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# COMBATING CORRUPTION AND STRENGTHENING RULE OF LAW IN UKRAINE

**TRANSPARENCY AUDIT: JUDICIAL SYSTEM OF UKRAINE**

**A Task Order Under the Rule of Law IQC  
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## INTRODUCTION AND SCOPE

This report was prepared for the United States Agency for International Development (USAID) Ukraine Rule of Law Project as part of a transparency audit of the Ukraine Courts. It focuses primarily on the courts of the first and second instance – trial and appeal – although its findings are also applicable to the cassation courts including the Ukraine Supreme Court. The report is based on interviews with judges, senior representatives of the State Judicial Administration, other USAID implementing partners, including the Commercial Law Center Project, the president of the National Independent Judges Association and working journalists who cover the courts. The author was able to participate in two roundtable discussions on the draft laws on the Status of Judges and Law on the Judiciary as prepared by the National Commission on Strengthening Democracy and the Rule of Law, and this participation added substantially to the insight on the state of the Ukraine Judiciary. In addition, the author reviewed current procedural laws, the State Judicial Administration Instructions for Case Management, draft decisions, and the web sites of the State Judicial Administration and High Economic Court to review the systems for access to case records. Finally, the author reviewed the many recent reports analyzing parts of the Ukraine court system. During this entire process, the author was given invaluable assistance from Alexander Biryukov of the Ukraine Rule of Law Project.

A public opinion poll of Ukrainian citizens completed in June 2006 by the Democratic Initiatives Foundation shows that 64 percent of citizens either completely or mostly distrust the courts. The interviews conducted for this report indicate multiple theories about the source of this distrust, particularly among legal professionals. One reason is the substantial corruption in the processing of cases and in the court decisions. Another reason is a lasting legacy from the Soviet era when the judiciary wholly lacked independence. Yet another part is the limitations imposed on the courts by inadequate funding, poor facilities, difficult working conditions, and complicated and easily manipulated procedures. The judges tend to emphasize the last reason as the most significant problem; others emphasize the first.

At the philosophical level, all persons interviewed agreed that more transparency is an antidote for these problems. Transparency reduces the opportunities for corruption and increases citizen understanding of how the courts operate, including the many difficulties that are part of that operation. Achieving more transparency, however, is not as simple as it may initially appear. Most people are not in litigation because they want to be; yet, effective participation will require disclosure of intimate details of the litigant's life, disclosure that makes many citizens uncomfortable. But an open society cannot prohibit the publication of such personal information once it is disclosed; thus, it is necessary to prohibit access to such information. Promoting transparency, while ensuring that inappropriate personal information about litigants and legitimate secrets are not disclosed, requires carefully drawn and balanced lines between openness and closed records and proceedings. Drawing these lines requires careful and time-consuming work, work that many court systems around the world have never done effectively.

The ability to promote transparency and the ability to protect legitimately confidential information are both helped and hindered by new technology. Electronic records, whether court decisions or documents filed in the case, are easier to disclose, and it is easier to protect confidential information within them. On the other hand, electronic information inevitably captures more than paper records and can be aggregated. It is easier to search for and find particular sensitive information.

As the report discusses, all these issues are in play and are in their infancy in Ukraine, but technology is starting to speed-up progress.

Two matters are within the scope of work for this report, but are not given more attention because they do not involve effective transparency. The first is how cases are assigned to judges, particularly in the trial courts. The second is whether ex parte communications with judges should be allowed.

At the first instance level, one judge is assigned to preside over a case from beginning to end. This assignment has traditionally been made by the chief judge of the court, with no standards for the exercise of that power. Anecdotal information suggests that this power has been abused to channel a case to a particular judge to ensure a predetermined decision. At this point in time, the best solution to the misuse of the power of the chief judge is to initiate random assignment of cases to judges within a court. Case assignment can be done by a computer program or by staff according to random numbers or rotational order. The author visited two courts, one with a relatively sophisticated computer system and the other with some computers but no system. Both have initiated random assignment on the order of the chief judge, and it is working well. Thus, the methods of implementing random assignment are known, and each chief judge should be encouraged to implement either method. If voluntary implementation is insufficient, random assignment should be imposed by law, as required by Article 118 of the Code of Civil Procedure and Article 189 of the Code of Administrative Adjudication. In any event, the assignment system should be transparent.

