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Rule of law

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According to the United Nations the notion of the "rule of law" stems from many traditions and continents and is intertwined with the evolution of the history of law itself. The Code of Hammourabi, promulgated by the King of Babylon around 1760 BC, is one of the first examples of the codification of law, presented to the public and applying to the acts of the ruler. In the Arab world, a rich tradition of Islamic law embraced the notion of the supremacy of law. Core principles of holding government authority to account and placing the wishes of the populace before the rulers, can be found amid the main moral and philosophical traditions across the Asian continent, including in Confucianism. In the Anglo-American context, the Magna Carta of 1215 was a seminal document, emphasizing the importance of the independence of the judiciary and the role of judicial process as fundamental characteristics of the rule of law. In continental Europe notions of rule of law focused on the nature of the State, particularly on the role of constitutionalism.

Recent attempts to formalize its meaning have drawn on this rich history of diverse understandings. The modern conception of the rule of law has developed as a concept distinct from the "rule of man", involving a system of governance based on non-arbitrary rules as opposed to one based on the power and whim of an absolute ruler. The concept of rule of law is deeply linked to the principle of justice, involving an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs.

Today, the concept of the rule of law is embedded in the Charter of the United Nations. In its Preamble, one of the aims of the UN is "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". For the UN, the Secretary-General defines the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to

the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

The principle of the rule of law applies both at international levels and national levels. Constitution of Ukraine in Article 8 establishes that in Ukraine, the principle of the rule of law is recognised and effective. The Constitution of Ukraine has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it. The norms of the Constitution of Ukraine are norms of direct effect. Appeals to the court in defence of the constitutional rights and freedoms of the individual and citizen directly on the grounds of the Constitution of Ukraine are guaranteed.

In this report I would like to make some points about the rule of law, democratic law-making, independent judiciary and the right to fair trial, being, of course, well aware that each of the items deserve volumes of scholarship.

The irony about the rule of law is that in its essence it is a political principle rather than a legal one. Contexts where it may acquire legal value are thinkable—let’s take for example international loans conditioned upon the debtor state’s pursuing the rule of law in its territory—but generally for strictly legal purposes the idea is perfectly meaningless. Though a political principle, it is tightly knit with law, just as its name implies, and effectively means that, all things equal, when making policy decisions, the obedience to the standing legal rules should prevail over whatever non-legal considerations: social, economic, political, even moral. That proposition can be easily accepted in times of peace and wellbeing but one can start to doubt its plausibility when existential issues are at stake, like the survival of a nation. In such circumstances either better arguments should be suggested than just “good for business”, or one has to agree that the rule of law has its rationetemporis limitations. My understanding would be that the rule of law would be meaningless without the ruled. However, if by “the ruled” we understand collective entities—households, companies, up to whole nations and even the international community—we’ll also have to concede that law is a constructive element for many of them and can be compared to a kind of “social cement”. Thus the emphasised reverence to law can be especially needed in times of existential threat to counter forces of destruction. In other words, law and the rule thereof not only benefit social actors but also create them and keep them in existence.

Law should not be repulsive to be socially constructive, and this proposition leads us to the subject of law-making. Alexandr Zinovyev, a late Russian philosopher, opined that the modern world lives in what he called “legal totalitarianism”, where an ordinary citizen can barely make a step not to injure his interests without consulting a legal adviser, the latter, of course, acting not free of charge. So those who can afford lawyers have a visible edge over those who cannot. Besides important political and social reasons, this situation also has purely juridical roots: the system of rules is vast, contrived and confusing, rules themselves are hard to comprehend without special training. And there is a real contradiction at the core of it all. Being actively engaged in law-making for many

