combining the judicial office with other positions, a removal petition may also be submitted by VRU members, Chairman of the SCU or high specialized court, or the Minister of Justice. LAW ON HCJ art. 34. A judge in question must be present during these hearings. The HCJ submits a recommendation on removal of a judge under the general grounds to the body that elected or appointed him/her if it is supported by majority of its members present during the hearings. *Id.* art. 31. Removal of a judge for committing a crime or combining judicial office with other positions must be supported by two thirds of the HCJ members present at the hearings, while removal for commission of a crime as stated in a court verdict must be approved by a majority of all HCJ members. *Id.* art. 32. For permanently elected judges, the procedure continues with a preliminary review and hearings by the VRU's Committee on Legal Policy, which submits a recommendation on removal of a judge to the full Parliamentary session. A judge in question must be present during both committee and session hearings to provide rebuttal, and may be questioned by any VRU member, following which the VRU decides on his/her removal by open ballot. See *generally* LAW ON ELECTION AND REMOVAL OF JUDGES arts. 19-24.

In practice, there are a number of problematic issues with judicial removal and discipline process. Substantively, most discipline and special removal grounds are formulated in broad general terms that are not legally defined and are therefore open to arbitrary interpretation. On the one hand, a judge may avoid any responsibility for misconduct if he/she has powerful and influential connections; on the other hand, these grounds can be used to take revenge against “unsuitable” judges. Non-judicial respondents criticized qualification commissions for refusing to discipline judges without any justification, suggesting that corporate solidarity steps in to cover up any misconduct. By contrast, many judges suggested that judicial responsibility for breaching the oath of office or for reversal of judgments are “the most perfect forms of reprisal against a judge” since almost any action or judgment can be interpreted to fit these grounds. This is especially problematic in light of the constantly changing legal framework, as well as the lack of uniformity in court practices and standards for interpretation of the law. Court chairmen can reportedly manipulate the process, for example, by assigning an excessive workload to a particular judge and following it up with instituting disciplinary proceedings against the judge for procedural delays.

In addition, most respondents criticized the work of qualification commissions as highly ineffective. Since their members work on a part-time basis and do not receive additional compensation, they have little time or incentives to act diligently when investigating alleged judicial misconduct. Their performance was apparently better under the old structure when they operated within each oblast. Few commissions meet on a regular basis, and sessions are often postponed due to lack of quorum and failure to attend meetings, particularly by non-judicial members. As a result, a lot of disciplinary proceedings are terminated because the 6-months statute of limitations has expired. There is lack of uniformity in the practice of different commissions, resulting in application of divergent sanctions for similar acts of misconduct. In addition, they often disregard the procedural rules, and may delegate the initial review of complaints to respective court chairmen (or even their assistants), fail to obtain a rebuttal from a judge in question, or mention the factual background or motivations in their disciplinary decisions. Such decisions are usually reversed by the HCJ on procedural grounds, even if they were correct in substance.

There are also some problems related to appealing decisions of qualification commissions. First, decisions that denies the formal initiation of disciplinary proceedings or that do not impose disciplinary sanctions against judges are not subject to appeal, including by entities who submitted the initial complaint.<sup>11</sup> Only a judge has standing to appeal a disciplinary decision, and only the HCJ rather than the HJC is authorized to review such appeals. This means that, in practice, a quasi-judicial body has authority to issue final decisions concerning judicial discipline. Consequently, the HJC plays almost no role in judicial discipline, being limited to disciplinary proceedings against appellate judges. There has also been criticism that a number of the HCJ disciplinary decisions are based on hearsay rather than hard facts. At the same time, the HCJ attempted to downplay its importance arguing that its removal recommendations are not binding on the VRU or the President, and that both its disciplinary and removal decisions can be, and often are, appealed to courts. In fact, a number of judges have apparently succeeded in reversing such decisions and postponing their removal by several years, since the HCJ decisions were ultimately affirmed by higher courts. Some judges have also reportedly succeeded in having the President’s decrees on their removal from office reversed.

During 2003-2005, qualification commissions of general courts completed 624 judicial discipline proceedings, imposing disciplinary sanctions against 250 judges (including 187 reprimands, 22 demotions, and 41 removal petitions to the HCJ). Out of over 1,000 formal complaints filed with qualification commission of commercial courts, 45 resulted in disciplinary proceedings and 4 judges were reprimanded. The HJC conducted 25 disciplinary proceedings against appellate court judges. Specifically, in 2004, qualification commissions and the HJC completed, respectively, 284 and 21 disciplinary proceedings, imposing disciplinary sanctions against 129 judges (including 99 reprimands, 10 demotions, and 20 removal petitions to the HCJ). Of these decisions, 13 were appealed the HCJ. 62 judges were disciplined in the first half of 2005. Further, 131 judges were removed from office in 2004,

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<sup>11</sup> It should be noted that, as this JRI was being finalized, the LJS was amended (March 16, 2006; see OG, No. 15/2006, art. 1068) to allow entities submitting the initial complaints against judges to appeal the disciplinary decisions of qualification commissions to the HCJ. However, since these changes were adopted after the completion of this assessment, the assessment team is unable to evaluate their impact.

including 6 for breach of an oath, and 66 judges were recommended for removal in 2005, including 5 for breach of an oath.

The same discipline and removal rules also apply to the SCU justices. Decisions on removal of the CCU justices under general grounds are made by the Court itself, while decisions on removal due to breach of an oath must be approved by the VRU. CCU PROCEDURAL REGULATIONS §§ 59-70. In practice, no justice has ever been disciplined or removed for breach of an oath of office, although VRU members occasionally attempt to file complaints against them.

## Factor 18: Case Assignment

***Judges are assigned to cases by an objective method, such as by lottery, or according to their specific areas of expertise, and they may be removed only for good cause, such as a conflict of interest or an unduly heavy workload.***

<b>Conclusion</b>	<b>Correlation: Negative</b>
<p>There are no uniform methods for assigning cases to judges. Civil and administrative cases must now be assigned “in queued order” but this is differently interpreted in different courts. In other categories of cases, considerations such as workload of judges, their specific areas of expertise, and complexity of cases may sometimes be taken into account. Although this is not explicitly provided for by any law, case assignment is usually within discretion of court chairmen and reportedly can be easily manipulated to exert influence on individual judges. However, once a judge is assigned to a case, he/she may be removed only for disqualification due to a conflict of interest.</p>	

### Analysis/Background:

No uniform rules exist that regulate case assignment in Ukrainian courts. In practice, cases in most courts are assigned by court chairmen, and the law does not set forth any objective criteria that would guide this process. This power of court chairmen is not explicitly provided for by any law; however, most court chairmen interpret their powers related to organizational management of court activities to include the right to assign cases to judges. In appellate and high specialized courts, cases are assigned by chairmen of respective chambers, who according to law “create panels of judges for consideration of cases.” See LJS arts. 29.2(2), 42.2(2), 53.2(2). Some courts, for example the SCU, have delegated case assignment to registrar’s offices and court chairmen are not involved in this process. There are reportedly almost no courts, including at the higher levels of the judiciary, which use a randomized or automatic method of case assignment.

New CIVPC and CAJ provide that all civil and administrative cases must be assigned to judges “in the queued order” no later than the next business day after they are registered. See CIVPC arts. 118.1, 297, 327; CAJ arts. 189, 214. However, neither Code contains a definition of “queued order,” and this term is, in practice, subject to different interpretations. Some courts simply assign an ordinal number to each judge and write one judge’s number on each case in the order in which cases are filed. Others assign each judge to a rotating duty for one day, and all cases filed on a given day, regardless of their number, are assigned to that judge. While these methods are arguably objective, neither of them takes into account specific areas of expertise, individual workload of a judge, or complexity of a case.

Criminal cases and administrative offenses in local courts are assigned based on territoriality, which means that each judge is assigned to particular streets, and all cases in which defendants reside on those streets are assigned to that judge. Larger local courts also introduced specialization of judges for the purposes of assigning criminal cases. At the same time, in courts with smaller number of judges, cases are simply assigned by court chairmen without adhering to any criteria, although many judges said that in practice court chairmen try to take into account the workload of a judge, his/her specialization, and

the complexity of a case. If a court retains the practice of open hours by judges and a judge receives complaints in that manner, such complaints would normally be assigned to a judge who received them.

In the majority of appellate courts and local commercial courts, case assignment is performed by chairmen of court chambers or their deputies, according to similar criteria as outlined above. In the HCC, the deputy chairman of the chamber or the most senior judge on the chamber is responsible for assigning cases to judges, and they try to take into account specialization and workload of judges. The Chairman of the HAC is formally responsible for case assignment, although in practice he delegated this function to his assistant who attempts to divide the caseload evenly among all judges; in addition, once the registrar's office is staffed, it will be responsible for case assignment without any involvement of the Chairman. The Chairman of the CCU assigns each case filed to one of the three standing panels of judges. A rapporteur for each case is nominated by a panel and approved at the regular session of the CCU, taking into account specialization of justices and the need for even caseload distribution. As cases are prepared for review by the full CCU, the Chairman also schedules hearing dates, taking into account the order in which petitions were originally filed. LCC arts. 46, 47; CCU PROCEDURAL REGULATIONS §§ 11.1, 12.

In practice, the existing case assignment process can be easily manipulated. Case assignment is reportedly the foremost mechanisms by which court chairmen exert influence on individual judges. If a court chairman has reasons to dislike a particular judge, he/she may choose to assign only, for example, divorce or other unattractive cases to that judge, or increase a judge's workload disproportionately and then use procedural delays or excessive backlog as a ground for discipline. In addition, sometimes cases are not assigned in a timely manner. The process is also allegedly abused by judges who may bribe court chairmen to assign to them the most "lucrative" cases. To be fair, numerous court chairmen reportedly choose not to abuse this process and assign cases fairly, without prejudices, and take into account a judge's workload or complexity of a case – but in the absence of clear rules to guide this process, this depends on the good faith of individual court chairmen. Nevertheless, most court chairmen defend their role in case assignment, contending that they do not attempt to influence other judges and that their involvement is simply a way for them to distribute the workload evenly between the judges. In addition, while most judges reported that it is irrelevant who is responsible for case assignment, a number expressed a preference towards preserving the status quo or at least towards granting the court chairmen the right to override case assignment decisions of registrar's offices.

One notable exception is the model Ivano-Frankivsk City Court, where cases are assigned to judges by the filing and registration unit in accordance with a schedule approved by the court chairman at the beginning of each year. For purposes of this schedule, all judges have specializations with respect to particular categor(ies) of cases, depending on their individual qualifications and/or other circumstances. The typical number and categories of cases filed each year, as well as their difficulty are likewise taken into account. To balance between the quantity and the difficulty of cases, each category is allocated a specified difficulty coefficient from 1 (most difficult; reserved for criminal cases) to 7 (the easiest, such as administrative violations and other similar cases). These are based on the estimated average length of time necessary for adjudication of any given case within a category. Thus, all criminal cases are divided into three categories, with one judge assigned to each category; similarly, another judge is only assigned cases related to administrative violations, while remaining judges are each assigned several categories of civil cases. In extreme circumstances, where it is necessary to equalize the workload of different judges (e.g., due to an unusual increase in the number of cases filed in certain category or a particularly complicated dispute), court chairman may re-assign a case to another judge. In addition, the case assignment schedule designates particular day(s) of each week for preliminary hearings by each judge. This means that once a filing clerk assigns a case to a judge, he/she immediately schedules preliminary hearing date in accordance with this designation. Therefore, a plaintiff is notified of the hearing date immediately upon filing a complaint, and is also responsible for mailing summonses to other parties and witnesses. To compare, in most other courts it takes on average 1-2 weeks before parties receive notice of a preliminary hearing date.

Once a case has been assigned to a particular judge, it cannot be reassigned to a different judge unless the initial judge is disqualified from adjudicating the case. This rule was formalized by a November 5,

2003 decision of the SCU (see 2 BULLETIN OF THE SCU (2004)) , which held that such reassignment constitutes constitutionally impermissible influence on judges by a court chairman. Nonetheless, there are some reports that this restriction is not always followed in practice. A judge is disqualified and must be recused if he/she had previously participated in the case in any capacity, has a direct or indirect interest in the outcome of the case, is a close relative of one of the parties, and in other circumstances that give rise to doubts as to his impartiality. CIVPC art. 20; CRIMPC art. 54; CAJ art. 27. In commercial cases and proceedings before the CCU, disqualification grounds include being a relative of one of the parties or other circumstances that put in doubt a judge’s impartiality. COMPC art. 20; CCU PROCEDURAL REGULATIONS § 37.2. In addition, a judge cannot be assigned to a case if he had adjudicated the matter during any of the previous stages of judicial proceedings. CIVPC art. 21; CRIMPC art. 55; CAJ art. 28; COMPC art. 20. In criminal cases, this restriction extends to adjudicating procedural issues (such as sanctioning search or seizure or authorizing pretrial detention) during the pretrial investigation. CRIMPC art. 54. If a motion for disqualification is granted, the case will usually be assigned to another judge on the same court. CIVPC art. 25; CAJ art. 32.

According to advocates, they rarely submit motions for disqualification of a judge, although when filed, such motions are frequently granted. At the same time, many judges reported that motions for disqualification are rather frequent and are often used by parties or their advocates as a means to delay the proceedings or to exert psychological pressure on judges.