The second issue is more complicated. While some of a judge's work time involves presiding in the courtroom, a great deal of work is done when the judge is invisible to the public – preparing for cases, analyzing the facts and law and rendering decisions. Again, anecdotal information suggests that some judges use some of that time for ex parte communication with litigants or their advocates, or to consult with the chief judge or others to determine a ruling. To a certain extent, ex parte communication is built into the system, particularly for the chief judge who is required to meet periodically with persons, including litigants, who seek the chief judge's intervention into cases pending or already decided. It is impossible -- and inappropriate -- to make the system so transparent so as to prevent improper ex parte communication.

Ex parte communication with litigants is not currently covered in the disciplinary standards for a judge, nor is it prohibited in the relatively new ethics code for judges. It is not clearly prohibited in the draft law on the status of judges. One method to address ex parte disclosure, currently being promoted in Russia, is to require judges to disclose any ex parte communication with litigants or representatives of litigants and to impose discipline for any failure to disclose. This would be a good first step for Ukraine.

Communication with others within the court system, particularly higher judges, is a more difficult problem to address. In general, it is desirable for mentoring relationships to develop, and cutting these relationships off by restricting internal communications would be unwise. If there is to be regulation, some form of disclosure regulation would be a better answer than a prohibition.

With this background in mind, the rest of this report will address the points at which public access is necessary, at least to some degree, to create transparency.

#### **FOUR POINTS OF ACCESS**

For modern courts in virtually any country or jurisdiction, there are four points of access to court records and proceedings. Access at all four points would make the court and court system fully

transparent.<sup>1</sup> Each point alone provides a degree of transparency. The following is a description of each of these points.

**A. Decisions** – These are the outputs of the court, the decisions of the judge based on the claims made, the defenses, and the evidence. These, in turn, are divided between final decisions and intermediary and interlocutory decisions. Of these, the most important are final decisions; only in a few types of cases are intermediary decisions more than routine.

In civil code countries, the form of a final decision is regulated by the applicable procedural code. Thus, the Ukrainian Civil Procedure Code specifies the form of court judgments in the first instance proceeding, on appeal, and on cassation review. The requirements are quite specific, and if honored, should elucidate the findings of fact, conclusions of law, and reasoning of the court. Thus, Article 210 of the Civil Procedure Code requires the judgment of the court to include, among other items:

- reference to the demands of the plaintiff, objections of the defendant, generalized account of the explanations of other persons participating in the case;
- facts established by the court and legal relations determined according to them;
- whether and by whom the rights and freedoms were violated or disputed, for protection of which the address to the court took place, non-fulfillment of obligations or other grounds to satisfy demands;
- name, article, its part, paragraph, item, sub-item, of the normative legal act ... under which the case was resolved ...;
- conclusion of the court on satisfaction of the claim or rejection of the claim fully or in part, instruction on distribution of judicial expenses, term and procedure of appeal from the judgment.

Article 210 specifies the content of intermediary rulings to include “reasons from which the court proceeded to its conclusions and the law the court has used rendering its ruling.”

Article 316 contains requirements similar to those in Article 210 for an appeal judgment. For its ruling, it must also include “reasons according to which the court of appellate instance came to its conclusions and reference to the law it is led by.” (Article 316) Articles 345 and 346 contain similar requirements for cassation (Supreme Court) rulings and judgments.

Final decisions at each instance are in writing; first instance decisions are normally also delivered orally in court.<sup>2</sup>

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<sup>1</sup> Open access to court decisions should become one of the most efficient forms of public control over the judiciary. It will promote uniform application of laws and consistency of judgments in repetitive cases. Restrictions on the availability of court decisions may only be imposed by law and solely for the purpose of non-disclosure of confidential personal data or secret protected by law. Decree of the President of Ukraine, No. 361/2006, For the Improvement of the Judicial System and Ensuring Fair Trial in Ukraine in Line with European Standards. (2006).

<sup>2</sup> 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,

**B. Case Files** – Each case has an individual file that contains all documents filed by either party in the case. Except in the most modern of court systems (Ukraine is not in this category), the documents are all in paper form, even if they existed in electronic form – for example, as a word processing file – prior to filing. None of the documents are scanned. The files are normally stored by case number in an office of the court staff. The files move between the instances at which the case is being considered. Once the case is closed, the case files go to some form of storage for a period of time.

