

**Central & Eastern European Judicial Exchange Network  
Webinar Spotlight Series: Judiciaries in Peril in Central and Eastern Europe**

**Spotlight #5:**

**JUDICIARY IN PERIL: UKRAINIAN CASE STUDY**

**Thursday 27 May 2021**

Transcript Speakers:

1. Mykhailo Zhernakov, Head of Board, DEJURE Foundation
2. Judge Markiyan Halabala, High Anti-Corruption Court of Ukraine
3. Yevheniia Motorevska, Journalist and Producer, Slidstvo.Info

**Background:**

Following the ‘Revolution of Dignity’ of 2013-2014, Ukraine embarked on a series of judicial reforms. A completely new Supreme Court was created and a process of widespread judicial evaluation and reform commenced. However, Ukraine’s judiciary remains today one of the least trusted public institutions in the country. At the same time, however, some of the newly established institutions, such as the High Anticorruption Court, demonstrated a deep desire for change and show that real judicial transformation in Ukraine is possible. What has Ukraine achieved in the last 7 years of reforms and what is the key to real judicial independence in the country? What are the challenges and perils being faced by the judiciary, from both external and internal forces? What does the future hold for Ukrainian judges and the justice system?

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**Freda Grealy, CEELI Senior Program Manager (FG):** Thank you, everyone for joining us for this fifth Spotlight Webinar event, where we focus on the Judiciary in Ukraine. I'm Freda Grealy. I'm a program manager at the CEELI Institute based in Prague. Before I introduce our speakers, I'd like to hand you over to Chris Lehmann, Executive Director of the CEELI Institute for a brief introduction.

**Chris Lehmann, CEELI Executive Director (CL):** Thank you, Freda. And I want to give my regards and welcome everyone this evening, particularly our three panelists, but also those of you that are joining for the webinar. This is part of our 10 year old, Central and East European Judicial Network project that we've had for almost a decade here at the CEELI Institute. We have had a long engagement with the judiciary in Ukraine and look forward to continuing that. It is a judiciary that has had a lot of challenges over the last number of years, perhaps more so than some of the other judiciaries in the region. And I think this spotlight will be important in taking a look at those challenges.

I want to just remind our colleagues and our judges from the region, we continue to value our engagement with the network, which brings together judges from about 18 different countries – from Estonia, to Armenia, from Ukraine to the Czech Republic and Slovenia, to discuss issues, common challenges, common threats to independence, that are facing judges across the region. This is not an easy time for judges. There's incredible state pressure. There's incredible public pressure. We appreciate that. And we look forward to providing

opportunities like this, to discuss and examine those challenges. So Freda, thanks for organizing this. I turn it back to you to welcome our first speaker.

**FG:** We have three speakers, and I'm delighted to introduce them all to you. First up we have Mykhailo Zhernakov, and he is the co-founder and chair of the board of the DEJURE Foundation. And he is a former judge. He resigned from the position of judge in February 2015 to work full time on judicial reform and civil society. And in 2016, he co-Founded DEJURE Foundation, which is now the leading NGO in justice reforms in Ukraine. He has a masters in law and also a doctorate. He was a member and then coordinator of the Public Integrity Council in Ukraine, which is a civic body responsible for integrity checks of judges and candidates for judicial positions –and he was in that role from 2016 to 2020. He's the author of more than 150 articles, policy papers and other materials on judicial reform and transformation, administrative and tax law.

Our second speaker will be judge Markiyan Halabala. He's a member of the high anti-corruption court. He graduated in 2004 from the Law Faculty of Lviv National University and in 2013, he was awarded his PhD. After university, he worked as a lawyer, representing clients who were victims in certain high-profile cases before the International Criminal Court. He also has experience as a legal expert in the non-governmental sector and cooperation with international projects run by USAID and the European Union. In 2019, Judge Halabala was appointed as a judge of the high anti-corruption court.