### Factor 19: Judicial Associations

***An association exists, the sole aim of which is to protect and promote the interests of the judiciary, and this organization is active.***

<b>Conclusion</b>	<b>Correlation: Neutral</b>
<p>The National Independent Judicial Association (NIJA) and several regional associations of judges exist for the sole aim of protecting and promoting the interests of their members, but they are relatively inactive and have not yet become effective representatives of the judiciary. In addition, the law provides for a network of judicial self-governance bodies that aim to strengthen the independence of the judiciary but also perform certain delegated functions, such as participation in appointment of court chairmen. Of these bodies, the COJ is active and operates independently from other branches of government, but there are concerns about its independence from the judiciary’s leadership.</p>	

#### Analysis/Background:

NIJA was established in August 2001 and registered by the MOJ as a non-governmental, not-for-profit organization in March 2002. NIJA operates pursuant to its Statute, which further defines it as a non-political organization and not a trade union, as judges are prohibited from participating in such organizations. See NIJA STATUTE § 1.2 (*last amended* Feb. 19, 2005); see also CONST. art. 127. Its stated goals include, *inter alia*, raising the prestige and independence of the judiciary, professional qualification of judges, promoting legal literacy, enabling cross-cultural judicial exchanges, and protecting the common interests of its members. NIJA STATUTE § 2.1. NIJA membership is voluntary and open to both sitting and retired Ukrainian judges who support the goals of the associations. In addition, it may include regional associations of judges as collective members, as well as honorary members. *Id.* §§ 3.1-3.3. Members pay an application fee of UAH 10 (US\$ 2) and a monthly duty of UAH 5 (US\$ 1). As of December 2005, NIJA membership included about 1,300 regular members, as well as local branches in Donetsk, Kharkiv, Zaporizhzhia and Cherkasy oblasts.

NIJA’s budget consists of member dues, charitable donations, and funds from operating donor-supported projects. Among its closest partners are ABA/CEELI, Center for Judicial Studies, Renaissance (Soros) Foundation, Swiss Development and Cooperation Agency, Ukrainian Bar Association, and USAID.

NIJA's major projects to date included conducting conferences on issues crucial for judicial independence and trainings on emerging legal topics. For instance, throughout 2005 it held a series of 6 regional roundtables as part of ABA/CEELI supported Civic Council for Judicial Reform. It also organized a conference on judicial salaries, which NIJA believes contributed to the eventual salary increase in the summer of 2005. It is conducting an on-going monitoring on the authority of the judiciary, for which it regularly reviews media and online publications to record instances of improper interference with the administration of justice and the government's reaction to them. NIJA also publishes a monthly bulletin and maintains a website (<http://www.uajudges.org>) and an electronic discussion forum. Finally, in the fall of 2004 NIJA became an extraordinary (non-voting) member of the International Association of Judges.

Despite these activities, NIJA remains a relatively low-profile organization. Most judges interviewed were not familiar with NIJA or its agenda and specific achievements. Some judges mistakenly believe that NIJA is a trade union, while many responded that they do not have time or willingness to participate in such organizations. NIJA leadership feels that its progress is blocked by court chairmen, most of whom should be aware of its existence but fail to share this information with judges. Nonetheless, a number of judges, including those familiar with NIJA's work, thought that it is not an effective representative of the judiciary and merely protects the interests of its leadership. Some judges who were among NIJA's founding members have become disillusioned with its performance and suggested that it should pursue a more proactive role. While none of the respondents was able to name one specific achievement of NIJA, many were quick to point out that it failed to issue any public statements related to the effects of new procedural codes or to condemn the recent remarks by the Minister of Justice, which accused the entire judiciary of being corrupt (see Factor 20 for details).

There also exist several oblast-level associations of judges, some of which hold collective membership in NIJA. Similarly to NIJA, most of these organizations are relatively ineffective. Some judges also participate in the associations of legal professionals, such as the Union of Advocates of Ukraine, the Association of Jurists of Ukraine, the Ukrainian Bar Association, or the World Congress of Ukrainian Lawyers. Finally, a new entity, the Foundation for Support of the Judiciary, was founded in December 2004 and has the potential for becoming a rival to NIJA. The Foundation's objectives include promoting the independence, impartiality and publicity of justice, strengthening the rule of law, development of the judges' profession, and protecting the interests of its members. While the membership is open to both judges and anyone else with the interest in supporting the judiciary, in practice about 90% of the Foundation's members are judges.

In addition to NIJA and regional judicial associations, there is a network of judicial self-governance bodies that exist pursuant to the law to resolve issues related to internal affairs of the courts, such as logistical support to courts and judges, social protection of judges, and other issues that are not directly related to the administration of justice. See CONST. art. 130; LJS art. 102. In particular, they strive to strengthen the independence of the judiciary and protect it from external influence, participate in issues related to personnel, financial, material, and logistical support of the judiciary, and monitor the performance of other agencies performing judiciary-related functions. LJS art. 103. These bodies include meetings of judges at individual court level, oblast-level conferences of local and appellate court judges, conferences of specialized court judges, and the Congress of Judges of Ukraine, as well as oblast-level and specialized councils of judges and the COJ as the executive arms of, respectively, conferences and the Congress of Judges. *Id.* arts. 104, 111, 116. In addition to representing the interests of the judiciary, these bodies may also exercise control over performance of individual courts and the SJA and play a role, for instance, in appointment of court chairmen, the CCU justices, and the HCJ and the HQCJ members. *Id.* arts. 111.4, 112.2, 116.5. Decisions of oblast councils of judges are mandatory for all court chairmen within their jurisdiction, while decisions of the Congress of Judges are mandatory for all judges throughout Ukraine. *Id.* arts. 111.5, 112.3.

By far the most important of these bodies is the COJ, which acts as the highest judicial self-governance body in between the Congresses of Judges. *Id.* art. 116.1. It must include at least one representative from each of the conferences of military and specialized court judges, the SCU and the CCU, while representatives of general local and appellate courts must make up at least half of the COJ's

membership. *Id.* art. 116.2. Its decisions are mandatory for all judicial self-governance bodies and may be reversed only by the Congress of Judges. *Id.* art. 116.6.

Despite these progressive provisions, there are serious concerns about the actual independence of councils of judges. In practice, most are controlled by judicial leadership, and this sentiment is shared by some judges who do not believe that these councils are truly independent. For instance, of the 77 members of the COJ, only 5 judges (2 local and 3 appellate) do not occupy any administrative positions or represent the top tier of the judiciary; the remaining members are the SCU, the CCU, the HCC and the HAC justices, chairmen or deputy chairmen of general, commercial and military appellate courts, and 6 chairmen or deputy chairmen of local general courts. Similarly, the council of judges of commercial courts consists primarily of court chairmen, and the council of judges of administrative courts for now includes only the HAC justices, although others are expected to participate as lower administrative courts become operational. Oblast councils of judges typically consist of chairmen and deputy chairmen of appellate courts and local court chairmen, and it is not uncommon for them not to include any regular judges. These councils are reportedly very active only in approximately 7 out of 27 oblasts.

At the same time, there are indications that at least the COJ seems to be operating independently from other branches of government. For example, it issued a sharp statement denouncing the Minister's of Justice recent remarks that accused the entire judiciary of corruption. As a result, the Prime Minister, in the presence of the SCU Chairman and the President of Ukraine, issued a public apology on the Minister's behalf (although the Minister himself refused to personally retract his statements). The COJ also attempts to attract attention to other problems faced by the Ukrainian judiciary through numerous channels, including publishing statements in the media or submitting petitions to the Council of Europe, the international judicial bodies, and members of the Ukrainian Parliament. Nevertheless, the COJ believes that its greater success is hindered by various forms of political pressures.

## V. Accountability and Transparency

### Factor 20: Judicial Decisions and Improper Influence

***Judicial decisions are based solely on the facts and law without any undue influence from senior judges (e.g., court presidents), private interests, or other branches of government.***

<b>Conclusion</b>	<b>Correlation: Negative</b>
<p>The law requires that judicial decisions be based solely on the facts and law and prohibits any undue interference with the administration of justice. Nevertheless, the judiciary is widely perceived as being corrupt, and judges may experience interference in their decision-making from a variety of sources, including private interests, court chairmen, representatives of legislative and executive branches of government, prosecutors, advocates, and the media. As a result, the level of public confidence in the judiciary is extremely low, and judges contend that this attitude is perpetuated by constant backlash against the judiciary propelled by criticism from other government officials and the media.</p>	

#### Analysis/Background:

“Justice in Ukraine is administered exclusively by the courts,” whose functions may not be delegated to or assumed by other bodies or officials. CONST. art. 124; LJS art. 5.1. Further, “the independence of judges ... [is] guaranteed by the Constitution and the laws of Ukraine. Influencing judges in any manner is prohibited.” CONST. arts. 126, 129. These provisions are elaborated in applicable laws, which provide, *inter alia*, that judges are independent from any interference, not accountable to anyone, and subject only to the law; that they shall issue judgments only in accordance with their moral certainty and the law; that everyone must respect the independence of judges and shall not encroach upon it; and that courts shall not consider any non-procedural petitions related to the merits of a particular case. In addition,

“interfering with the administration of justice, influencing judges in any manner, contempt of the court, and collecting, using or disseminating (orally, in writing, or otherwise) information that can harm the authority or influence the impartiality of the court is prohibited and shall result in responsibility as provided by law.” See LJS art. 14; LAW ON STATUS OF JUDGES arts. 3.1, 11.2, 12. More specifically, interfering in the activity of judges in order to prevent the exercise of their duties or to achieve an illegal judgment is punishable by a fine, corrective labor, or up to 3 years of imprisonment. CC art. 376.

Notwithstanding these statutory provisions, there is a widespread perception that judiciary is highly corrupt and that judgments usually depend on the official or financial status of the parties rather than on the merits of a particular case. This perception is typically stronger with respect to commercial courts and resolution of corporate disputes. See, e.g., Blue Ribbon Commission for Ukraine, *A NEW WAVE OF REFORM: PROPOSALS FOR THE PRESIDENT* at 30 (UNDP, 2005); U.S. Department of State, *Ukraine, in COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2004* (Feb. 28, 2005); BLACK & BLUE CONCEPT PAPER at 7. In the wake of the SCU’s decision in *Yushchenko v. CEC*, which clearly ruled against the interests of incumbent regime, many people hoped it would become a positive example for other courts, making them more fair and independent, but have since become disillusioned. As a result, the overall level of public confidence in the judiciary remains low, with a number of surveys suggesting that as many as 40-60% of the population do not trust the courts. In a perceptions survey conducted by Transparency International, the judiciary tied with the customs authorities and the police as the most corrupt sector of the society, receiving a score of 4.1 on 1-5 scale (where 5 means extremely corrupt). See TRANSPARENCY INTERNATIONAL, *REPORT ON THE GLOBAL CORRUPTION BAROMETER 2005*, at 4-5 & Table 9 (Dec. 2005) [hereinafter *GLOBAL CORRUPTION BAROMETER 2005*]. Nevertheless, only about half a dozen of judges are prosecuted annually on corruption charges, and not a single individual was prosecuted under CC Article 376 throughout 2003-2005.

According to various reports, judges may experience external interference in their decision-making from a variety of sources. First, judicial decisions are said to be influenced by parties, advocates, and other private interests, usually through offers of bribes for issuing an illegal judgment or for creating procedural barriers to resolution of a case. Several respondents even quoted fixed “rates” for obtaining a favorable court decision, dependent on a court’s location, the type of dispute, and the amount at stake. Reportedly, advocates may act as intermediaries in these schemes, and their fees sometimes incorporate an agreed-upon judge’s “fee” unbeknownst to a party. As documented in a recent study, judges also receive bribes for performing their duties in accordance with the law, under traditional “presumptions of mandatory gratitude,” and few judges actually extort or even hint at bribes. In addition, bribes are not necessarily limited to receipt of monetary benefits but also include so-called “household” corruption (e.g., accepting free medical services or other benefits of a personal nature) or performance of specific services (e.g., office repairs) in exchange for a positive outcome. See generally CIDA & MOJ REPORT at 15-18. The Report also pointed out a peculiar phenomenon of “a judge-dependent,” who regularly receives payments from certain political, business or organized crime groups, in exchange for being on a standby in case there is need for judicial “intervention.” *Id.* at 70.

Judicial decisions are also apparently subject to interference from various players within the judicial system, most significantly the court chairmen. There is a widespread belief that these officials are the “true masters of judges” and can influence them in numerous ways, ranging from assigning cases through approving judicial vacation schedules or awarding bonuses. Some court chairmen attempt to directly control the outcome of all cases on their court by pre-approving each judgment. It is reportedly common for a judge to pay a visit to court chairman to discuss case circumstances and his/her vision before issuing a judgment, a practice that is regarded as normal by most judges. See *A Court at the Power Crossroads*, 27 MIRROR WEEKLY (2005). At the same time, most court chairmen are themselves dependent on local or national authorities, as well as commercial interests, making it easier for these actors to manipulate any given judge without ever contacting him/her, channeling all influence through a court chairman. Nevertheless, some respondents felt that there are a number of court chairmen, particularly in smaller towns where transparency is greater and stakes are lower, who never attempt to interfere with the day-to-day work of other judges.

A less prevalent mechanism of influencing judicial decisions from within the judiciary stems from the power of appellate and higher-level courts to provide “methodical assistance on application of the law” by immediate lower courts. LJS arts. 26, 39, 47, 49. This practice is, in theory, intended to ensure uniform application of the law by lower courts. In practice, however, this reportedly opens avenues for interference and non-procedural dependence of judges from different levels of courts. In some instances, such assistance is manifested in informal instructions by appellate judges on how to decide a specific case or editing draft local court judgments. However, most judges view this practice as a welcomed advice on how to avoid legal errors in their judgments rather than a form of non-procedural interference.