Access to case files provides groups and individuals with the most information about a case and judicial decisions, and thus is the single greatest tool of transparency. It is particularly effective in court proceedings that rely almost entirely on documentary evidence, rather than in-court testimony of witnesses. Virtually all proceedings in economic court fall in this category.

**C. Case Management System** – Every court needs a system for retrieving case information, case assignment, case calendaring and scheduling, notification of parties, and generation of court statistics. The broad umbrella name for these systems is “case management system.” Rudimentary systems are wholly on paper and capture little information. More sophisticated systems are electronic and capture virtually all information about court activities, parties and representatives.

The case management system information is the best source of quick summary information about a case. It shows what is available in the paper court files, allowing retrieval of relevant records and decisions. Access to the system information, depending upon how sophisticated the system is, can be a critical component of transparency.

**D. Events in the Courtroom** – Most cases involve some event that occurs in the courtroom. In most cases, there is a trial that includes evidence presentation leading to a final judgment. Access to the courtroom allows members of the public, including the media, to observe the in-court activity.<sup>3</sup> Observation of the proceedings is not necessarily effective access. Trials are relatively tedious and slow-moving, even in countries where the adversary system is relatively new. Thus, to fully understand the proceeding, the observer often must be present for many hours, possibly days. An observer cannot remember accurately all the testimony and evidence for later reporting. Thus, effective access requires some method of obtaining a transcript or recording of the in-court events.<sup>4</sup>

In Western court systems, the in-court proceedings are recorded by the court by some method that will allow a verbatim transcript of proceedings: stenographic reporting, audio taping or

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218; CRIMPC art. 341; CAJ arts. 160, 167; COMPC art. 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. American Bar Association’s Central European and Eurasian Law Initiative, “Judicial Reform Index for Ukraine.” Volume II, (December 2005).

<sup>3</sup> 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. Id..

<sup>4</sup> Although the Ukrainian 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. Id.

video taping. More modern systems use digital recording that stores an audio or video recording of the in-court events in an electronic file. The Soviet system never employed verbatim recording of in-court activity, relying instead on summary notes of a court secretary. Even this summary is entirely accurate, it is an inadequate way to capture complete testimony, other evidence, and argument.

The alternative is to allow the public observer to use audio or video recording equipment to make a recording of in-court events.<sup>5</sup> While this is an alternative, it is limited. It is difficult to capture an accurate recording of a trial from a single-track recording device, particularly if placed in a spectator area. Video taping is expensive and may disrupt the proceeding – for example, a witness who fears his or her testimony will be shown on television news may become a reluctant witness.

To the extent that most of the evidence in a case is documentary rather than testimonial, the value of in-court observation is limited without access to the documentary evidence, part of the case file. For example, the criminal procedure in the Soviet system relied heavily on a preliminary investigation file, prepared by law enforcement officials under the supervision of the procurator, and presented to the court at the start of the criminal case. Observation of the criminal trial gave a very limited view of the case without access to the preliminary investigation file. A more current example is the proceedings in the economic courts. Although the procedure code for economic court cases allows testimonial evidence, it is usually not presented. The positions of the parties rely almost exclusively of documentary evidence.

**E. Other** – Although the four points of access cover the most important attributes of transparency, there can be other access issues. For example, assignment of cases to judges may occur according to specific policies or represent ad hoc decisions of a chief judge. The court is not transparent unless the method of assignment is clear and available to the public.

## **TRANSPARENCY IN THE UKRANIAN COURTS**

The following is an analysis of the four points of access for the Ukrainian courts today. Because this report is based on a limited number of interviews, the findings from more comprehensive studies of corruption and transparency in Ukrainian courts have been noted where the findings are relevant.

**A. Decisions** – This area has had the most development with the adoption of the new law on access to court decisions in December 2005.<sup>6</sup> Regarding balance, this new law is a step forward, but only a limited one. The law became effective for some of the courts on July 1, 2006, so it is possible to evaluate some experience. The major effect of the law will be felt on January 1, 2007 when the law becomes effective for all decisions of first instance general jurisdiction courts.