And finally, our third speaker will be Yevheniia Motorevska, and she is a producer of documentary films and works with the independent journalist investigation agency Slidstvo.Info. She investigates violations and abuses in law enforcement and judicial systems of Ukraine. She has 13 years of work experience in media. She's also a former member of the Public Integrity Council, which participates in the selection of judges in Ukraine. And she's the recipient of a number of Ukrainian and international awards in the area of investigative journalism.

So each of our panelists are going to take between 10 and 15 minutes, provide us with some presentations. And following that, we will go for questions. So please feel free to add your questions in the chat function or the Q&A. And I will now hand the floor over to Mykhailo.

**Mykhailo Zhernakov (MZ):** Hello. Thank you very much, Freda. Thank you very much, CEELI Institute for doing this. This is a fantastic thing. I think it's been some time since we have had an opportunity to see each other in person. But I'm really happy still that we've found this opportunity to see each other online at least and speak about the very important issues that of course, are judicial independence and integrity, and judiciary as a whole. I hope... Sorry, I speaking from my kind of a mobile office, almost reached my destination in time today, I hope this is okay.

Judiciary has been in Ukraine like Chris mentioned. It's been an interesting field, of course, and a very important one, I do not have to explain this to the audience, why it is important. But it has a lot of challenges. And it had a lot of challenges in Ukraine for decades now. It is the least trusted still, or one of the least trusted public institutions, according to the latest polls, about 78% of people mistrust courts fully or completely. And that is an issue, obviously. And two of the main reasons why people think so is corruption inside the judiciary

itself and dependence of the judiciary on politicians and oligarchs. And to find that we had extraordinary measures, especially since the Revolution of Dignity of 2013/2014. We changed the constitution regarding judiciary, we launched a number of processes—such as kind of a wholesale analysis and vetting of judges to see whether they correspond to the integrity and professionalism principles that are entrenched in the Constitution, and also created a number of new institutions and try to reboot the old ones in order to progress. But it has not been very successful so far, because of several reasons, among which is the judicial governance and the approach to judicial governance.

This is one of my favorite topics, I should say. And of course, we see our fear of change is that we have to make our judicial governance bodies really of high integrity and the agents of change, rather than the agents of keeping the status quo that are there now. But still, we're struggling to do that. And we have two most important ones. It's the High Council of Justice that is responsible for disciplinary proceedings and judicial appointments, and the High Qualification Commission of Judges that is responsible for judicial selection and contents and evaluation. And both. Again, there's been challenges with both for the last several years. And we tried to make them work. But unfortunately, the model that we chose the infamous, or the famous depending on which country we're talking about, self-governance principle, the majority of judges elected by judges.

It either works or doesn't work. It depends on what you're trying to achieve. And whilst in western democracies where the judiciary is well established, and where the judiciary enjoys trust, and properly exercises their functions. Self-governance, working to preserve the status quo is doing a good thing. It's keeping the system in place that is good, non-corrupt, and of high integrity and of high professionalism. And when one such system reproduces itself through the means of judicial governance, it is good for the society. It is very different in Ukraine, as it is I am sure in other countries, that we are also reforms in which we're following ...that when there are serious challenges for the judiciary, when it is corrupt, when it is dependent, when the judges themselves are not ready to be independent. This self-governance principle the majority of judges in the judicial governance bodies in the judicial councils that we have. Yeah, both institutions that I mentioned are judicial councils. It preserves the not so good status quo, when the judiciary doesn't act as judiciary, but in many cases, I'm sorry to admit that but it is like this in Ukraine.

And I think Yevheniia will follow up on that – they did a fantastic investigative job on revealing corruption in certain courts that are very important and they have tremendous influence on the rest of the judiciary. When the judiciary acts as an organized crime in many senses, it is not good to preserve such system. That is why we are convinced that judicial governance shouldn't be judicial self-governance, at least for the time being, unless/before we figure it out. And before judiciary is really independent, and is really capable of maintaining its independence and professionalism and integrity.