Most judges are reluctant to discuss manifestations of internal improper interference in the administration of justice. Consequently, no judges openly admit to the prevalence of bribery, and most see any interference from other judges as normal business conduct. By contrast, almost all judges are rather straightforward about the improper influence coming from other branches of government, as well as from prosecutors, advocates, and the media. Thus, government officials employ multiple means to influence the judiciary, ranging from letters, phone calls or personal visits to judges or court chairmen through open criticism of specific judicial decisions that diverge from their vision of justice. Regrettably, it does not appear that the new government has so far managed to improve the record of its predecessor, and in some instances has gone even further to diminish the already low public confidence in the judiciary. For example, during a recent CMU session, the Prime Minister has reportedly expressed his dissatisfaction with a series of court judgments on a particular politicized issue and suggested “to compile a list of judges who issued such non-objective decisions and to publish it on the ministry’s website.” See Press Service of the CMU, *Prime Minister Demands Dismissal of Officials Responsible for Illegal Meat Imports into Ukraine* (Jan. 25, 2006). Some reports also suggest an increase in the number of top-level requests to resolve a particular dispute “on the merits and according to the law,” while at the same time presenting arguments in favor of a particular party whose rights are supposedly violated. Requests like these often result from attempts by VRU members to abuse their right to file formal interpellations related to particular cases pending before the courts, despite the 1999 CCU decision prohibiting such actions. To create the appearance of complying with the Court’s ruling, these petitions have simply taken a more subtle form of official letters addressed to judges. In addition, many of these requests have recently involved individuals assembling in front of the President’s office, who were referred to the courts after speaking personally with the President, and whose arguments had no merits as they were simply dissatisfied with the outcomes of their cases following full judicial review. See, e.g., *Judicial Power: Aspects of Independence*, 20 MIRROR WEEKLY (2005); *Rumors about Total Judicial Corruption are Somewhat Exaggerated: Interview with Vasyl Maliarenko*, 22 MIRROR WEEKLY (2005). VRU members also have an additional vehicle for controlling judges during their initial 5-year term, as they will have to come before the VRU if they wish to be elected permanently. Some of them reportedly analyze all decisions issued by these judges to check whether they may have affected their interests, and have openly threatened judges with election-related “consequences” if they fail to act to their bidding. Because of these threats, most judges feel significantly more dependent during their initial tenure.

Perhaps the most damaging and high-profile example of improper government interference that underscores the overall lack of respect towards the judiciary was manifested in the recent controversial remarks by the Minister of Justice. In November 2005, a local court in Kyiv reviewed a complaint by the former Prosecutor General contesting his removal from office and held that the President overstepped his authority in issuing that decision. In response the Minister, representing the President, appealed the judgment, followed by a series of television interviews in which he repeatedly accused the court of committing a professional crime, which should be prosecuted accordingly. The Minister also referred to the actual judgment as an arbitrary farce, “a total absurd[, and] the ultimate manifestation of judicial idiocy, lunacy, and cynicism.” He went further to suggest that these features are characteristic of the entire judiciary, with a governing “judicial mafia” at the top, concluding that he “would not wish for any citizen of Ukraine to seek protection of his rights from such judges, as one should no longer count on their sense of fairness.” See *Piskun Starting and Winning*, 46 MIRROR WEEKLY (2005); *A Popular-Heroic-Mafioso Judiciary*, 48 ZAKON & BIZNES (2005). Needless to say, all judges and non-judicial respondents alike, including representatives of the legislature and the executive, prosecutors, and advocates, found these remarks unacceptable. Both the COJ and the SCU Chairman issued formal statements calling for the Minister’s resignation and contending that his comments are a way of influencing the appellate court

in considering his appeal, as well as other courts which would now have to think twice before issuing a judgment that goes against the Minister's demands. Most judges interviewed felt that such unsubstantiated accusations and derogatory language put in doubt the very existence of judiciary as an independent branch of government and make it difficult to command respect of the regular users of court system. Some judges believed that, aside from being unethical and legally illiterate, these remarks also constitute a crime under CC Article 376. Finally, a number of judges pointed out to specific decisions of the ECHR that prohibit such criticism of court decisions, a particular irony given the fact that the Minister is regarded as the leading domestic authority on the ECHR and has suggested that the Ukrainian judges are not familiar with the European law.

In recent past, the judiciary has also been under significant pressure from the prosecutors. For instance, in September 2004, then-Prosecutor General issued an internal instruction requiring prosecutors, *inter alia*, to actively collect information on all judges and otherwise analyze their work on specific cases; to present their findings in print and broadcast media; and to report to their superiors on specific achievements in implementing this order on a monthly basis. See *Encroaching Upon the Independence of Judges: Prosecutor General Wishes to Participate in 'Formation of Judicial Corps,'* 40 YURIDICHESKAYA PRAKTIKA (2004). In a specific illustration of this interference, several appellate judges formally complained to the Ombudsmen that prosecutors attempt to interfere in their work by using psychological pressure and demanding access to case files unrelated to cases in which they participate. To its credit, the COJ immediately issued a statement condemning this latent interference in the administration of justice and demanding the Prosecutor General to repeal this document.

Further, judges felt that their decisions are often influenced by negative publicity created by increasingly "fashionable" media reports, which misstate or omit facts, or otherwise misinterpret their decisions. They reported that media, frequently working in tandem with advocates of a losing party, publish exposés related to pending cases, essentially lobbying on behalf of a certain party under the pretext of high aspirations. As a result, public opinion is largely formulated by views of the few individuals with particular resentment against the courts. See also generally NIJA MONITORING REPORT (2005). In addition, a number of judges and prosecutors blamed advocates for openly misleading their clients to believe that judges are, in fact, corrupt. They reported about a seemingly popular corrupt scheme where advocates, knowing the merits of a particular case, inform their clients that they are willing to pass a bribe on to a judge for a certain resolution, without ever intending to do so. In one oblast, an advocate was reportedly prosecuted on fraud charges for running such a scheme, but no conviction resulted. Obviously, examples like these and critical media campaigns perpetuate a negative stereotype that all judges are corrupt.

Finally, judges brought to the assessment team's attention a relatively recent form of interference with the judicial decision-making, which is arguably a by-product of the Orange Revolution. These include various pickets, hunger strikes, demonstrations and the like held outside of the court buildings which, as most judges believe, are organized by different political actors attempting to achieve certain outcomes in specific cases. For example, one political party recently picketed the HCC building demanding the resignation of its Chairman; this action prevented entry into the building by judges and the public alike and reportedly caused over 60 court sessions to be rescheduled. Such occurrences have apparently become more common in the run-up to March 2006 Parliamentary election. Most judges feel uneasy about this "street pressure," suggesting that it stems from lack of popular understanding that courts are not a proper forum for electoral campaign sites.

Many believe that improper interference with judicial decisions is facilitated by low judicial salaries, arguing that they make it difficult for judges to resist the offers of easy additional income. However, almost everyone, including the judges, agrees that increasing judicial salaries alone is insufficient to prevent corruption. The problem may be more of a societal issue, as contemporary Ukrainian society is known for its high degree of corruption tolerance, and many people do not see a difference between a bribe and a "gratuity" to a government official. Indeed, a recent survey illustrated that only 4.7% of businessmen believe that corruption in the judiciary hinders business development, while 35% of the population and 55% of businessmen reportedly feel nothing when giving a bribe, as it is a common practice. See CIDA & MOJ REPORT at 8-9. Similarly, as evident from the Transparency International survey, 82% of the Ukrainian respondents who paid bribes during the past year offered to do so in

exchange for services they were entitled to; interestingly, this percentage is significantly above both the regional and the global averages (61% and 49%, respectively). By contrast, only 24% reported paying a bribe that was directly solicited by a public official; this number is lower than respective regional and global averages (29% and 43%). See GLOBAL CORRUPTION BAROMETER 2005, at 13-15; full source data tables available at [http://www.transparency.org/policy\\_research/surveys\\_indices/gcb](http://www.transparency.org/policy_research/surveys_indices/gcb). This information suggests that corruption in Ukraine is often a supply-side rather than a demand-side phenomenon.

Most judges believe that any allegations or perceptions of improper influence on the judiciary should be substantiated by specific facts of proven misconduct rather than being based on hearsay. Also, the few negative examples that are reported in the media should not, by default, be extended as characteristic of the entire judicial system. To support their contention that public confidence is not adequately represented by various opinion polls, they often argue that the number of cases filed with the courts is constantly increasing, that most civil and commercial disputes are resolved in favor of the plaintiffs, and that only a small percentage of judgments are appealed, signifying that most court users are satisfied with their performance. Further, while most observers agree that because corruption has permeated the entire Ukrainian society, it is impossible to expect the judiciary to remain its only “clean” segment, the fact that a number of them believed that honest judges do exist in Ukraine is encouraging. Some judges apparently manage to stay free of influence by keeping their office doors open at all times, while others, including among deputy chairmen of appellate courts, make every effort to avoid any contacts with the government. Some judges also reported that they were able to build a reputation of being immune to any forms of interference early on in their tenures, and that attempts at influencing them have indeed ceased over time. These examples serve as a proof for a well-known statement that judges need to start respecting themselves before they can be respected by the rest of the society. See Bohdan A. Futey, *Rule of Law in Ukraine: A Step Forward or Backward?*, in ESTABLISHING THE RULE OF LAW IN UKRAINE 235, 249 (YURINKOM INTER 2005) In his letter No. 1-5/671 dated September 5, 2005, the Chairman of the SCU urged the judges to “show courage in resisting any attempts at interference” by reporting all suspected facts to their court chairmen or to higher courts and forwarding copies of all official letters requesting “assistance” with a particular dispute to the SCU for their subsequent publication. In addition, he recommended that judges’ office telephones have recording devices installed as both a preventive measure and a source of evidence of alleged interference. While some of these recommendations may seem overly intrusive, measures like these, as well as a recent Anti-Corruption Action Plan for the HCC, are certainly promising developments.

## Factor 21: Code of Ethics

***A judicial code of ethics exists to address major issues such as conflicts of interest, ex parte communications, and inappropriate political activity, and judges are required to receive training concerning this code both before taking office and during their tenure.***

<b>Conclusion</b>	<b>Correlation: Neutral</b>
<p>The Congress of Judges adopted the Code of Professional Ethics for Judges, which is somewhat repetitive of ethics provisions included in other pieces of legislation. The Code is, in theory, binding on all judges, although few judges seem to think so and judges cannot be disciplined for breaching the Code. As a result, the Code remains a mere declaration that fails to effectively address major issues such as conflicts of interests or <i>ex parte</i> communications. There is no requirement that judges undergo ethics training.</p>	

### Analysis/Background:

The Congress of Judges of Ukraine approved the Code of Professional Ethics for Judges [hereinafter Code] in October 2002, which replaced the provisional Code of Judicial Ethics of 2000. The Code consists of a Preamble and 12 broad, vaguely worded articles addressing in general terms issues such as

duty to strengthen public confidence in the judiciary (art. 1), conflicts of interest and avoiding external influence (art. 2), prohibition on political activity (art. 3), diligence and competence (art. 5), confidentiality (art. 6), duty to be tactful, courteous and respectful towards the parties (art. 7), and equality and non-discrimination (arts. 9-10). While the Code should, in theory, be mandatory for all judges in Ukraine by virtue of its adoption by the Congress of Judges (see LJS art. 112.3), this purpose is seemingly defeated by the Code's Preamble, which states that it "may not be used as a ground for disciplinary responsibility of judges ... [a]lthough judges should aspire to follow these norms in their professional, civic, and private affairs." To make the matters more complicated, many terms used in the Code, such as duty of judges to exhibit conduct that would be beyond reproach in the opinion of a reasonable observer (art. 12) or to avoid conduct that discredits the judiciary (art. 4), have apparently been borrowed directly from the common law legal tradition and lack definitions in the domestic law. Nonetheless, a representative of the COJ interviewed confirmed that the Code is, in fact, binding on all judges.

In addition, a number of the Code's ethical standards are repetitive of provisions set forth by the Law on Status of Judges. Thus, the Law provides for the following duties of judges: to ensure comprehensive, objective, and timely consideration of cases; to preserve confidential information that became known to them in the course of closed court hearings; and to abstain from any actions that discredit the judiciary or can raise doubts as to a judge's objectivity, impartiality and independence. See art. 6. Judges must take an oath of office prior to assuming their duties, in which they commit to perform these duties honestly and diligently, to be bound only by the law, and to be objective and fair. *Id.* art. 10. Further, judges are not permitted to "belong to political parties and trade unions, take part in any political activity, hold a representative mandate, occupy any other paid positions, perform other remunerated work except scholarly, teaching and creative activity." CONST. art. 127, LAW ON STATUS OF JUDGES art. 5; LCC art. 16.

While most judges interviewed are aware of the Code's existence, no one, even those at the highest levels of the judiciary, seemed to think that it is binding or to have a solid familiarity with its provisions. Some judges thought that, because it is a "code", it must be approved by the VRU in order for judges to be bound by it. A number of judges were also convinced that the Code is nothing more but yet another mechanism for taking revenge against undesired judges. Further, largely because of the overlap between the Code and the statutory provisions on judicial conduct, many judges, including those on the SCU, do not feel that they need to have a separate code of ethics to guide their actions. In fact, quite a few judges believed that they should be ethical by virtue of internal perceptions or some unwritten rules.

As a result of this lack of acceptance, the Code has so far remained a formal declaration and has not become an effective instrument in regulation of judicial conduct. Thus, conflict of interests situations are allegedly frequent; indeed, an expert poll conducted for the CIDA & MOJ Report found that "40-70% of judges regularly face conflicts of interest." See CIDA & MOJ REPORT at 74. Judges, especially in smaller towns, are reportedly often rude or arrogant towards the parties or advocates, arrive late for scheduled court sessions, attempt to humiliate the parties, use psychological pressure, particularly against juvenile criminal defendants, and do not follow basic ethical norms. Apparently, some also disregard the constitutional prohibition on political activity, as evidenced by the fact that several judges, including Chairmen of the SCU and the HCC, are on candidates' lists of political parties running for the March 2006 Parliamentary election.