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<sup>5</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. *See* LJS art. 9.2; CIVPC art. 6.8; CAJ art. 12.8. *Id.*

<sup>6</sup> The Verkhovna Rada of Ukraine 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.*

The main purpose of the new law is to create a state registry of court decisions.<sup>7</sup> According to rules adopted by the Ukraine Cabinet of Ministers, the registry is administered by the State Judicial Department. All court decisions are placed in this registry and must be made available without charge on the State Judicial Administration Web site. Thus, Web site users must have the opportunity to search, review, copy and print court decisions.

There is differential access to the registry. Judges get full access to a complete text of each decision. The public, however, can access files only after certain personal information is deleted. The information deleted includes the names of any physical persons, whether or not parties; the address of a physical person; telephone numbers; email addresses; identification numbers; vehicle identification numbers; and any other information that allows identification of the physical person. For purposes of the law, physical persons do not include the judge or persons who are officials or employees who take part in the case as a part of their duties. Also, information from a closed court hearing cannot appear in the text of the court decision.

All court decisions of all courts in Ukraine, whether intermediary or final -- other than those from first instance general jurisdiction courts -- must be entered into the registry beginning no later than July 1, 2006. Decisions of first instance general jurisdiction courts must be entered as of January 1, 2007.

In addition to establishing the registry, the law clarifies the right to access the full text of court decisions from the court. These are available to non-parties for whom the decision "is directly related to her/his rights, freedoms, interests or obligations." The person who wants access must apply to the court office. A decision must be made no more than three working days from the request. Any denial must be in writing, show the reason for the denial, and explain the right to appeal. Although there are references in other laws to decisions being public, the import of this provision is that public access is available only through the registry.

The implementation of the law, part of which is commanded by the rules of the Cabinet of Ministers, somewhat undermines its usability. Court decisions -- whether or not available in electronic form -- now covered by the law are printed out or copied and sent to the contractor of the State Judicial Administration in paper form. The contractor then scans each decision after removing the personally identifying information and puts the scanned image in the registry. A limited amount of additional information is entered for each case to allow searches. The following fields are captured: party name (if not suppressed because a physical person), region, court, code of court, name of judge, case number, date of case filing, date of court decision, registry number, type of proceeding (administrative, economic, criminal or civil) and type of court decision (five possibilities). Also captured is some rudimentary information about the type of case. For example, the system recognized the keyword "bankruptcy" as a type of case for which it could search.

Note that the registry system was first developed in the economic courts and was used there before the new law was created. In the economic courts, all of which have networked computers at all levels and enter all decisions electronically, the electronic file is transmitted to the contractor who puts it in the registry electronically. These decisions can be searched by text string, which greatly increases search capabilities. The economic court decisions are still available on the Web site of the higher economic court. The State Judicial Administration wants to move to transmission of electronic files of decisions, but believes it cannot do so as long as

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<sup>7</sup> To support the recently approved law to establish a registry of judicial decision, court decisions should be systematically published on the Web to make judges more accountable for their decisions. Management Systems International, "Corruption Assessment: Ukraine." USAID (2006).

some decisions are handwritten (this is true in all courts because some judges refuse to use word processing technology).

The addition of the decisions from the district courts (first instance courts of general jurisdiction) represents a tremendous challenge. Many of these courts are not computerized so many decisions are handwritten or typed and not entered electronically. Even where there are computers, these computers are usually not networked. In fact, many judges use personally owned computers because the court does not supply one. Although the State Judicial Administration officially plans to computerize all district courts and start the flow of decisions for posting in the registry by January 1<sup>st</sup>, that deadline seems optimistic for many courts. It is likely that there will either be a high percentage of handwritten decisions or all decisions will not be posted by the deadline.

Because of the large challenge in the district court, the goal of entering electronic decision files that can be text searched appears to be unreachable in the near term for the general jurisdiction courts.

According to the preamble to the law on access to court decisions, publication is intended facilitate three goals: transparency, predictability of decisions, and unified application of legislation. Ukraine does not have a precedent system so the latter goals can be met only if judges are willing to read the output of their peers and the higher courts, and use that output to help shape their decisions. This process will, of course, be more likely to develop if parties and their representatives draw attention to decisions relevant to their case. There is some anecdotal evidence that use of the economic court decisions is starting to develop in this way.