There's a good counter example, though, I'm very happy that we have Judge Halabala here with us today, who is one of the judges of the high anti-corruption court that was created with a say slight difference, but a very important one. When we came up as a country. And it's no secret that it was originated in the civil society to create a separate independent, high anti-corruption court, we thought, we already saw that judicial self-governance at this moment in time doesn't work in Ukraine. And what we suggested was to include the panel of

independent international experts, who would not be connected to the politicians in Ukraine, who could not be influenced, who could not be bribed, or basically influenced in any other way, negatively, who could properly exercise these functions and what they had, they had a very good... there was a very good rule in the law that the Council of international experts had a decisive power to eliminate from the contest, those competitors who did not correspond to the integrity criteria, about whom there were doubts. And turns out this is what was needed to create a really good strong institutions, with not a single judge or not a single person who became a judge about whom there was serious reservations of the civil society or the expert community, and now we see that the court is working, it's produced already dozens of verdicts in high profile corruption cases.

And it differs day and night, from the rest of the system, and especially when it comes to judicial selection and evaluation. So it is a very good counter example. And it's basically a model of what we decided to do with the reform and how to proceed with the rest of the judicial system. And that is why we won. We just had... not just, about two years ago already, we had a change in the government, the President and the government. And when both the President and the parliament that when they were running for the offices, we suggested, and we proposed this, what we call justice reform agenda, where we said basically, that we have to scale the system, the success story to the rest of the system and apply the same rule to the reboot of the judicial governance bodies.

Also, including the independent international experts into the reboot of these institutions. And that is something that was supported by the President and the parliament, and the expert community. And later, it became a subject of the memoranda between Ukraine and the international partners, namely, the IMF and the EU. And then the Venice commission also supported in numerous opinions, the idea of inclusion of independent international experts, but also the members of the civil society of Ukraine in the selection of the judges, and judicial governance bodies, also the judges of the Constitutional Court, with which we also have a number of issues now.

So all in all, the idea is to basically to rebuild the judicial governance bodies with the help of those institutions and groups in the society that enjoy the most trust. Those are actually when it comes to judicial selection, the independent international experts and representatives of the civil society. So far though, it has been challenging ...we have not done this yet. There's been attempts, but they were blocked unfortunately still by the High Council of Justice, the top institution in the judicial system that is now, as we see, as we're following their activity, is not only actively blocking the reform efforts, unfortunately, but also actually exercising pressure on the judges of the anti-corruption court. That is, again, I have to emphasize, is different from the rest of the system. And it is goal, and it is their mandate to go after, so to say, the other judges, because they are subject to the investigation by the National Anti-corruption Bureau, and then these cases go to the anti-corruption court. That is why the old system kind of sees a threat in them and essentially attacks them and wants them to cease to exist.

And now we see this kind of small ...now we're in the point where we see the small islands of integrity, and the new, really new institutions where we see that judiciary is working and it is producing fair, just decisions, and it is becoming the agent of change. But at the same time we see ironically, or even absolutely, some might say, the parts of the same justice system,

where the judges vote for their representatives that are supposed to protect them and their independence to the High Council of Justice. We have 11 out of 21 members of the High Council of Justice are selected directly by the judges. But unfortunately, they still become this peril, they still become this threat to real judicial independence. And that is probably number one problem now. And again, we think that the way out of that is simply to engage the expert community from the countries where rule of law is respected, where the practices are good and solid, and where, which is probably the most important...where we already have a good track record of rebooting or selecting the judicial institution with the help of these experts, and it works brilliantly.