Further, *ex parte* communication between judges and parties, which are not directly prohibited by procedural rules or the Code, are reportedly commonplace. Such contacts most frequently take form of office hours regularly held by most local judges, during which they personally receive complaints, consult potential parties on the merits of a case and voice their opinion about likely outcome. This practice remains confined largely to the majority of local courts, as most appellate and higher courts, as well as commercial courts, instituted policies prohibiting it. Although the new CIVPC, unlike its predecessor, prohibits the public from filing complaints directly with the judges, many still try to follow the old procedures in the hopes of receiving free legal advice. In addition, in September 2005 the SCU issued a recommendation to all judges to avoid any *ex parte* communications, and some appellate courts extend the prohibition on such contacts to all judges within their oblast, initiatives that were reportedly welcomed by most judges. At the same time, many local judges believe it would be unlawful for them to stop conducting office hours because procedural laws and instructions issued pursuant to the Law on Petitions

of Citizens seemingly require them to be available to talk directly to the public on any issues. However, a number of local courts attempt to deal with this problem by assigning several judicial assistants or other non-judicial personnel to conduct office hours on a full time basis on behalf of all judges in the court. For example, in Ivano-Frankivsk City Court, only designated court staff may hold office hours and respond to questions concerning specific cases, while court chairman, his deputies and assistants hold office hours to review complaints and other petitions, provided they are not related to a particular pending case. All other judges are expressly prohibited from having *ex parte* communications, either through office hours or through telephone conversations. In the latter instance, if anyone outside the court would like to speak with a judge, he/she must first call a judge's secretary who may connect the caller in accordance with a judge's instruction.

The COJ is attempting to raise judicial awareness about the ethical rules, including the binding nature of the Code. For example, it published brochures with the text of the Code, which were distributed to every judge in Ukraine. Nonetheless, the progress so far has admittedly been limited, as there are no real consequences for breaching the Code. In addition, it was suggested that these efforts at times do not find sufficient support from court chairmen. Judicial ethics issues also do not feature prominently on the agendas of various judicial training programs, and only a couple ad hoc seminars have been devoted to these issues. For example, the AOJ conducted a two-day seminar in 2004 on Judicial Ethics, Independence and Impartiality (with funding from the Council of Europe), which was open to judges who teach at the AOJ. The French Embassy in Ukraine has also sponsored several seminars on judicial ethics organized by the Center for Judicial Studies, the Institutes for Training of Professional Judges in Kharkiv and Odessa, and Kyiv City Appellate Court. ABA/CEELI had touched upon judicial ethics issues in a number of its judicial seminars.

## Factor 22: Judicial Conduct Complaint Process

***A meaningful process exists under which other judges, lawyers, and the public may register complaints concerning judicial conduct.***

<b>Conclusion</b>	<b>Correlation: Neutral</b>
<p>A process exists under which other judges, lawyers, and the public may register complaints concerning judicial conduct, and this process is actively utilized. However, most complaints are unjustified and represent attempts to revise judicial decisions outside of the formal appellate or cassation process. Review of the complaints is not fully transparent and is often cursory, as insufficient resources are dedicated to this purpose.</p>	

### Analysis/Background:

Constitution guarantees everyone “the right to file individual or collective petitions, or to personally appeal to bodies of state power, bodies of local self-government, and to the officials and officers of these bodies, that are obliged to consider the petitions and to provide a substantiated reply...” See art. 40; see also generally LAW ON PETITIONS OF CITIZENS (BVR, No. 47/1996, art. 256; last amended BVR, No. 11/2005, art. 200). This Law sets forth the process under which the public may register complaints, including those concerning judicial conduct, and the procedure for reviewing such complaints.

Public complaints concerning judicial conduct should be registered with entities and officials entitled to initiate disciplinary proceedings against judges. In practice, complaints are most frequently filed with court chairmen, as well as with higher-level courts, regional councils of judges and the COJ, qualification commissions of judges, and the HCJ. These complaints need to be justified, because the law prohibits instituting disciplinary proceedings against judges on the basis of a complaint that does not provide facts of alleged misconduct or breach of oath by a judge, as well as pursuant to anonymous complaints. See LJS art. 97.4. Additionally, complaints concerning judicial misconduct are often registered with other

government agencies and officials, including the SJA, the MOJ, the Ombudsmen, the VRU and local councils, and the President of Ukraine.

The assessment team was unable to obtain accurate nationwide data regarding the number of complaints against judges, although some figures suggest the magnitude and may be indicative of the overall trends. For example, the COJ received 4,458 complaints against judicial misconduct through the end of September 2005, while the HQCJ received over 1,000 complaints. In 2004, the COJ and the HQCJ jointly received over 8,000 complaints. The number of complaints received by the COJ has grown threefold since 2003. The council of judges of commercial courts received over 6,000 complaints in 2004, while the HCC typically receives about 40 complaints per year against its judges, and about 600 complaints against lower commercial court judges. Kharkiv oblast council of judges received about 2,000 complaints in 2005, compared to about 200 complaints received by the Kyiv city council of judges. The MOJ received about 3,500 complaints against judges in 2004, and this number has grown twice over 2005. Secretariat of the President receives around 1,600 letters daily, over half of which allegedly involve complaints against the judiciary, the procuracy, and the police.

To streamline the review of complaints, the COJ issued a recommendation in March 2005 addressed to chairmen of appellate courts and oblast councils of judges to set up judicial inspectorates consisting of experienced judges. However, this effort did not succeed as in most oblasts it turned out to be impossible to find judges willing to undertake these additional responsibilities. The MOJ has likewise suggested that it does not have sufficient capacity or powers to review most of the complaints it receives, and is able to submit only several dozens petitions to the qualification commissions or the HCJ to institute disciplinary proceedings against judges. Occasionally, the MOJ cooperates with the COJ by requesting that it delegates review of the complaints to oblast councils of judges, who would then file their own disciplinary petitions.

Most recipients of complaints against judges confirmed that the vast majority of complaints, perhaps as many as 80-90% of them, are unjustified and are nothing more than an attempt to alter judicial decisions through non-procedural means, including decisions that were reviewed and affirmed by several levels of courts. Such complaints are typically written as petitions for appellate review, alleging that a judge violated substantive or procedural law in the course of the trial or in issuing the decision. In other words, the public is using the existing judicial conduct complaint process as another avenue for appeal. The process is often channeled through petitions by VRU members to judicial qualification commissions, presented as a “strongly encouraged request” to institute disciplinary proceedings and remove a judge from office, with a losing party’s complaint attached. In addition, some complaints also contain offensive or insulting language with respect to judges. Overall, the reviewing entities were unable to verify the allegations of the complaints in most cases. Nonetheless, there are occasional motivated complaints that allege, for instance, excessive procedural delays by judges, breaches of judicial ethics, or failure to provide access to judgments and case files.

These problems are perhaps best illustrated by data on complaints against judges that were received by Odessa oblast branch of the SJA, council of judges, and qualification commission of judges in 2005, which was provided to the assessment team. Thus, the oblast branch of the SJA received 153 complaints, which were related to procedural actions of judges (70), procedural delays (31), appeals of judicial decisions (15), failure to provide access to case files (11), and unethical conduct by judges (2). Only 14 of these complaints turned out to be justified. The oblast council of judges received 575 complaints, related to violation of substantive or procedural law by judges (208), procedural delays (136), requests to institute disciplinary proceedings against judges (62), appeals of judicial decisions (36), unethical conduct by judges (30), and failure to provide access to case files (29). The allegations were deemed justified in only 24 of these complaints. Finally, the circuit qualification commission received 132 complaints, concerning requests to institute disciplinary proceedings against judges (40) and procedural delays (20); only 3 of these complaints were found justified. While most complaints are submitted by individuals or legal entities directly affected by judicial actions, there were also a number of petitions filed by higher-level courts and the HCJ, as well as by the MOJ and its oblast departments, the SJA, the Ombudsmen, VRU and local council members, regional executive authorities, and the President’s office.

Most judges are aware of these problems and have expressed their frustration about the abuse of complaint process by the public, which they see as a manifestation of legal nihilism and generally low level of legal culture within the society. Some also suggested that the law should prevent agencies or officials outside of the judicial branch from reviewing complaints against judges.

### **Factor 23: Public and Media Access to Proceedings**

*Courtroom proceedings are open to, and can accommodate, the public and the media.*

<b>Conclusion</b>	<b>Correlation: Neutral</b>
<p>Court proceedings are generally open to the public and the media; however, there are several broad exceptions to this principle that may be used to restrict media and public access to hearings, particularly in high-profile cases. In addition, lack of courtroom space in most courts often makes it impossible to accommodate those wishing to observe a trial. Commercial courts are frequently criticized as being the least accessible of all courts.</p>	

#### Analysis/Background:

Publicity of a trial is among the main constitutional principles of judicial proceedings. CONST. art. 129(7). Procedural codes establish a general rule that hearings in all cases are public, and closed trials may be conducted pursuant to a court's decision only in exceptional cases provided by procedural laws. See LJS art. 9.3. At the same time, information on time and place of court hearings can in no circumstances be held secret from the parties. CIVPC art. 6.2; CAJ art. 12.1. Only parties and other case participants can be present in the courtroom during the closed hearings. CIVPC art. 6.5; CAJ art. 12.4. Public may attend the CCU proceedings if seats are available, although a separate section of the courtroom is allocated to accredited mass media. CCU PROCEDURAL REGULATIONS § 41.

Different procedural codes set forth different grounds that may trigger a court's decision on conducting closed hearings. All codes allow for non-public hearings in order to protect state or other secret. See also CCU PROCEDURAL REGULATIONS § 31.4. In civil cases, additional grounds include the need to protect the secrecy of adoption or to prevent the disclosure of information related to intimate relations of the parties or that may humiliate their dignity. CIVPC art. 6.1, 6.3. Hearings in administrative cases may also be closed to the public in order to protect individual privacy, interests of minors, or in other circumstances set forth by law. However, if a court, in the course of a closed trial, decides that the protected information may be of high social importance, the hearings will be conducted in public. CAJ arts. 12.3, 12.5. Criminal trials may further be closed to the public in cases involving crimes committed by individuals under the age of 16, sexual crimes, to prevent the disclosure of information related to intimate relations of the parties, and in the interests of victim and witness protection. CRIMPC art. 20. In addition, persons under the age of 16 may not be present in a courtroom during criminal trial, unless they are defendants, victims or witnesses in the case. *Id.* art. 271. Finally, in commercial cases, a court may decide to hold closed hearings if it is necessary to protect state, commercial or banking secret, or if one the parties submit a motivated motion requesting a closed hearing. COMPC art. 4<sup>4</sup>.

Those present in the courtroom during an open trial may take notes and use portable audio-recording devices, while photography, filming, video or audio recording by stationary devices, and TV or radio broadcasting of the trial are allowed only with a permission of the court and with the consent of parties (other than government entities in administrative trials, who may not object to such recording). See LJS art. 9.2; CIVPC art. 6.8; CAJ art. 12.8.

In practice, even though attempts to attend trials by the media or the public are rare (except for trials in high-profile cases) judges are often unable to ensure public and media access to court proceedings, as they typically hear cases in their offices rather than in the courtrooms. Lack of courtrooms and

scheduling conflicts also frequently result in last-moment rescheduling of the posted hearings, which is a source of significant frustration for journalists. According to judges, however, although most of them try to be considerate of their colleagues' schedules, conflicts like these are inevitable given the shortage of courtrooms. Nevertheless, most judges responded that they never, or rarely, attempt to prevent access to hearings by the public or the media, unless there are space constraints or one of the parties submits a motion to that effect. Most also believe that only those judges who are unsure of their positions or have something to hide may be afraid of publicity. A number of judges supported the idea of having televised trials, suggesting that this would have disciplining effect on the parties and their advocates who allegedly behave disrespectfully in the court. They also believe that greater trial openness would change the public opinion about the judiciary. These responses mirror the results of a 2004 survey conducted by the Support for Independent Media Project, which showed that 65% of judges were not bothered by media presence during the hearings, and 55% of judges even felt that this disciplines the parties. See *Free Press and Independent Judiciary: Conflict or Mutual Understanding?*, 13 YURYDYCHNA GAZETA (2004). This positive attitude towards trial publicity may have also been inspired by the December 2004 SCU's proceedings in the dispute over the fraudulent Presidential election results. In order to ensure complete transparency, the SCU made an unprecedented, at the time, decision to allow live television broadcast of the entire hearings.

At the same time, media respondents were quite skeptical about openness of the court proceedings and felt that most judges actually try to restrict media access or prohibit the use of cameras or audio-recording without any justification. In addition, many find the lines and personal searches of those wishing to enter the buildings of some higher courts humiliating. Journalists reported that one local court in Kyiv routinely denies access to journalists, and that they are sometimes excluded from hearings in high-profile or politicized cases. The assessment team received a confirmation of this claim during its visit to Ukraine, which coincided with the start of the preliminary court proceedings against former police officers accused of murdering an independent journalist Georgi Gongadze. The case has been at the forefront of the public's attention since late 2000, when the journalist's headless body was found in the woods near Kyiv and tapes secretly made by a former Presidential bodyguard alleged that the murder took place upon orders from President Kuchma. Despite this publicity, Kyiv City Appellate Court did not allow the journalists to observe the opening session citing space constraints, while court police units were physically blocking the doors into the courthouse. When the journalists subsequently attempted to enter the building by force to observe the trial, the court tried to close the trial to public and the media, under a pretext that some of the evidence may be classified as a state secret, a claim that has been rejected by advocates of Gongadze's relatives. The court also attempted to prohibit photography and video recording, granting a motion of one of the defendants who argued that his health is too sensitive and such recording makes his blood pressure go up. In response to these actions, the Institute of Regional Mass Media and the National Union of Journalists petitioned the President to interfere and ensure their constitutionally guaranteed right to access this trial, which the President took under consideration and implored the court to conduct the hearings in public.

The HCC, and other commercial courts to a lesser extent, were described by many as the most closed courts in the country, and many respondents believed that it is almost impossible for non-parties or those without a power of attorney or connections within the court to go past security in those courts. This frustration was also shared by some judges on other general courts. For example, in order to enter the building of the HCC and observe a trial, one must request an advance building pass from one of the judges on the reviewing panel. Representatives of the HCC interviewed argued that they usually permit media in the courtrooms if there is space, although they admitted actually having space concerns during high-profile trials.

There are generally few problems with openness of the CCU proceedings, and media as well as law students and legal scholars frequently attend the CCU sessions.