There is no evidence that judges in the general jurisdiction courts are consulting appeal and cassation decisions now being posted. One chief judge who was interviewed indicated the judges in his court are too overworked to consult registry decisions. Of course, these decisions have been available only since July 1<sup>st</sup> so the system may be too new to have gained popularity and extensive use. More likely, however, the inability to search decisions by text string will make finding relevant decisions too difficult and time consuming to warrant the effort necessary. Thus, the latter two goals will be unrealized for general jurisdiction court decisions at least until the power to search for relevant decisions is enhanced.

As the United States experience has shown, effective searching for relevant decisions requires some methods of categorizing decisions based on their substance, so the scope of the search is sufficiently narrow. Developing effective searching tools and conducting searches for specific audiences, is likely to occur only in the private sector as a response to market demand. For example, a commercial service might develop an effective method of digesting bankruptcy decisions and might analyze all bankruptcy decisions for a specific period providing reports on significant decisions and trends. The law does allow access to registry court decisions for publication – for example, by “electronic data bases of court decisions.” It is not clear, however, that private publishers can receive electronic files of decisions (when these are fully available) for their own analysis. Allowing and facilitating private publication of decisions and analysis would greatly improve the likelihood that the second and third goals would be realized.

Effective searching also requires that decisions be well written and thoroughly reasoned. Everyone interviewed appeared to agree that decisions are currently far short of these standards. There was a general consensus that judges need training in judicial reasoning and writing.

Posting decisions will create some improvement in transparency, but the requirement that names, including party names, and physically identifying information be deleted greatly limits that

transparency gain. Only in cases that involve parties who are legal entities or government officials will it be possible to connect the decision to the case and parties. Thus, it is impossible to determine if the decision accurately states the facts and the positions of the parties. To the reader, the decisions are about hypothetical circumstances. It is possible to connect the case decision to the actual case if one has the docket number, but the docket number is generally confidential and not available to the public.

**B. Case Files** – Case files are not open to public inspection. Part 23 of the Instructions of the State Judicial Administration to the courts specifies the procedure for seeking access to a file, including the procedures applicable to advocates, procurators, parties, witness and others whose legal rights and obligations were ruled upon by the court. It also covers persons unrelated to the case “who have the right to request cases by their official status.” The latter group must make a request to the chief judge and obtain approval. There is no provision for access by persons other than those specified above, even with approval of the Chief Judge.

Even for those with a limited right of access to the case file or information in the file, there are restrictions.<sup>8</sup> The person can read the case file, but only “on the court premises in the presence of a court staff member.” The person who receives the file for reading must sign a log. The court staff person must record on the cover of the file that the file was read and by whom. After the case file is returned, the staff must determine if the file is intact and undamaged and give a receipt. The person can obtain copies of documents only with the approval of the judge presiding in the case.

The absence of any public access to case files and documents in the case file is a crippling blow to transparency. Even if an individual can see and read the decision, it is impossible to evaluate the findings of fact, application of the law to the facts, conclusions of law and remedies without knowing what input was provided to produce the decision.

An example that came up in interviews demonstrates this point. There is extensive criticism of the statutes defining the subject matter jurisdiction of the economic courts because they are vague, enabling both economic and general jurisdiction courts to claim jurisdiction over the same basic dispute. The problem is apparently acute in cases involving shareholder rights. As a result, many parties file the same case, with differences in form to claim jurisdiction, in both economic and general jurisdiction court. The dual filings create chaos, and frequently, a battle of inconsistent rulings. Judges believe that the public perceives the problem as a result of judicial corruption, but the actual cause is inappropriate manipulation of the system by the parties.

Even if one could find decisions in cases in these circumstances – very difficult to accomplish if names are suppressed – it would be impossible to seriously analyze the quality and impartiality of the decisions without knowing what information was provided by the parties, information that is only accessible through the case file. When the case file is made confidential, the secrecy is understandably seen as a hallmark of corruption. The judges cannot demonstrate the actual problem, as they perceive it, because of the secrecy rule.

**C. Case Management System** – Ukraine has a patchwork of case management systems, reflecting the action of Western donors in the past. The economic courts have a sophisticated case management system that apparently meets Western standards. A couple of general jurisdiction appeals courts have well constructed, but outdated, case management systems.