So just finishing, I have to say that, of course, there's a lot of challenges right now, but we already know how to move and what to do. What is important to now is to unite behind these efforts and to really help us achieve what has to be achieved. Not least by actively engaging in the rule of law reforms in Ukraine, and by pushing from all the sides, by pushing our government to do the right thing. And, of course, also to rethink their approach to judicial governance, at least for the time being when in the democracies that are developing, where the rules that are designed to do good for their judges, do not work for the good of the judges, they work in opposite direction. So at least for the time being before we establish a trustworthy and professional judiciary of high integrity, change the approach to judicial governance... include those who enjoy the highest trust from the society to kind of reshuffle to redo, to reboot the system. And then when we have the really trusted institution, then we're ready to switch back to judicial self-governance.

And I'll stop here. And of course, I'll be very happy to take the questions and answer them. Thank you very much.

**FG:** Thank you so much, Mykhailo, for that hugely interesting and informative overview. And I'm sure we will come back to some of those points in the questions. And perhaps some of our participants will have questions too, that they can add in the chat feature. So now I'm delighted to hand over to our second speaker this evening. And Judge Markiyan Halabala. Floor is yours.

**Judge Markiyan Halabala (MH):** Thank you very much, Freda. I'm happy to see you all and to hear you all. Well, distinguished participants of the webinar. It's pleasure for me to speak in front of such an honorable public. Not so many of us are present. However, it's interesting to share our experience and I would like also to share my presentation.

After Euromaidan, Revolution of Dignity...Ukraine has finally self-determined with its pro Western vector of development. Thus, we needed to prioritize the reforms in the field of anti-corruption and the judiciary, because the state of things in these fields was among the worst. In 2016, was founded the National Anti-Corruption Bureau of Ukraine (NABU), a new body in Ukrainian law enforcement, created with the purpose of cleansing top government level of corruption. NABU started to work in a quite intensive way. At the same time, unfortunately, the Ukrainian judiciary found itself not ready to deal with high profile anti-corruption criminal cases, the necessity to solve such a gap raised.

Ukrainian NGOs and other international partners began to promote the establishment of the new court institution that will be in charge of high-profile corruption criminal cases

consideration. However, the top politicians were against this idea and undermined it. Against all odds in 2018, the high anti-corruption court has been founded and in September 2019, started its activity. In the selection process, have been engaged the experts delegated by our international partners.

And therefore, the high anti-corruption court is working for almost two years and we can make the first assessment of its work. One of the criteria for it can be the speed of case consideration. For example, we can take into account the average duration of the preliminary hearing stage for the ordinary courts before the HACC's establishment, it was 147 days. For us, it's 52 days, thus, we do it three times quicker. However, one of the most widespread complaints that HACC meets in the course of its operation is its slowness. There is a high public inquiry in Ukraine for quick justice. Unfortunately, we cannot satisfy it because of a few reasons--- a large number of cases, a huge volume of evidential basis, a small number of judges, and often abuse of procedural rights by the defense.

For example, for the last year, the court panel has examined just 10 volumes of 300 in the case against the former member of the Parliament, Mr. Martynenko. 45 volumes of 300 have been analyzed in the case against the former chairman of the State Fiscal Service of Ukraine, Mr. Nasirov. And 170 volumes of 500 in case against the former member of the Parliament, Mr. Onyshchenko.

Other criteria for the assessment of HACC's work can be the number of verdicts. Before the foundation of other court, just one verdict has been handed down. The high anti-corruption court has issued 20. These data do not cover the plead guilty verdicts. Besides, it is necessary to take into account that we provide judicial control over pre trial investigation made by NABU and also by the State Bureau of Investigation. In certain types of cases. Just in 2021, our investigative judges have considered over 3000 cases at the pre-trial stage.

However, not everything is so rosy unfortunately, especially when we take into account the public opinion survey on confidence in the institutions: completely do not trust the hack 41% of the respondents; 31% rather do not trust them trust; rather trust and do not trust 10%; and just 2% completely trust the hacks. What are the reasons for such a negative perception? First of all, I believe it's a generally negative perception of the judiciary, which extrapolate to the perception of our courts system. Of course, the HACC is an inseparable part of the Ukrainian judicial system. The second, unfortunately, we still do not have verdicts in really high-profile cases. And third, that as a rule, mass media share negative information rather than positive.