years, I had an opportunity to practically experience it. A good law should be unambiguous, logical and well fit into the whole system of legal acts. However, the more it meets the mentioned criteria, the more incomprehensible it becomes to the uninitiated. To be functional it needs to worded in the language of judges and legal professionals, but to be accepted and adopted it needs to be read by people who have no diploma in law. And no law-making can be properly called “democratic” when only the few actually know and understand what is being made. An efficient solution might be either sacrificing something, or somehow creating a responsible community of legal and extra-legal experts able and willing to serve as bona fide interpreters from and into legalese for the benefit of the broadest public. That’s not as easy as it sounds for a number of reasons. To name but a few. Reflexive and inclusive approach to law-making can only take place when the public sees some clear agenda which is current but stable. In such circumstances, discussion can be held and options debated with legal formalities to crown the outcomes. The sad fact about Ukraine is that politicians don’t really care to create such agendas and sustain them for some meaningful periods of time. If they do, their approach can barely be called reflexive because solutions are proposed without ever formulating the problem in the first place. The good Western usage of preceding pieces of new legislation with much discussed voluminous reports, “white books” and such like analytical materials is not current in Ukraine. Explanatory notes to legislative drafts are short and worded in most general terms. The art of discussion is really hard one. Ukrainian politicians are not unique in their reluctance to stand real discussions. The troubling fact is that what can be loosely called the “expert community” also increasingly shun them. Many state the need in “reforms” but few care to explain what they mean and why they think the need is real.

To rule, law needs being properly applied just as properly adopted, this leading us to the judiciary. Independent judiciary is believed to best guarantee the proper implementation of law. One of the “dictatorship bills” so nefariously promoted by the previous regime contained a prohibition to collect information about judges and as such could be perfectly viewed as yet another guaranty of judicial independence. Nevertheless, its corrupt nature raised little questions then. When talking about independent judiciary, it is critically important to be very particular about the exact things a judge is supposed to be independent from. He or she should be independent from other state organs and officials, from political and business interests, however judges should not be outside of any forms of social control. In Ukrainian circumstances more transparency and more public exposure is in the majority of cases better than less. The secret of the deliberation room is sacrosanct but all other aspects of delivering justice should be open to public scrutiny unless there are really compelling reasons to delay public curiosity for a period of time.

Finally, the right to a fair trial equals to the recognition of the fact that justices, just like the rest of mankind, have no access to the Absolute Truth and hence can make mistaken and unjust decisions. The latter should, nevertheless, be accepted as long as the judges have done everything possible in the circumstances to approach the truth. A trial is just as long as it is fair. Fairness is a procedural

category which means the ability of both parties to present their cases followed by the judges' closest attention possible to the meaningful details of each case. Lots of undercurrents here, but the obvious consequence is that the fair trial requires that judges be attentive to what parties try to say. To create incentives for that judicial decisions should be brought to the focus of public attention, discussed and criticized, which is impossible without the assistance of competent and benevolent interpreters from the legalese I have already mentioned.

The current situation like no other requires the emphasised, even ceremonial, if not religious, deference for law. It is a vital necessity for repairing the shattered Ukrainian statehood, rather than just having good look in the eyes of our European and international partners. I hope most politicians, civil society activists, officials and ordinary citizens can understand that.

Currently there is a need to reform the judicial system of Ukraine. However each branch of power, certain political actors have their own vision of the ways to reform it, and on this grounds this issue remains open. Significant public response was called by propositions of the Special Ad Hoc Commission of the Verkhovna Rada of Ukraine on preparing draft law on amending the Constitution of Ukraine particularly as regards liquidation of the high specialized courts.

It is important to note that the High Administrative Court of Ukraine is actively involved in the discussion of problems on reforming of the judicial system drawing particular attention to the issues on the place of administrative courts in the judicial system of Ukraine (at present there is a real threat of abolishment of the clear hierarchy of administrative courts).

In particular on May 15, 2014 the Plenum of the High Administrative Court of Ukraine discussed and approved propositions to the Special Ad Hoc Commission of the Verkhovna Rada of Ukraine on preparing draft law on amending the Constitution of Ukraine.

In addition to this the working group of the Council of judges of administrative courts of Ukraine works on the constitutional amendments as well. It is composed of the members of the Council of judges of administrative courts of Ukraine, judges-members of the Research Advisory Board at the High Administrative Court of Ukraine, experts from the court staff of the High Administrative Court of Ukraine. This working group also prepared propositions on amending the Constitution of Ukraine as regards judicial reform. They were discussed with experts and scientists in the course of the round table "Amending the Constitution of Ukraine: reform of the judicial system" which was held on June 2, 2014 in Kyiv.