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<sup>8</sup> 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. American Bar Association’s Central European and Eurasian Law Initiative, “Judicial Reform Index for Ukraine.” Volume II, (December 2005).

Others have a limited system for statistical reporting. There is no uniform case management system at the district court level; many of these courts do not have computers on which to run a system.

The economic court system now has public terminals in the courthouse that display case management system information for all economic courts in Ukraine, searchable by party and case number. The case management system apparently constructs and shows a docket sheet with all relevant events and activity in the case. This information is only accessible from the terminal. None of the case management system information is accessible over the internet.

The State Judicial Administration wants to install a case management system with similar features and public access terminals in all general jurisdiction courts. At this point, there is no attempt to reconcile the policies on public access to court files and decisions with the availability of information from the case management system. Thus, as reported, the case management system through the public access terminals shows the names of physical parties and may show other identifying information suppressed from the public copy of decisions under the law on public access to decisions. While the case management system does not show the full content of documents contained in the file, it may describe those documents to some degree.

While the case management system is -- at the present time -- a minor tool of transparency, and then only in the economic courts, its role is likely to become more significant as the general jurisdiction courts are computerized. It will be particularly significant if terminals are placed in all courts for access to the system and all information in the system is available at the terminals. It will be even more significant if the information is available over the internet.

**D. Access to Proceedings in Court** – Access to case proceedings is governed by the procedure codes for the type of case being considered. The most current and detailed policy is in Article 6 of the Code of Civil Procedure, which provides:

- Consideration of cases in all Courts shall be carried out orally and openly.<sup>9</sup>
- Closed/private judicial consideration shall be allowed if the open consideration may lead to divulgence of a state secret or other secret protected by law as well as upon the request of any persons participating in the case in order to secure the confidentiality of adoption, to prevent the disclosure of information about intimate or other personal details of life of persons participating in the case or information humiliating their honour and dignity.
- Private papers, letters, records of telephone calls, telegrams and other types of correspondence may be made public during the court hearing only with the consent of the persons stipulated in the Civil Code of Ukraine. This rule shall be applied to the examination of audio and video records of the similar nature.
- The court shall adopt in the deliberation room a reasoned resolution on private consideration of the case. This resolution is subject to immediate promulgation.

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<sup>9</sup> Judges frequently hear cases in their offices, so the public is denied access to proceeding. Blue Ribbon Commission for Ukraine, "Proposals for the President: The New Wave of Reform." UNDP (2005).

Each of the other procedural codes is similar. See Code of Administrative Adjudication of Ukraine, Art. 12(3); Code of Commercial Procedure of Ukraine, Art. 4-4. The Code of Criminal Procedure, Art. 20, states:

- Consideration of cases in all courts is conducted openly except for cases when this contradicts the interests of keeping state or other secrets protected by law.
- Additionally, closed trial shall be allowed upon the reasoned court decision in cases concerning crimes of persons under 16 years of age; in cases concerning sexual crimes; and in other cases to prevent the disclosure of information on intimate side of life of persons participating in the case and if this is required to provide for the safety of persons taken under protection.
- Consideration of a case at a closed court sitting is carried out with observation of all rules of legal procedure. Judgments/verdicts of judges shall be announced publicly.

Anecdotal reports indicate that the application of these standards is uneven, and media representatives are occasionally barred from court proceedings with no explanation. There are also occasions when media representatives are barred from entering the courthouse by security persons. Additionally, some courthouses lack courtroom space so hearings are held in judges' offices where there is no room for spectators.

The Ukraine procedural codes for civil, administrative and commercial cases require that court proceedings be "recorded by technical means," that is, by audio recording. This requirement has been delayed until 2008 because the courts lack the audio recording equipment. Meanwhile, proceedings are being recorded only at the request of a party, which rarely happens. While there are provisions for party access to the recordings for transcript preparation, there is no authorization for public access to recordings even for proceedings that are open.

The procedure codes do allow use of portable recording devices to record an open court hearing. The Civil Procedure Code provides:

- Participants to the civil case and other persons present at the open court hearing have the right to make notes in writing, as well as to use portable audio-technical devices. Taking photo-camera pictures and shooting (video-recording) as well audio-recording with fixed installation equipment and broadcasting of court sittings on radio and TV are allowed on the basis of a court resolution if the consent of the persons participating in the case was granted.