The CCU, the SCU, and the HCC, as well as a number of appellate courts have press offices or PR specialists on their staff, although media respondents found most of these efforts inefficient. One notable exception was the Press Office of the CCU, which they felt is sincerely trying to help the journalists better understand the Court's procedures and judgments but does not yet have sufficient capacity to do so.

## Factor 24: Publication of Judicial Decisions

***Judicial decisions are generally a matter of public record, and significant appellate opinions are published and open to academic and public scrutiny.***

<b>Conclusion</b>	<b>Correlation: Negative</b>
<p>Most judicial decisions are not a matter of public records and only parties are entitled to access them; even then, however, it is sometimes difficult to obtain copies of decisions. Others must typically receive permission from a court chairman in order to access a particular decision. Only the CCU opinions, as well as most SCU and HCC decisions are regularly published. Lack of public access to judgments results in lack of uniformity in applying the law and numerous conflicting decisions in factually similar cases. A law providing for publication of all court decisions on the Internet was recently adopted but is yet to come into force.</p>	

### Analysis/Background:

The law currently guarantees access to copies of judicial decisions and other information on results of consideration of a case by court only to the parties and other participants in the case. LJS art. 9.1; CIVPC art. 6.9; CAJ art. 12. Judgments are announced immediately following the completion of hearings, although the court may postpone the writing of a full judgment by up to 5 days, provided that it states its conclusion during the session. CIVPC arts. 209, 218; CRIMPC art. 341; CAJ arts. 160, 167; COMPC art. 85. Copies of civil and commercial judgments must be mailed to parties via registered mail with delivery confirmation within 5 days after they are issued. CIVPC art. 222; COMPC art. 87. Copy of a criminal verdict must be provided to a defendant within 3 days after it is issued. CRIMPC art. 344. The court must mail a copy of a decision in and administrative case the following day after it is issued. CAJ art. 167.

However, the new procedural codes also contain provisions that anyone can access texts of judgments issued in the course of public court proceedings, unless the information contained in the decision is of confidential nature. See, e.g., CAJ art. 12. Nonetheless, the law currently in effect requires official publication only of the CCU's judgments, which are published in its BULLETIN. LCC art. 67. In addition, the SCU and high specialized courts also have official journals, which publish texts of their decisions and other materials. See LJS arts. 46, 57.3. These periodicals include BULLETIN OF THE SCU and PRACTICE OF THE HCC, and the HAC is planning to begin publishing its own Bulletin when there will be a sufficient number of judgments to publish. While these journals include the majority of judgments issued by these courts, they do not contain texts of all their decisions. In addition, these publications are not supplied to lower courts free of charge, and each court must subscribe to them individually; in practice, most courts purchase one copy of such periodicals, which is stored in the library. In addition, the SCU sends copies of its judgments and resolutions of the Plenary Assembly to all appellate court chairmen, who should distribute them to lower courts, as well as to the MOJ and major law schools. The HCC no longer sends copies of its judgments to lower courts, because they are accessible through the internal network of commercial courts. The majority of highest court judgments are also published on their respective websites, <http://www.ccu.gov.ua> (CCU), <http://www.scourt.gov.ua> (SCU), and <http://www.arbitr.gov.ua> (HCC).

Judgments of appellate and local courts are not published in any centralized manner. A number of commercial legal periodicals selectively publish texts of some judgments, but only a very small percentage of decisions is published in this manner. In addition, most appellate courts regularly analyze decisions issued by courts within their oblast and compile summaries on general trends and errors, which they send to local courts or use in trainings they organize for oblast judges. Otherwise, it is impossible for judges to obtain copies of decisions of their colleagues or information about judgments from other oblasts. There is no meaningful opportunity for non-parties or representatives of the media to obtain copies of court decisions directly from the courts, unless they receive permission from a court chairman. While some court chairmen are reportedly quite open to such requests and frequently grant such

permissions, this varies greatly from court to court. Some courts also prepare abstracts of judgments in high-profile cases, which are distributed to the media as press releases. Further, parties are not prohibited from disseminating copies of judgments in their cases in any form they wish. As a result, journalists typically receive copies of judgments from advocates of a losing party.

At the same time, there are reportedly instances when even the parties face obstacles with obtaining copies of decisions in their cases in a timely manner. Some courts attempt to justify this refusal by saying that decisions are not in force until approved by a higher court. See CIDA & MOJ REPORT at 17. In one local court in Kyiv, for instance, the chairman introduced a standing prohibition on providing copies of judgments to the parties until he personally reviewed them, and the court's secretariat would not file any final judgments unless they were countersigned by the chairman. See *Judicial Reform ... According to Territoriality*, 18 MIRROR WEEKLY (2004).

Inaccessibility of court decisions results in numerous problems, most importantly the lack of uniform court practice. Courts frequently issue conflicting judgments in cases with similar factual background, or interpret the same law in a different manner. Lack of clear rules to allocate the subject matter jurisdiction between different types of courts makes it possible for the same case to be considered simultaneously by, for example, both a general and a commercial court, who may issue two mutually exclusive rulings. A recent article mentioned an example where eight different courts issued eight separate judgments in the same case in the course of one day. See *A Court at the Power Crossroads*, 27 MIRROR WEEKLY (2005). Judges are also less concerned about the quality of judgments as they are not subject to public scrutiny. Indeed, many judges do not follow procedural rules when writing their judgments, and fail to accurately describe the factual circumstances of a case, the evidence examined or the rationale behind their conclusion, or even to use proper legal terminology. See SCU, *Quality of Writing of Court Decisions in Criminal Cases and Cases on Administrative Offenses* (Aug. 1, 2004).

The government and most judges recognize the lack of transparency in court decisions as a serious problem. Almost all judges interviewed spoke in favor of having all judgments published and accessible to the public, as they believe they have nothing to hide in their decisions. They feel this would raise the public confidence in the judiciary, as well as allow the judges to learn how other courts have ruled in similar matters, thus contributing to greater uniformity and stability in the application of the law. Publication would also help judges avoid legal errors in their decisions. Some judges even went as far as to hope that publication of their decisions would be helpful to their future colleagues, stating that they would be proud if their judgments are cited. Nonetheless, some judges felt like they should not be required to write a full judgment in every case, arguing that because over 90% of judgments are never appealed and therefore full judgments should be written only at the request of parties (for example, if they intend to file an appeal).

To address this problem, the VRU passed the LAW ON ACCESS TO COURT DECISIONS at the end of December 2005, which is currently scheduled to come into force on June 1, 2006 (see BVR, No. 15/2006, art. 128). The new Law guarantees everyone the right to view a text of any court decision. See art. 2. To ensure this, the SJA is mandated to set up a Uniform Register of Court Decisions, which will be freely accessible through the official Web portal of the Ukrainian judiciary (<http://www.court.gov.ua>) and will include all judgments issued by courts of general jurisdiction. *Id.* arts. 3-4. Texts of decisions available to the public will be encrypted, so that any information that may identify an individual or is related to information disclosed during a closed court session will be accessible only to judges and parties. *Id.* arts. 7, 4.5. For purposes of the Law, such identifying information includes names and contact information of individuals and vehicle registration numbers; it does not include names of judges who issued a decision and names of government officials whose participation in a case was a part of their official duties. *Id.* art. 7. In addition, if a non-party believes that a judgment directly affects his/her rights, he/she may apply in writing to the court that issued this decision and request to be provided with a full text of the decision. *Id.* art. 9. The SJA must begin adding judgments from all courts, except local general courts, and regularly updating the Register by June 1, 2006; for local general courts, the deadline is set at January 1, 2007. *Id.* art. 11.3.

It remains to be seen how this new Law will be implemented in practice, although the SJA is optimistic. It already began testing the pilot software and conducted an open tender for the technical administrator of the Register, which was won by the Judicial Information Center, a state-owned company that currently runs the internal network of commercial courts. The Register will initially be funded by the State Budget, but it is expected that eventually it will be financed with proceeds from fees for information support of court proceedings envisioned by the new procedural codes.

## Factor 25: Maintenance of Trial Records

***A transcript or some other reliable record of courtroom proceedings is maintained and is available to the public.***

<b>Conclusion</b>	<b>Correlation: Negative</b>
<p>Although the Constitution provides for full technical recording of proceedings, recent introduction of such requirement in all civil and administrative proceedings made it clear that the judiciary is unprepared to comply with this mandate due to shortage of courtrooms where recording equipment can be installed. As a result, the only records of proceedings are the protocols summarizing the key points of the trial, which are prepared in longhand by court session secretaries and are often of poor quality. Protocols and other case materials are available only to the parties, but there are obstacles to exercising this right due to lack of space to review case files and the equipment to make copies.</p>	

### Analysis/Background:

Complete recording of trial by technical means is one of the fundamental constitutional principles of judicial proceedings. See CONST. art. 129(7); LJS art. 9.4. Until recently, however, procedural laws provided that such recording is mandatory only upon the request of one of the parties and are prepared in addition to the protocols, with a copy of both a protocol and audio recording attached to the case files. See, e.g., CRIMPC arts. 87, 87<sup>1</sup>; COMPC art. 81<sup>1</sup>. The protocol, which is kept in all criminal and commercial proceedings, serves as the main record of the trial and includes all significant information related to the course of the trial and summaries all procedural actions in the order they were taken, such as all orders of a judge, summaries of the parties' motions, detailed summaries of the testimonies, evidence analyzed in the proceedings, brief summaries of the oral arguments, and the judgment announced. CRIMPC art. 87; COMPC art. 81<sup>1</sup>. The protocol is prepared by a court session secretary. CRIMPC art. 87<sup>1</sup>; COMPC art. 81<sup>1</sup>. If an audio recording is prepared in addition to the protocol, it can be played at the appellate or cassation court, as well as to assist the judge in ruling on the objections filed with respect to the protocol. CRIMPC art. 88<sup>2</sup>; COMPC art. 81<sup>1</sup>. In addition, parties and anyone present in the courtroom may now conduct their own recording using portable audio equipment, without a separate permission from the court. LJS art. 9.2.

This situation should have changed with the adoption of the new CIVPC and CAJ, which became effective on September 1, 2005. According to these Codes, full trial recording by audio technical means became mandatory in all civil and administrative cases, and such recording was recognized as the only official record of court proceedings. CIVPC arts. 6.10-6.11, 197; CAJ arts. 12.6, 41. In addition, court session secretaries must keep a log of a court session, which includes information on each procedural action undertaken in the course of the session. CIVPC art. 198; CAJ art. 42. To implement these provisions, in July 2005 the SJA issued an *Instruction on Procedure for Recording of Trial by Technical Means* (see Order No. 84/2005; OG, No. 32/2005, art. 1974).

These provisions were seen as a significant improvement. Protocols are usually handwritten and not verbatim but simply summarize the key points of testimonies and other procedural actions taken during the hearings. Because they are prepared by court session secretaries who do not have a law degree, important information may frequently be left out, because secretaries are unable to distinguish between

substantial and insubstantial points. Some judges also complained that they are frequently forced to rewrite grammatically incorrect protocols prepared by secretaries. In addition, there are reportedly numerous instances when protocols are falsified, by amending them to a judge's dictation after the end of the court session, in order to "fit" them to a specific judgment. See, e.g., CIDA & MOJ REPORT at 17. Nonetheless, judges seemed to prefer having trials audio-recorded despite thinking that such recording takes up significantly more time and will cost the judiciary an additional UAH 25 million (US\$ 5 million) per year to cover the costs of diskettes or CD-ROMs.

At the same time, when full trial recording became mandatory in September, courts found themselves unprepared and paralyzed, since they lacked proper conditions to implement the recording. Parties throughout the country who were scheduled to appear before the courts received formal notices stating that their trials have been rescheduled due to lack of recording equipment in the courts. Consequently, one week after their effective date both Codes were amended, postponing the mandatory technical recording of trials until January 2008. In the meantime, courts will be required to audio record the trial only upon a motion of one of the parties, and would follow the old procedures of preparing court session protocols in the remaining cases. See generally CIVPC Transitional Provisions § 2<sup>1</sup>; CAJ Transitional Provisions § 2<sup>1</sup>.

The SJA, which by law is responsible for providing the courts with technical equipment for trial recording, defended its actions by saying that it did purchase a sufficient number of audio recording sets for the courts. Specifically, it reported having bought a total of 2,522 sets throughout 2004-2005, sufficient to cover 100% of needs of the appellate courts and over 90% of needs of the local courts. It further clarified that this means one audio recording set was installed in each courtroom, as the law appears to prohibit installation of such equipment elsewhere, including in judges' offices. In addition, the AOJ organized trainings on operating the new recording equipment and recording rules, in which most court secretaries participated. Therefore, the SJA believes that the suspension of rules that mandate complete trial recording was primarily the result of insufficient courtroom space rather than of lack of equipment. Nonetheless, at least a few judges interviewed denied the SJA's claim that courts are fully equipped with recording equipment. For example, some judges reported that only one recording set is available for the entire court, which sometimes exceeds 20 judges. Some judges also said that while their courts have a sufficient number of recording sets, they are based on outdated technologies that require the records to be manually transcribed instead of being printed out automatically.

If a party requests to have the trial fully recorded by technical means, such motions are typically granted. However, because most judges hear cases in their offices rather than in the courtrooms, it is frequently necessary to wait, sometimes for a substantial period, until a courtroom becomes available. As a result, some judges reportedly discourage such requests and they are rare in practice.

#### **FULL RECORDING OF TRIALS BY TECHNICAL MEANS (thousand trials)**

	<b>Criminal Trials</b>	<b>Civil Trials</b>
<b>2003</b>	2.9	1.2
<b>2004</b>	3.4	4.9
<b>2005 (Jan.-June)</b>	2.7	3.5*

Source: SCU, ANALYSIS OF COURTS PERFORMANCE IN 2003, 2004, AND THE FIRST SIX MONTHS OF 2005.

\* When trial recording in civil cases became mandatory in September 2005, over 20 thousand civil trials were reportedly recorded. See Speech by the SCU Chairman at the 7th Annual Congress of Judges (Nov. 2, 2005).