Despite all the difficulties, we will stay strong and as a proverb say, "little strokes fell great Oaks." In the conclusion, I would like to recommend extending the engagement of internationals into selection process in the judiciary that will take place in Ukraine soon. As it was done with HACCs formation. The international partners can participate in the selection procedure of the High Qualification Commission of Judges of Ukraine members and in the High Council of Justice member examination, such an approach, as Mykhailo said before can help to break the principle of covering each other's backs and the principle of cover up in the judiciary. Thank you very much.

**FG:** Thank you so much judge for those insights into the work of the anti-corruption court. And now finally, I am delighted to ask Yevheniia to take the floor. Thank you.

**Yevheniia Motorevska (YM):** Thank you, Miss Freda, thank you for the invitation. Thank you for the opportunity to raise the challenges faced in Ukraine. I'll speak Ukrainian so that I could formulate my statements clearly and specifically.

Indeed, as my colleagues had mentioned, the need for judicial reform arose in 2014, following the Revolution of Dignity, then the role of the judges was an important one in the revolution, because some of them, by far not all of them, but some of them became the instruments for the government to curb the protests, to threaten the activists. We have over 300 cases still pending in the courts about the judges who recorded the driving licenses from the activists, those who drove over to the residence of the former president. There were other cases when the judges forbade the [riots and protests in Kyiv] and other cities, and there were cases when the protesters who were beaten and tortured, were then detained. Although it was clearly seen that they were experiencing difficulties with their health as the protests were very active then and violated the center of Kyiv.

And then the issue was raised that we need to cleanse the judiciary, and the seven years which followed weren't used too fully because the public activists and progressive politicians demanded the reform from the government. And even though the level of trust in the judiciary was very low, the issue was not formulated as a priority number one. The surveys showed that Ukrainians are very concerned about combating corruption, completing the war in the east, but the judiciary reform was not on top of the list. And once the current president came into office, two events happened that now serve as an impetus for Ukraine to make the change. So there is an important social demand for it.

The first event is the constitutional crisis, as it became known when in 2019/2020. The Constitutional Court has revoked two key laws for Ukraine, the law on illicit enrichment and the law on criminal liability for the officials—public officials who reported false data in their financial declarations. This triggered large protests in Kyiv. The issue of judges was raised at all the talk shows, and the people have come to realize that without the judicial reform, we cannot make progress because the story can happen again. When the Constitutional Court revoked the laws that were seen as very progressive, just overnight, and now the parliament is enacting the laws again, making amendments. But it is a lengthy process that prevent us from tackling corruption head on.

And the second event that heightened the problem with corruption and showed the scope of problem was the 2019 year... when there was a leak from chamber of the one of the key courts in Ukraine, and this is the district court in Kyiv of administrative jurisdiction. This is a court hearing cases against the public institution. So this Court has a very important standing in Ukraine because most decisions made by the Ukrainian government appealed in this court of law, and the chairman of the court for a long time, had a very extensive clout in Ukraine.

My team got hold of the records. In six months, the law enforcement tapped the meetings and conversations going on in judicial chambers. He was notified of the suspicion on a number of occasions, some records were made public. Some other records were made available to us as the journalists, we've listened to half a year of the conversations. And if earlier, the opinion was that the greatest problem in Ukraine is low level corruption, and we had a lot of discussion about the pay that should be offered to the judges, how do we combat the bribery

at the case level. Then, after these vote, tapes became public, the issue was raised about the political dependence of judges and the independence of the judiciary overall, as the records have shown the fantastic scope of abuse.