Similar language appears in the other procedural codes. Despite the authorization to use portable audio recording devices, media representatives have reported that they have been barred from using these devices.

The procedural laws usually require the court to reach a decision following the hearing and announce it in open court. Assuming the proceeding was open, the announcement of the decision is also open.

The new draft law on the Judiciary contains an Article, Article 10, on openness and transparency of court proceedings. Rather than setting one policy on access to decisions, part (2) of draft Article 12 leaves the grounds for closing the proceeding to the procedural code. The article does, however, state for all proceedings the language of the civil procedure code that allows portable audio recording devices.

## RECOMMENDATIONS

The following recommendations are made to the Ukraine Rule of Law Project (UROL), as the implementing partner for USAID's objective of improving the transparency of the Ukrainian courts. These recommendations could also be of overall use to USAID, the Government of Ukraine, or other donor organizations. The choice was made to standardize the audience and not necessarily to propose the best strategy for implementation.

**1. General** – Like governments throughout the world, the Ukrainian government has not fully thought through the competing demands of privacy interests of court litigants and transparency of court processing of cases. The system currently in place lies too far on the privacy side, and there is strong evidence that the privacy interests of litigants are being used as an inappropriate shield to prevent public scrutiny of the courts. Moreover, the balance is being struck in each separate procedural law, and the results are not entirely consistent. Article 10 of the draft law on the judiciary contains a general provision on “Openness and Transparency of the Court Proceedings.” Rather than referring to the procedural codes for specific regulation, this article should contain a full and comprehensive policy on public access to court proceedings and records, including decisions. The Article should strike a balance that promotes greater openness, especially with respect to court records and decisions. UROL should draft a proposed article and submit it to the National Commission on Strengthening Democracy and the Rule of Law.

**2. Decisions** – The current system for publishing decisions will not accomplish the transparency and privacy goals, at least at the current level of technology. The relevant decisions are too hard to find, and cannot be related to a specific case because of the absence of names. The effort and analysis necessary to find relevant decisions is too time-consuming and may be further impeded by the quality of the writing and reasoning. The Presidential Decree of May 10, 2006 outlining the concept for improving the Ukraine judicial system stated:

- Open access to court decisions should become one of the most efficient forms of public control over the judiciary. It will promote uniform application of laws and consistency of judgments in repetitive cases. Restrictions on the availability of court decisions may only be imposed by law and solely for the purpose of non-disclosure of confidential personal data or secret protected by law.<sup>10</sup>

The current system will increase public control over the judiciary but to an insignificant degree. It will only marginally promote uniform application of laws and consistency of judgments. To improve the current system UROL should take the following steps:

- a. UROL should assist the State Judicial Administration in implementing, in all courts, technology that requires all decisions to be created in electronic form, to be

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<sup>10</sup> President Victor Yushenko, Concept for the Improvement of the Judicial System and Ensuring Fair Trial in Ukraine in Line with European Standards § II(4) (May 10, 2006).

transmitted to the registry in electronic form, and to be included in the registry in electronic form so that all of the text can be searched.

- b. UROL should seek an amendment to the law on public access to court decisions so that the names of parties and other physical persons are not deleted from court decisions when they are entered into the registry, except in specific types of cases involving juveniles or other vulnerable individuals.
- c. UROL should prepare training for Ukraine judges on writing high quality court decisions consistent with requirements of procedure codes and standardizing language and citation form so that decisions on the same subject can be retrieved.
- d. UROL should assist the State Judicial Administration in making available to private publishers databases of decisions for analysis and publication to consumers of court information.

**3. Court Files and Records** – As discussed above, effective transparency will be difficult to achieve without some public access to court records in the case files. The current law, which prevents all public access, goes too far in protecting the privacy rights of litigants, thus blocking effective public scrutiny of the courts and of officials, like procurators, who routinely must appear in the court as their job responsibility. The current law goes far beyond protecting “confidential personal data” and secrets, as specified in the Presidential concept.

On the other hand, the extent to which truly personal information ends up in court records cannot be ignored. This is particularly true in family proceedings and those intended to protect children.