Parties have the right to review the case files, including the protocols, court session logs and audio recordings and to file their objections. CIVPC art. 199; CRIMPC art. 88; CAJ arts. 43, 119; COMPC art. 81<sup>1</sup>; see also *Temporary Instruction on Case Management for Local General Courts* § 19.1 (approved by the SJA Order No. 20/2005; see OG, No. 13/2005, art. 694) [hereinafter *Temporary Instruction*]; *Instruction on Case Management for Commercial Courts of Ukraine* § 3.7 (approved by Order of HCC Chairman No. 75/2002; see 1 GAZETTE OF THE COMMERCIAL JUDICIARY (2003)) [hereinafter *Instruction*]. However, in criminal and commercial proceedings, a decision on whether to provide a copy of the audio

recording to the parties is made by a judge on a case by case basis. CRIMPC art. 88<sup>2</sup>; COMPC art. 81<sup>1</sup>. Further, in commercial proceedings, case files may be reviewed only with the permission of a judge to whom a case is assigned, or with the permission of court chairmen for completed cases. *Instruction* § 3.7. In addition, parties may file a request to have audio recording reproduced, receive copies, and have the record transcribed in part or in full, for an additional fee, as well as make copies of any case materials. CIVPC art. 197.5-6; CAJ art. 44. Case files are not accessible to non-parties, although court chairmen may permit students who are doing an internship or writing a thesis under the supervision of a judge to obtain access to materials directly relevant to their research topic. *See Temporary Instruction* § 19.2. Those who receive case files for review must sign in a special log, and a court employee must also sign that log when a case file is returned and to verify that all materials are in order. *Id.* § 19.3. Once a case file has been transferred to the archive, anyone wishing to review it must obtain a prior permission from a court chairman. *Id.* § 20.7; *Instruction* § 20.10.

In practice, there are problems with ensuring the access to trial records even by the parties. Most courts lack space for review of case files or the equipment to make copies. Many courts have only one room for document review, while some, such as Kyiv Oblast Appellate Court, have only one small desk for this purpose in a clerk’s office. This means that parties in different cases must reserve the room in advance, and there apparently are instances when parties fail to show understanding and demand to be provided with access to case files immediately. To make copies of records, parties must usually supply their own equipment. In Kyiv and other large cities, they usually come prepared with their own portable Xeroxes or digital cameras, but elsewhere the needed text is simply copied by hand. In addition, there are reportedly occasional instances when certain materials are stolen or misplaced, or when parties make their own marks, cross out information, or tear out pages. To limit such occurrences, most courts allow review of case files only in the presence of a judge or a court employee. In commercial courts, case files may be reviewed only in the presence of a judge to whom the case is assigned or a court employee designated by that judge, because they must be located in a judge’s office for the entire duration of a trial. *Instruction* §§ 3.7, 21.2.

A number of judges reported that police or prosecution officers at times abuse their rights and subpoena case files, under the pretext that they are necessary for a pending criminal investigation. Court rules prohibit denying such requests, although they may be granted only upon a court chairman’s written permission. *See Temporary Instruction* § 19.4; *Instruction* § 3.8. In such instances, the courts are typically instructed to treat the case file as lost and start collection of materials anew, although a court employee may be allowed a to make copies of such materials in the presence of a police officer. In other instances, the police may intentionally “lose” the case files and report to the court that they have no record of ever requesting or receiving these documents. Most judges believe this is a form of external influence on their decision making and a way to delay proceedings.

## VI. Efficiency

### Factor 26: Court Support Staff

***Each judge has the basic human resource support necessary to do his or her job, e.g., adequate support staff to handle documentation and legal research.***

<b>Conclusion</b>	<b>Correlation: Neutral</b>
<p>Most judges have the basic human resource support to assist them with handling documentation and legal research, although few local court judges rely on their support staff for conducting initial research or drafting decisions. Courts also have secretariats that provide logistical support. However, low salaries and limited career opportunities make it difficult to attract and retain qualified court personnel. Creating new court staff positions has also been problematic, purportedly due to the lack of funding.</p>	

## Analysis/Background:

Each court has its own secretariat responsible for providing logistical, methodological, and informational support. Court staff positions include, among others, court session secretaries, judicial assistants (similar to law clerks), research consultants, court bailiffs, accountants, statisticians, case management specialists, librarians, archivists, and others. Chief of a court secretariat is subordinated to the court chairman and must also coordinate his work with the oblast branch of the SJA. All court staff have the status of civil servants. Structure and statutory number of court staff of local and appellate courts are set by the Chairman of the SJA upon a recommendation of the court chairman, within the approved budgetary allocations. LJS art. 130. In practice, according to the SJA, it must submit its proposal on increasing the number of court staff to the CMU, which provides the formal approval. The structure and number of the SCU and high specialized courts' staff are approved by the respective court's presidium upon a recommendation of the its chairman. Within the approved statutory number of positions, court chairmen are responsible for hiring, promoting and dismissing court support staff, assigning bonuses, and imposing disciplinary sanctions. *Id.* arts. 24, 28, 41, 50.

Each justice of the SCU, the CCU, and the high specialized courts has a judicial assistant, who must be a citizen of Ukraine and have a higher legal education. *Id.* arts. 40.2, 49.2; LCC art. 25. For law clerks of the SCU justices, an additional requirement is at least 3 years of experience in the field of law. LJS art. 49.2. Further, chief of the CCU's secretariat must meet the requirements that are established for a professional judge. LCC art. 32. In addition, each chamber of the SCU has a group of research consultants attached to it. LJS art. 53.9. Finally, these courts have research and consultative councils to draft interpretations on application of the law, issue opinions on draft laws, and assist with other research requests. *Id.* arts. 45, 57; CCU PROCEDURAL REGULATIONS § 73. The law does not list any special requirements for staff of these departments, although it does say that the SCU's research council must consist of highly qualified professionals in the field of law. Similar councils also reportedly exist in some appellate courts.

### **SUPPORT PERSONNEL IN UKRAINIAN COURTS (as of late 2004)**

<b>Court level</b>	<b>Statutory number of positions</b>	<b>Actual number of court staff</b>	<b>Number of vacancies</b>
<b>Local general courts</b>	13,782	13,085	697
<b>Appellate general courts</b>	1,930	1,537	182
<b>Local commercial courts</b>	2,187	1,544	643
<b>Appellate commercial courts</b>	1,025	684	341
<b>Military courts</b>	280	233	48
<b>TOTAL</b>	<b>19,204</b>	<b>17,083</b>	<b>2,122</b>

Source: SJA Report.

In practice, each SCU justice has a judicial assistant assigned to him/her, who also perform the functions of court session secretaries. Likewise, each justice on the HCC has one assistant. Each CCU justice has a judicial assistant and a research consultant. In most local courts, each judge has a judicial assistant and a court session secretary assigned to him/her and does not have to share these staff with other judges. At the same time, situation appears to be worse in the appellate courts, where a judicial assistant is usually assigned to several judges. For example, 15 judges of the criminal chamber of Ivano-Frankivsk Oblast Appellate Court must share two assistants and one secretary, and must obtain prior permission to use these staff from the head of the court's secretariat. Although each judge on the Kyiv City Commercial Appellate Court has a judicial assistant, a court session secretary and a research consultant are assigned to assist three judges. There is a shortage of court session secretaries in Odessa Oblast Appellate Court, and judicial assistants de fact perform their functions in addition to their regular duties. Overall, all appellate judges interviewed felt that the number of court staff employed by these courts is insufficient. In addition, there is a shortage of court bailiffs who must assist with maintaining order in the courtrooms (see Factor 9 for details). While the SJA estimates that at least 2,543 court bailiffs (and UAH 624,000 (US\$

125,000) per year) are necessary to comply with procedural rules, there were only 1,048 court bailiffs as of late 2005. Many courts have only one bailiff on their staff.

Some judges, particularly those on the commercial courts as well as on the higher-level courts, allow their judicial assistants to conduct initial research and draft judgments and other procedural documents. Nevertheless, most local court judges believe that, because judicial assistants are not mentioned in the procedural laws, they should not be allowed to perform any procedural actions, and drafting a judgment arguably constitutes such an action. Further, many judges feel that their assistants are not qualified to draft a high-quality procedural document, and that it would take them longer to revise such drafts than to write decisions themselves. In practice, therefore, most judicial assistants on local courts are assigned to review minor administrative offenses, where there are no contentious issues, and to write judgments in these cases, on which the judges simply sign off.

Low salaries and perceived lack of career growth opportunities within the judicial system are the main reasons behind the problems with attracting and retaining qualified personnel to the Ukrainian courts. At the local court level, the base salary of court session secretary is UAH 182 (US\$ 36) per month, while the base salary of a judicial assistant (who must have a law degree) is UAH 210 (US\$ 42) per month. They are entitled to receive additional allowances for length of service and civil service rank, but not to any additional monetary allowances available to judges. As a result, court session secretaries actually receive about UAH 250 (US\$ 50) per month, while judicial assistants receive about UAH 350 (US\$ 70) per month. At the appellate courts, judicial assistants are paid about UAH 400-500 (US\$ 80-100) per month, while research consultants are paid about UAH 300-350 (US\$60-70) per month. Other court employees in local courts reportedly receive between UAH 180-270 (US\$ 36-54) per month, and UAH 200-300 (US\$ 40-60) per month in appellate courts. Low salaries have been a source of numerous complaints to the SCU filed by court staff from almost every court in the country. Many judicial assistants take these low-paid jobs with the hopes of themselves becoming judges; reportedly, this is the aspiration of as many as three quarters of newly hired judicial assistants. However, as described in Factor 2, few manage to succeed in their endeavors. Consequently, most judicial assistants apparently view these positions as an opportunity to make connections or receive experience and first-hand knowledge of the work of the courts, and quickly move on to more lucrative employment options with private law firms.

Another problem relates to the selection of court staff, a process which is completely dependent on court chairmen. Although the civil service legislation requires that hiring of civil servants must be competitive and based on the results of qualification examinations, these rules are rarely followed in the selection of court support personnel. For example, hiring of court staff for the HCC is reportedly based only on an interview with the Court's Chairman. Judges are usually unable to hire their own judicial assistants. While some court chairmen allow the judges who transfer from different courts to bring along their previous assistants, many refuse to do so claiming that no vacancies are available on the court. Only the CCU justices may independently select their assistants and research consultants, who may not be hired or removed without a justice's consent. CCU PROCEDURAL REGULATIONS § 74.3.

The government recognizes the problems with staffing and salaries of courts support personnel. For example, in 2004, the SJA developed proposals that would significantly increase the number of court staff. These include, for example, creating the positions of chief accountant, cashier, statistician, as well as IT and HR specialists in each local court. Of all these positions, the SJA views accountants as the priority, because every legal entity must, by law, have such position; in the absence of accountant, it has so far been impossible to grant legal entity status to local courts, even though they are defined as such under LJS Article 130.7. If approved, the proposal would increase the statutory number of local court staff by 5,843 positions, and that of appellate court staff by 310 positions. However, as mentioned above, such proposal must first be approved by the CMU, which has so far failed to act on it, reportedly due to the lack of funding. In addition, the SJA is proposing to improve the financial situation of court personnel by allowing court chairmen to award to them bonuses for "special conditions of civil service" in the amount of up to 100% of their base salary.

The government is also making effort to raise the level of qualification of court staff. Per statutory requirements (LJS art. 129.2(2)), the AOJ, through its regional branches, has been implementing various

training programs for them. For instance, over 5,000 court session secretaries were trained in various technical skills during 2005. The AOJ also conducted week-long qualification sessions for 161 court session secretaries, 178 court secretaries, 43 bailiffs, and 60 appellate court statisticians, as well as separate trainings for 324 judicial assistants from local, appellate, and commercial courts. Nonetheless, although the Judicial Training Concept Paper requires court staff to participate in 2-week trainings once in 3 years, in practice this depends on the requirements imposed by each judge on his/her staff.

## Factor 27: Judicial Positions

***A system exists so that new judicial positions are created as needed.***

<b>Conclusion</b>	<b>Correlation: Negative</b>
<p>In theory, a system exists so that new judicial positions are created as needed. However, lack of funding to support the new positions has meant that it is almost impossible to increase the number of judges in response to growing caseloads. This makes it difficult for most judges to adhere to procedural mandates regarding timeliness of proceedings and other requirements. The number of judicial vacancies has also remained high and relatively stable over the past several years.</p>	

### Analysis/Background:

The President of Ukraine “establishes courts by the procedure determined by law.” CONST. art. 106(23). He acts upon a recommendation of the Minister of Justice, with the consent of the SCU or high specialized court chairman. Courts can be established or liquidated if any of the following grounds exist: change in the administrative division of the country, reorganization of Armed Forces, or change of the structure of the courts. LJS art. 20. The President also determines the statutory number of judicial positions upon a recommendation of the Chairman of the SJA, with the consent of Chairman of the SCU or high specialized court. In doing so, the courts’ caseload, the recommended standard workload of judges, and the budgetary allocations available for the judiciary must be taken into account. *Id.* arts. 20.4, 43.2(8), 54.3(8). The SJA jointly with the COJ analyze the caseload of the courts and develop proposals on the number of judges for each individual court. *Id.* art. 126(17); see also PROGRAM FOR ORGANIZATIONAL SUPPORT OF THE COURTS, Action 9.

The network of courts and number of statutory judicial positions in courts of general jurisdiction are regulated by a series of Presidential Decrees issued since 2001. See Decrees No. 641/2001 (local general courts); No. 642/2001 (appellate general courts); No. 511/2001 (commercial courts); No. 769/2001 (military courts); No. 1417/2004 (administrative courts); No. 995/2002 (HAC); and No. 1427/2005 (SCU). The number of SCU justices (18) is fixed by the Constitution. See art. 148.