Some of the major initiatives of the High Administrative Court of Ukraine concerning reform of the judicial system of Ukraine were the following: formation of the system of administrative justice according to the pattern widely spread in Europe in particular separation of the system of administrative courts from the system of courts of general jurisdiction and assignment of a three-link system of administrative courts at the constitutional level (administrative district courts and administrative courts of appeal, the Supreme Administrative Court of Ukraine); development of legislation in particular improvement of the Code of

Administrative Justice of Ukraine and completion of the Administrative Procedural Code elaboration adoption of which would reduce caseload (it should be noted that prejudicial administrative procedural appealing against decisions, actions or omissions of public entities is the essential component of the system of administrative justice in many European countries) and others.

I would like to pay attention to the fact that on 11th of April 2014 the Law of Ukraine "On Restoring Confidence in the Judiciary of Ukraine" came into the force. The Law raised mixed reaction within the judicial corps as well as public society because of its political deviation. Firstly the Law does not provide precise criteria for so called "lustration" of judges, it takes more populist approach instead. Secondly the order of "lustration" commission formation gives rise to doubt. Thirdly the Law does not provide gradation for "lustration" penalties (e.g. what measures should be taken in every concrete occasion). Due to the opinion of European experts as well as domestic lawyers and legal scientists this Law is an imperfect one and violates the Constitution of Ukraine. There were some concerns that the Law in such wording risks the intensification of the pressure of the state authorities as well as political actors on the courts rather than favours the real refining of judiciary and increasing the public confidence.

According to this Law the Special Ad Hoc Commission provides the screening of those judges as far as their decisions concerned were not taken according to the law (particularly, the subject to the screening should be judges who took unjustified rulings to restrict civil rights to assemblies, meetings, street processions and demonstrations that were passed between November 21, 2013 and the date the Law came into force; unjustified rulings to impose pretrial custody against individuals lawfully recognized as political prisoners; unjustified rulings to impose administrative penalty against participants in mass protests that were passed between November 21, 2013 and the date the Law came into force; rulings to strip people's deputy of his/her status and others). New rules for formation of the judicial bodies are established.

The Council of Judges of Ukraine is elected by the delegates of the Congress of judges. Only persons appointed by the Congress of judges due to the provisions of this Law can become new members of the High Council of Justice, the High Qualification Commission of Judges of Ukraine as well as Judges of the Constitutional Court of Ukraine.

There and then with reference of this Law entry into force presidents of the courts, their deputies as well as secretaries of court chambers were dismissed. In this regard there was a need to hold meetings to elect judges for administrative positions in these courts. In some courts such meetings were held in public representatives' presence, in some cases attempts were made to press the judges when electing the president of the court.

On 16th of September 2014 the Verkhovna Rada (Parliament) of Ukraine adopted the Law of Ukraine "On the refining of the authorities" (as on 19th of September 2014 the Law has not yet been signed by the President of Ukraine and has not been published). The purpose of the Law is to define the legal and organizational principles for screening of civil servants and equated positions, self

governance officials in order to renew confidence in public authorities and to create conditions for making new system of public authorities in accordance with European standards.

The law envisages that subjects of screening are in particular the following: civil servants, judges of the Constitutional Court of Ukraine, other professional judges, Head, members and disciplinary inspectors of the High Qualification Commission of Judges of Ukraine, officials of the Secretariat of this Commission, Head, Deputy Head, secretaries of sections of the High Council of Justice and other members of the High Council of Justice. Article 4 of the Law defines grounds of non-undergoing of screening which conditionally may be divided into three types: professional, political and property grounds.

It is important to note that the attempt to interfere in the independence of the judicial branch of power may have negative consequences in the future. In fact independence of the judicial power is that fundamental principle in the course of justice on observation over which all branches of power should work – the President, the Parliament, the Government and surely judges.