- a. UROL should assist the State Judicial Administration in developing a list of proceedings in which court records should be presumptively closed and court records that should be closed. These proceedings should be part of a new instruction that makes all case records open, unless on the list as closed. The instruction should allow copying or scanning of open court records on paying a fee or by using equipment brought for the purpose by the person requesting access. The instruction should specifically provide that a transcript of an open court hearing is a record to which access is allowed. It should specify that any denial of access can be appealed to the chief judge.

**4. Case Management System** – A modern case management system can not only meet the needs of the court for effective management and statistical reporting, but can also promote transparency by public access to case information. Since case management system information is electronic, access can be provided over the Web, through public computer terminals at the courts, or both. The case management system developed in the economic courts has that capacity.

- a. UROL should assist the State Judicial Administration in developing a case management system for the general jurisdiction courts with public access to case management system information over the web and at public terminals in all courts. Public access should include access to the names of parties in all cases, but not to the names of victims in criminal cases, or to personally identifying information such as that currently suppressed in court decisions under the law on public access to those decisions. It should reflect the filing of records that are closed from public access

but should not describe the content of those records. It should include the text of brief rulings, orders and decisions of the court.

**5. Access to In-Court Proceedings** – As with other points of access discussed above, the balance struck has been inadequate in ensuring transparency. Here, the major deficiency is in the breadth and vagueness of the standard for closing the proceeding. Litigation rarely involves the best aspects of human behavior. Thus, closing a proceeding because it involves information about persons that humiliates their honor and dignity or involves the “intimate side of life” goes too far and can be misused.

In some courts, public access is denied because of inadequate facilities. Wherever possible, the law should make clear that if members of the public want access to the proceeding, it must be held in a room that allows such access.

There is no provision in the current law for persons wanting access to proceedings to be heard by the court before the court considers closing the proceeding. Such a provision should be added.

The ability to be present in court is not sufficient to ensure transparency. In many proceedings, much of the evidence is documentary. The law should be clear that access to the proceeding includes the right to inspect all evidence unless it is specifically sealed for good cause by the court.

It is difficult to be present for an entire trial, especially in a longer case, and note-taking alone does not ensure accurate reporting. Thus, it is necessary to be able to effectively audio-record a court proceeding. The current allowance of only portable recording equipment may be insufficient in some cases. Once court recording becomes the norm in all cases, the public should have a right to obtain a copy of the tape by a method that ensures its security. This will be readily achievable if the courts implement digital audio recording.

- a. As part of the draft prepared in response to the general recommendation, the draft article on openness and transparency presented to the National Commission on Strengthening Democracy and the Rule of Law should include new, more narrow standards about when all or part of an in-court proceeding can be closed to in-court access. Those standards can include a list of types of in-court proceedings that are presumptively closed. Although the parties can request the closing of all or part of a proceeding, the decision should be made by the court. If a party requests closure of all or part of the proceeding, or the court proposes to close the hearing in whole or in part, the court must allow persons who have given notice that they seek access a hearing on whether closure will be ordered. The draft should specifically provide that if the proceeding is open and taped by the court, the public has a right to listen to and copy the tape. It should further provide that all evidence submitted in an open proceeding, including all documentary and real evidence, is available for public inspection. Finally, it should provide that a proceeding to which a member of the public seeks access must be held in a room allowing such access if such a room exists in the facility and is reasonably available.
- b. UROL should assist the State Judicial administration in purchasing and using digital audio recording systems for general audio recording in Ukraine courts. These systems allow the highest quality recording and allow public access and duplication without compromising security. The system used for recording should include the

opportunity for the media to connect to capture the audio being recorded for broadcast.

- c. UROL should assist the State Judicial Administration in drafting instructions to local courts that prohibit security workers at the entrance to the courthouse from blocking access to persons seeking public access to proceedings unless they present a real and current security threat. The instructions should also require that court calendars be posted in prominent places in the courthouse at least 24 hours in advance of proceedings.

## **CONCLUSION**

By international standards, the Ukraine courts are among the least transparent in the world, and that lack of transparency helps breed corruption and prevents establishment of public trust and confidence in the system even when corruption is absent. Some progress is being made, but the reform measures are weak and are slowly being implemented. Much more effort is needed for effective reform and there needs to be a greater sense of urgency. The recommendations of this report, if implemented, would bring about a very substantial increase in transparency while protecting legitimate privacy rights and secrets.