In particular, the records show that one of the key causes in Ukraine the decisions are made at the instruction of the president of the court. So the records contained scores of meetings and conversations between the President and the judges, when he instructed them on the decisions that they should make. These tapes recorded dozens of high-profile Ukrainian cases, including political ones... on the review of utility tariffs, it's a very relevant issue in Ukraine; on the restitution in the job of firing of the high-ranking official. The same court has a lack of transparency in the review of cases on the nationalization of the Privatbank. It's a high-resonant cases in Ukraine ...bank is one of the largest banks in Ukraine, formerly owned by an oligarch, Ihor Kolomoyskyi, which is now under investigation and sanctions in the US. And the government, nationalized his bank, as the bank was siphoned off of millions of dollars. And the tapes show that the court deemed their nationalization illegal.

The trials are still in progress, but this leak resulted in the bomb effect, as finally the journalist started talking and writing about the problems of the judiciary reform, it became raised at the political shows. And finally, people came to understand that Ukraine needs a true judicial reform. And we need to start right there in order elsewhere, that what Mykhailo was saying is very relevant. We need to reform the judicial self-governance institutions as this case with the president of the court. He's a superstar of the Ukrainian judicial issues. He's well known due to the tapes. Despite the fact that suspicions were delivered to him. He's hiding from the NABU. He's not appearing for interviews at the NABU. He is not turning up in court for the measure of restraint to be chosen against him. And since judges enjoy a certain level of immunity in Ukraine, there's difficulty in forcing him to appear. Still this president of the court is still serving on the post because the High Council of Justice, the judicial self-governance body, the only agency that can recuse the judges and discipline them refusing to do so. And this cover up has been in the country for two decades. And we can't break it without cleansing the system by bringing in outsiders who would help shape new transparent agencies of judicial self-governance.

And now to enter the negative note, I'd like to say that Ukraine has undoubtedly, in the seven years from the starting point of 2014, when first attempts of the judicial reform started. Ukraine has done a lot. There's been a lot of SME coverage of the judicial reform, of the cleansing of the judiciary. And changes have happened, changes have happened in the social perception. If 10 years ago, no one in Ukraine raised the question of the conflict of interest, as when myself and Mykhailo participated in this election of judges to the Supreme Court. There have been times when the court of the judge of the Supreme Court would review the cases decided on, and it did not call any surprise from the public. But it is a conflict of interest, objectively, not the concept of Journal of conflicts of interest is studied by the journalists, the activists write about it.

There are three, at least, NGOs that focus on covering the judicial contact, and the matters like recusals and self-recusal have started to work more effectively. We have the high anti-corruption court established that Halabala, the judge, spoke of. We have the Supreme Court, there's still some issues with the Supreme Court. But still the activists, the lawyers, and the

activist said, as a much better entity than its predecessor. And surely, and this is due to the heightened attention of the public, the conduct of the judges has changed.

Now there's more talk of the code of judicial ethics, of being consistent with Bangalore principles in Ukraine. And if a decade ago, the charges would show off their luxurious lifestyle out of line with their official income. Now, this is not being done. So even if the judges have some assets or live beyond their means. This is done, secretly. And I will say that, despite the fact that we didn't have far reaching changes, we will see them in the upcoming years. And the changes in the assessment of the judges have already taken place. Now, there's a war amongst the progressive public activists, the progressive MPs want the government to implement real law that would help cleanse the judiciary, that would help create judicial governance agencies.

As a journalist I have long been covering the judicial area and judges. And I know that without an adequate high council or justice, which is the main self governing body for the judges, no hiring, disciplining, or reduction can happen in Ukraine, same as this agency cannot protect the progressive judges, as another benefit that last year's have borne is that there are some whistleblower charges in Ukraine, the people who dared to speak out about the problems and corruption in Ukraine, there is always a hornet, a renowned Ukrainian judge that together with a special service filmed being offered a bribe, and the self-governance agency cannot cleanse the system and cannot protect the judges that seek the cleansing of the system. Thank you for your attention.

[TRANSCRIPT ENDS]