### NUMBER OF JUDGES IN UKRAINIAN COURTS

Type of courts	Number of courts (Oct. 2005)	Statutory number of judges (Oct. 2005)	Vacancies			2005 vacancies as %
			2003	2004	2005 (Oct.)*	
Local general	666	4,550	670	536	460	10.1
Appellate general	27	1,739	480	475	420	24.2
Local commercial	27	638	n/a	n/a	40	6.3
Appellate commercial	11	341	79	80	60	17.6
Local military	17	89	n/a	n/a	20	22.5
Appellate military	4	43	n/a	n/a	8	18.6
Local administrative	27	215	n/a	215	212	98.6
Appellate administrative	7	66	n/a	66	44	66.7
Total: local and appellate**	786	7,681	1,322	1,208	1,018	13.3

HCC	1	95	n/a	n/a	16	16.8
HAC	1	65	n/a	n/a	24	36.9
SCU	1	95	n/a	n/a	13	13.7
CCU	1	18	n/a	n/a	13	72.2

Source: SCU, ANALYSIS OF COURTS PERFORMANCE IN 2003 AND 2004; SJA Report (for 2005 data); websites of the highest courts (for actual number of judges on respective courts).

\* Data on high court vacancies are as of early 2006. Further, as explained above in Factor 5, 9 of the 13 CCU vacancies were filled in November 2005 but justices are unable to begin exercising their duties due to failure on the part of the VRU to conduct a swearing-in ceremony.

\*\* The total number and percentage of *vacancies* for local and appellate courts excludes administrative courts.

Although the legally specified procedure for changing the statutory number of judges is relatively simple, in reality it is reportedly almost impossible to increase their number in response to growing caseload or population growth due to lack of funding to support the newly created positions. In addition, at least several judges reported that the success of their requests to create additional judicial positions has been dependent on personal relationship between a respective court chairman and the chief of the SJA's oblast branch. Lack of resources is also one of the primary reasons behind the relatively stable number of judicial vacancies, particularly in appellate general courts. Most of them reportedly do not have sufficient space to set up offices for new judges. Other reasons that apparently contribute to judicial vacancies include low salaries that make it difficult to attract a sufficient number of candidates, excessive workloads, difficulties with securing employment and educational opportunities for family members (in rural areas), and negative image of the judicial profession in media reports.

The number of cases filed with the courts has been steadily increasing over the past 15 years. For instance, it reportedly grew by 2.4 times since 2000. This also resulted in a significant increase in the average monthly workload of each judge. At the same time, this workload is not distributed evenly between the courts: while some local courts receive about 35 cases per judge per month, others may go as high as 250-300 cases. Appellate as well as military courts have significantly lower workloads than local or high courts, and a number of respondents suggested that appellate court workload is about 30-40% of their full capacity. Judges on civil chambers of appellate courts, however, reported that their caseloads are significantly higher than those of their colleagues on criminal chambers.

#### CASES FILED WITH COURTS

Court level	2003	2004	2005 (Jan.-June)
Local general courts	5,864,610	6,400,000	2,989,851
Civil cases	1,589,906	1,900,000	846,613
Criminal cases	612,022	522,000	277,871
Administrative offenses	3,419,453	3,650,000	1,848,938
Appellate general courts	122,000	151,000	79,000
Local commercial courts	221,256	279,300	131,602
SCU	48,000	67,000	31,000

Source: SCU, ANALYSIS OF COURTS PERFORMANCE IN 2003, 2004, AND THE FIRST SIX MONTHS OF 2005.

#### AVERAGE WORKLOAD OF JUDGES (number of cases per judge per month)<sup>12</sup>

Court level	2003	2004	2005 (Jan.-June only)
Local general courts	113	121	116.5
Civil cases	32	37	32.9

<sup>12</sup> It should be noted that official statistics calculates judicial workloads per statutory number of judges (listed in the abovementioned Presidential Decrees) and does not take into account existing vacancies or division of judges into different chambers. As a result, the actual workloads are higher than shown in this Table.

Criminal cases	4	4.6	4.6
Administrative offenses	68	73	72.1
Appellate general courts	6.6	8.5	8.4
Local military courts	15	27	26.2
Appellate military courts	2	2.7	3
Local commercial courts	32	40	37
Appellate commercial courts	n/a	12.8	n/a
HCC	n/a	35	n/a
SCU	51	75	67

Source: SCU, ANALYSIS OF COURTS PERFORMANCE IN 2003, 2004, AND THE FIRST SIX MONTHS OF 2005.

The current caseloads mean that judges have, on average, 30-40 minutes to complete each case (from reviewing case materials to issuing a judgment). Judges attempt to deal with these workloads by prioritizing cases, although there are no formal rules to guide this process. Thus, criminal cases where defendant is in pretrial detention, housing, labor and personal injury disputes, as well as cases involving civil liberties (e.g., election-related disputes) receive a priority. Nevertheless, it is usually impossible for to adhere to procedural requirements. It is typical for a judge to schedule 10-11 hearings per day, often without breaking between different sessions. Many judges reportedly work 14-hour work days and weekends, and some schedule hearings for 10 pm. Judges also frequently require that parties state all arguments in writing and restrict their time for oral arguments, in violation of CivPC requirements. Some appellate courts allot only 30 minutes per session in each case.

Significantly, many judges are unable to comply with procedural mandates that cases be resolved within a reasonable term, which usually means two months from the filing date. See CivPC art. 157; CAJ art. 122; COMPC art. 69. At the same time, 2-3 months sometimes passes before a judge is able to schedule a hearing, and it is not uncommon for recess between sessions in the same case to take just as long. According to the SJA, about 20% of civil and 10% of criminal cases are resolved with procedural delays, and about 25% of civil and 15% of criminal cases are backlogged each year; in some oblasts, mostly in the eastern and southern parts of Ukraine, these numbers go as high as 40-50%. This issue has also come up in 6 cases decided by the ECHR against Ukraine, with about 40 more cases involving this issue were accepted by the ECHR for review on the merits.

Judges and other observers believe that there are a number of ways to ease the workload of judges. First, about 60% of the courts' caseload is made up of administrative offenses (petty misdemeanors with a 2-month statute of limitations), in which there is no controversy per se. About 85% of these cases are related to minor traffic infractions, punishable by a fine of UAH 3.5-17 (US\$ 0.7-3.4), which were transferred from the police to the courts in 2002. Many of these proceedings are terminated due to expiry of the statute of limitations. Most judges feel that the government is actually wasting the scarce money by having these cases reviewed in courts, as the cost of paper and postage expenses alone is about UAH 10 (US\$ 2).

Many judges also suggested that the timeliness of proceedings can be improved by simplifying certain procedural rules. For example, the new CivPC mandates that preliminary hearing be conducted in each civil trial. CivPC arts. 129, 130.1, 130.7. According to most judges, this hearing is almost fully duplicative of the regular hearing and is nothing more than a legislative way to delay the proceedings. At least three separate sessions are now reportedly required in each civil case, although prior to these changes about two thirds of all civil disputes could be resolved over a single session. This and other deficiencies of many new codes can be arguably attributed to the fact that there have been no consultations with local or appellate judges during the drafting stages.

Some judges also observed that because they are required, by procedural laws and other court rules, to perform numerous functions that are not directly related to the administration of justice (such as case assignment or public office hours), this leaves them with less time to review cases, and suggested that these functions should be assigned to court support personnel. In practice, a similar arrangement has worked well for the model Ivano-Frankivsk City Court where, since 2002, all functions related to

movement of a case within a court (from registration and assignment through controlling the compliance with procedural terms and archiving) are supported by a court's administrative staff, while judges' duties are limited to adjudicating the cases. The court's caseload grew almost four-fold between 2000 and 2004, while the number of judges has remained constant at 12. The court has coped with this caseload with an enviable success. Despite having one of the highest workloads per judge (246 cases in 2005), it has been able to dispose of over 96% of these cases in a timely manner (up from 91% in 2000).

Finally, the process of creating and liquidating courts has reportedly been subject to manipulation. For example, in March 2004, 146 local city and district courts were liquidated, and 73 merged city-district courts were established in their place. The proffered reason was to even out the workload of these courts. However, this measure was criticized sharply in contemporaneous press reports, which suggested that there were no statutory grounds for this merger and that the true reason was to establish executive control over the courts by means of unconstitutional reassignment of court chairmen. See, e.g., *Judicial Reform ... According to Territoriality*, 18 MIRROR WEEKLY (2004). Similarly, realignment of appellate commercial court boundaries and creation of several new courts by the old government was reportedly caused by a desire of certain oblast governors to have their own pocket commercial courts rather than by growing caseloads. Jurisdiction of some of these courts now extends to only one oblast. As a result, the new government is now contemplating to revert to the original regional division.

## Factor 28: Case Filing and Tracking Systems

***The judicial system maintains a case filing and tracking system that ensures cases are heard in a reasonably efficient manner.***

<b>Conclusion</b>	<b>Correlation: Negative</b>
<p>Most courts operate manual case filing and tracking systems, which are open to abuse and fail to ensure that cases are heard in a reasonably efficient manner. Some model courts have designed their own case management systems that enable greater effectiveness in adjudication of disputes, and the SJA will consider eventually expanding such systems to other courts. It also expects that most courts will have automated case filing and tracking systems in place by the end of 2007.</p>	

### Analysis/Background:

Case filing and tracking rules are prescribed by a case management instructions for local general and commercial courts (see Factor 25). The two documents set forth the rules on handling complaints and other case materials from the moment they are received by the court until their transferred into the archives. All judges and court employees are responsible for safekeeping of case files. *Temporary Instruction* § 1.7; *Instruction* §§ 1.9, 21.1. Complaints or other documents received by a court must be filed by the registrar's office on the same day. If complaints are received directly by judges during their office hours, these must be immediately transferred to the registrar's office for proper registration. In addition, a person who submitted the complaint may obtain a "Received" stamp on his/her copy of the document, signed and dated by a court employee. No later than the next business day after this registration, complaints must also be registered on registration (index) cards or in registration log, as well as in alphabetical indices that are kept separately for different categories of cases according to subject matter jurisdiction. Alphabetical indices are prepared according to the names of the parties. Each category of cases in general courts is assigned a fixed numerical index of 1 through 8, and each case number consists of the respective index and the ordinal number of the registration card, followed by the last two digits of the current calendar year (for example, a civil case may be numbered as No. 2-30/05). At the end of the calendar year, all cases that were not completed must be renumbered chronologically, in the order of their filing. If a case is remanded from a higher-level court, it is registered as a new filing and assigned a new case number. These rules differ somewhat for commercial courts. After registration, complaints are first transferred to court or chamber chairman, who assign cases to judges. They also

assign numbers to cases, consisting of the ordinal number of a judge to which a case is assigned and the ordinal number of a case in the current year's docket of that judge (for example, No. 3/40). If a commercial case is appealed, it may not be registered under a different number at the appellate or cassation court. Regardless of the type of court, all future correspondence and materials related to a particular case will be filed under the assigned registration number and attached to a case file in chronological order.

After a case is properly registered, the registrar's office transfers the case file to a judge to whom it was assigned, who must verify the receipt by signing in a special control log, which is kept separately for every judge on a court. Once a case is completed and a judgment is issued, or if the hearing is postponed, a judge must return a complete case file to the registrar's office; this must occur no later than the next business day after a respective decision was issued. This, as well as any other information on the movement of a case within the court is also recorded on registration cards, presumably to enable easy tracking of the case.

In practice, most courts operate their case filing and tracking systems manually. This system is reportedly subject to abuse. For instance, a number of advocates complained that court employees, particularly outside of large cities, often refuse to stamp their copy of complaint as "Received," which means that the only way to ensure that documents have, in fact, been received is to mail them via registered mail. Registrar's office also allegedly refuse to accept complaints, advising the parties that they must be mailed rather than filed in person or citing some formal grounds, such as excessive formalities, or mis-sequence documents and fail to register them in a timely manner. Finally, despite the seemingly strict rules that require tracking the movement of a case within the court, there are instances when registrar's offices misplace or lose the case files. See *also* CIDA & MOJ REPORT at 17.

A noteworthy example of a well-functioning case filing and tracking system exists at the model Ivano-Frankivsk City Court.<sup>13</sup> As aptly described by its chairman, this system is akin to a technical production line, where all staff perform their duties in a timely manner without special outside control, allowing for speedy and cost-effective adjudication of disputes. To enable easy case tracking, proceedings are subdivided into four basic stages: filing and assignment, adjudication, submission for enforcement, and archiving. Separate units of a court's secretariat are responsible for each stage and must follow hard timing deadlines. Whenever a case file is transferred from one unit to another, a recipient must sign in a control log; thus, responsibility for misplacing a case file or other materials shifts in accordance with each signature. When a complaint is received by the filing and registration unit, its staff reviews whether it meets formal requirements; assigns it to a judge following the rules described in Factor 18 above; schedules a preliminary hearing date; and performs all required registration steps. Once a case has been assigned, the filing officer immediately transfers the file to a judge's secretary, who files it with the information and control unit no later than the next morning. As a general rule, all pending case files must be stored in that unit, which is responsible for coordinating the movement of a case within the court. Each judge has a filing stand, with drawers numbered per each day of a month. Case files are placed into drawers according to their scheduled hearing date, and a secretary takes them out on a judge's behalf only on that date. If there is a recess, a secretary must return a case file to the information unit on the same business day, placing it into a drawer that corresponds to the next hearing date. While judges may study case files outside of the hearings, this must take place when no sessions are scheduled and only during the business hours of the information unit. To control the compliance with these requirements, the unit keeps a case tracking log for each judge, which includes lists of cases that were not re-filed on time, cases that were not scheduled for hearings, and completed cases. Secretaries provide such docket reports for each judge on a daily basis. Once a final judgment on the merits is issued, the case file is immediately transferred to the enforcement unit (consisting of criminal and civil sectors and chancelleries), with an appropriate notification to the information unit. Once all actions related to enforcement of a judgment are complete, the case file is transferred to the archival unit.

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<sup>13</sup> Aspects of this system are also in use in other models courts, although not visited by the assessment team.

The SJA is currently planning to expand the Ivano-Frankivsk model to other model courts, which, presumably, would be followed by eventually introducing this system in all local courts. In the past, there have also been proposals to set up computerized case management systems in model courts, but they were not implemented. The PROGRAM FOR COMPUTERIZATION OF GENERAL COURTS FOR 2004-2006 (adopted by the COJ in April 2004) [hereinafter COMPUTERIZATION PROGRAM] envisions complete transfer to electronic case management system for all courts, a measure that would require UAH 123 million (US\$ 24.6 million). The SJA expects that most courts throughout Ukraine will have electronic case management systems installed by the end of 2007. According to it, the main challenge it faces with implementation of this program is that the majority of local courts do not yet have local computer networks enabled. Commercial courts have their separate internal network, which includes an electronic case management system that enables easy access to electronic versions of various procedural documents. The newly opened palace of justice in Odessa, which houses the local and appellate commercial courts, has an electronic kiosk, installed upon the judges' initiative, which allows anyone familiar with case number or names of the parties to track the complete history of that case within the court. In addition, several courts were able to obtain outside funding and independently set up computerized case management systems. For example, ABA/CEELI developed computerized case flow management software that was piloted in three courts, and outfitted additional model courts with the necessary hardware and software for reception of the SJA's new court documentation software upon the completion of its pilot testing.

## Factor 29: Computers and Office Equipment

*The judicial system operates with a sufficient number of computers and other equipment to enable it to handle its caseload in a reasonably efficient manner.*

<b>Conclusion</b>	<b>Correlation: Negative</b>
<p>The judicial system does not have a sufficient number of computers and other equipment to enable it to handle its caseload in a reasonably efficient manner. Government-supplied computers meet only about 20% of the judiciary's computer needs and most judges, at least in larger cities, usually buy their own computers and other equipment.</p>	

### Analysis/Background:

The SJA is charged with providing technical equipment to the courts, including the equipment necessary for recording of trials by technical means, and with organizing the computerization of the courts for the purposes of administration of justice and case management. LJS art. 126. More specifically, per PROGRAM FOR THE ORGANIZATIONAL SUPPORT OF THE COURTS, the SJA was tasked with setting up a uniform computer network of the Ukrainian courts (Action 31), and with completing the set up of computerized workplaces for judges throughout the country, as well as of local computer networks with access to legal and other information resources (Action 34). In addition, the SJA developed a COMPUTERIZATION PROGRAM, which was approved by the COJ in April 2004. The measures of the latter Program include, *inter alia*: providing a sufficient number of computers to judges and court personnel; creating or modernizing local computer networks in general courts; enabling Internet connection in all general courts; ensuring the transition of the judiciary to the use of licensed software; and setting up a network of regional technical support centers

Of these planned measures, only a handful has so far been fully implemented. Specifically, the SJA did set up a centralized technical support service and a hotline to assist judges and court staff in the use of computers and other equipment, as well as a network of regional support centers in each oblast. The SJA has also taken some steps to implement most other measures. See COJ Decision No. 9/2005, On Implementation of the Program for Computerization of General Courts for 2004-2006.

In practice, only the CCU, the SCU, and the HCC appear to be fully equipped with the computers and other necessary equipment. For all other courts, the SJA reportedly purchased 4,200 computers in 2003-2004, and an additional 2,000 computers in 2005. According to its own estimates, this meets only about 20% of the computer needs of the general courts. In order to fully meet their needs, the government will have to purchase an additional 16,800 computers, for a total of UAH 67.2 million (US\$ 13.4 million). The assessment team was able to confirm during its interviews that the courts are indeed severely under-equipped. Many local court judges believed that the government purchased only two computers per each court, although model courts are apparently better equipped. In Ivano-Frankivsk Oblast Appellate Court, 15 judges on the criminal chamber share 4 computers, but not all of them are in working condition, and no computers available for court staff. While all judges in Kyiv Oblast Appellate Court have government-supplied computers, many of them are likewise not functional. Odessa Oblast Appellate Court recently received the first government installment of 25 computers for 72 judges. These were divided evenly between the civil and the criminal chamber, and judges were told to decide amongst themselves who would get a computer. There is a similar shortage of other equipment in the courts. For example, there is reportedly only one printer for the entire Kyiv City Appellate Commercial Court. In addition, most courts do not have IT staff to maintain computers in proper working order or to perform repairs if necessary.

Most judges reported having to buy their own computers, printers, and other equipment. Many judges also informed that if they do receive any computers from the government, they typically choose to give them to their assistants and secretaries, and purchase their computers at their own expense. As this means that judges must also purchase their own computer software, most resort to buying cheaper pirated versions. A recent audit by the SJA established that 47% of judges are using pirated copies of Microsoft Windows and almost all judges are using pirated Microsoft Office software. To enable the full transition of the judiciary to licensed software, the government would need to come up with about UAH 4 million (US\$ 800,000).

Most judges in Kyiv and other big cities do, in fact, own computers and conventionally use them to write decisions and conduct legal research. Indeed, many feel that they cannot imagine how they would be able to cope with the ever-increasing workload without computers. However, judges from outside the oblast centers, even if they are provided with computers, reportedly do not have the skills to use them, and usually handwrite their decisions.

The SJA has had similarly limited results with the implementation of other measures under the COMPUTERIZATION PROGRAM. For example, it established and maintains the unified Web Portal of Ukrainian Judiciary (<http://www.court.gov.ua>), which includes a separate web page for each court. Most of these websites, however, do not contain any substantive information and the SJA is currently planning to add such information by the end of 2007. The progress has likewise been slow with creation of local computer networks in courts, which would enable judges to access electronic legal databases and online resources, as well as to implement electronic case management systems. As of end of 2004, these were set up in only 93 general courts. In 2006, the SJA is planning to complete creating local computer networks for all appellate courts, and has requested the government to allocate UAH 42.8 million (US\$ 8.6 million) for this purpose.

According to the SJA, it has enabled network connections for the majority of general courts, which means that they, theoretically, should have Internet access. In reality, however, because of the poor telephone lines and frequent service disruptions (including due to the courts' failure to pay the bills) in most areas outside of the major cities, Internet is seen as a luxury for the majority of the courts. Most courts typically have only one computer equipped with Internet access, usually in the library. In addition, over 100 local courts have no Internet connectivity. The SJA has plans to remedy these problems by installing more powerful modems and setting up digital telephone lines in the courts.

Commercial courts are generally regarded to be better equipped than other general courts. For example, the SJA estimates that at present, over 50% of the computer needs of commercial courts are covered with government-supplied computers. In addition, all commercial courts are connected to an internal network run through the Judicial Information Center, which is theoretically accessible by all commercial courts. The searchable database includes information on all cases filed, their procedural standing, and

texts of all interim and final decisions issued in a case. The SJA is using this network as a model in creating a similar system for other general courts.

### **Factor 30: Distribution and Indexing of Current Law**

***A system exists whereby all judges receive current domestic laws and jurisprudence in a timely manner, and there is a nationally recognized system for identifying and organizing changes in the law.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Neutral</i></b>
<p>Each court receives one official copy of all codes and subscription to official periodicals. All courts also have one computer with access to a regularly updated computerized legislation database, which enables them to receive current domestic laws in a timely manner and includes a system for identifying and organizing changes in the law. However, most judges have to purchase legal texts and subscribe to legal periodicals for their own use. There is an antiquated system of updating judges' copies of the codes, whereby a librarian provides judges with printouts of amendments which judges then glue into their individual copies.</p>	

#### Analysis/Background:

Official texts of the laws and other acts issued by the VRU, as well as legal acts issued by the President and the CMU, must be published in one of the print editions designated as official. According to the Decree of the President of Ukraine No. 503/1997, *On the Manner of Official Publication of Legal Acts and Their Coming into Force* (OG, No. 24/1997, art. 11; last amended OG, No. 20/2005, art. 1057), such publications include the OFFICIAL GAZETTE OF UKRAINE (OG), the GOVERNMENT COURIER newspaper and, for laws and other VRU acts, BULLETIN OF THE VERKHOVNA RADA OF UKRAINE (BVR) and VOICE OF UKRAINE newspaper. See § 1. The law entrusts to the MOJ the publication of official texts of laws and Codes of Ukraine, as well as codification and indexing of the current law and maintaining the uniform system of legal informatization. See *MOJ Statute* §§ 4(10)-4(12). In addition to the official print publications mentioned above, the MOJ also has several publications that provide access to systematized official texts of the current laws, with subject matter and alphabetical indices, organized in binders to enable easy removal of outdated pages and insertion of new pages. These include SYSTEMATIC COLLECTION OF EFFECTIVE LEGISLATION OF UKRAINE; multi-volume collections of legislation organized by subject matter; and periodic monthly publication CODES OF UKRAINE.

The SJA is responsible for supplying the courts with texts of the current laws and other legal publications. Specifically, according to PROGRAM FOR THE ORGANIZATIONAL SUPPORT OF THE COURTS, it was charged with organizing the delivery of texts of legislation and codified volumes to the courts (Action 29), enabling the access by the courts to electronic legal databases (Action 32), and establishing a unified electronic library for the judicial system, accessible by every court in the country (Action 22). COMPUTERIZATION PROGRAM further specified that the SJA was to install Liga-Zakon software, a private systematized legal database, in all courts in early 2004, and to update it on a regular basis. Finally, the SJA is responsible for funding court libraries and supplying them with texts of legislation, specialized literature, and case-law materials. LJS arts. 131, 56.2.

The SJA through its oblast branches purchases, in a centralized manner, subscription to official legal publications for all courts. In practice, most courts subscribe to only one copy of such publications, which is kept either in the library/codification department or in the court chairman's office. The SJA purchases official copies of all codes for each court, which can be used by judges to verify the accuracy of citations in their decisions. Local and appellate courts typically have codification departments or individuals responsible for keeping these codes up to date, but the quality of their work varies greatly between the courts. Most judges have to buy their own texts of the laws, codes, and research publications, and

subscribe to legal periodicals for their own use. In some oblasts, for example Kharkiv and Odessa, it was reported that in early 2005 every appellate judge received a copy of all then-current codes, some of them annotated, but most have since become outdated. A librarian or a codification department staff sometimes brings to judges printouts of new laws or amendments to existing laws, which judges then glue into their individual copies of the codes. In addition, many courts organize staff meetings where judges discuss the most important changes and new laws. Despite these efforts, there is a belief among the judges that the SJA is doing a worse job than the MOJ with respect to supplying courts with current texts of the laws and other materials.

The SJA also installed the Liga-Zakon software in each court and is updating it on a weekly basis; however, because most courts do not have local computer networks enabled, in practice only one computer in the court, usually in the library or in the codification department, has access to it. This arrangement is reportedly different in the CCU, the SCU, and high specialized courts, where each judge has a computer with access to Liga-Zakon. In addition, some judges on local and appellate courts subscribe to Liga-Zakon or other private legal databases at their own expense. Access to texts of the current laws will likely become much easier as more courts are connected to the Internet, since the VRU maintains free complete online legal database (<http://zakon.rada.gov.ua>) that contains up-to-date texts of all legislation and is accessible from any computer with Internet connection.

All courts have their own libraries funded by the SJA. The SCU and the CCU have very good libraries, and the government does, in fact, provide sufficient funding to keep them updated. In addition, a number of appellate courts are also reported to have extensive library holdings. Libraries of most local courts, however, have very limited resources and are rarely updated. Their holdings typically include only official copies of the codes and other official publications, as most courts do not have sufficient resources to purchase any materials beyond this. At the end of 2003, the SJA allocated UAH 5 million (US\$ 1 million) to purchase literature for the courts, and each court library should have received 52 separate titles selected jointly by the Chairmen of the SCU and the SJA, although few judges seemed aware of this effort.

Courts also occasionally receive publications from a variety of private sources. For example, a number of judges spoke favorably of the effort by one VRU member (formerly a private advocate) who sponsors the publication of a weekly legal periodical ZAKON & BIZNES, and provides free subscription to it for the courts. In addition, the Ukrainian Legal Foundation, with support of the Renaissance (Soros) Foundation, regularly publishes translations of judgments of the ECHR, which are also provided to the courts free of charge, and judges also receive copies of the laws and international legal materials during various trainings they attend.

## List of Acronyms

<b>AOJ</b>	Academy of Judges
<b>ARC</b>	Autonomous Republic of Crimea
<b>BVR</b>	Bulletin of the Verkhovna Rada of Ukraine
<b>CAJ</b>	Code of Administrative Justice
<b>CC</b>	Criminal Code
<b>CCU</b>	Constitutional Court of Ukraine
<b>CEC</b>	Central Elections Commission
<b>CIDA</b>	Canadian International Development Agency
<b>CivPC</b>	Civil Procedure Code
<b>CLE</b>	Continuing Legal Education
<b>CMU</b>	Cabinet of Ministers of Ukraine
<b>COJ</b>	Council of Judges
<b>ComPC</b>	Commercial Procedure Code
<b>CRIMPC</b>	Criminal Procedure Code
<b>ECHR</b>	European Court of Human Rights
<b>HAC</b>	High Administrative Court
<b>HCC</b>	High Commercial Court
<b>HCJ</b>	High Council of Justice
<b>HQCJ</b>	High Qualification Commission of Judges
<b>JRI</b>	Judicial Reform Index
<b>JTC</b>	Judicial Training Center of the Supreme Court
<b>LCC</b>	Law on the Constitutional Court of Ukraine
<b>LJS</b>	Law on the Judicial System of Ukraine
<b>MOI</b>	Ministry of Interior
<b>MOJ</b>	Ministry of Justice
<b>NIJA</b>	National Independent Judicial Association
<b>OG</b>	Official Gazette of Ukraine
<b>OSCE</b>	Organization for Security and Cooperation in Europe
<b>PACE</b>	Parliamentary Assembly of the Council of Europe
<b>SCU</b>	Supreme Court of Ukraine
<b>SES</b>	State Enforcement Service
<b>SJA</b>	State Judicial Administration
<b>UNDP</b>	United Nations Development Program
<b>USAID</b>	United States Agency for International Development
<b>VRU</b>	Verkhovna Rada (Parliament) of Ukraine