

Irina Paliashvili: Legal system needs to be dismantled

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Activists hold portraits of judges in front of the Constitutional Court of Ukraine demanding a purge of the judicial system on Oct. 22 in Kyiv.

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The legal community has always been active in the reforms process in Ukraine, but it has significantly intensified its efforts within the past 18 months. There are many ongoing projects on legal reforms under way, and one of them is the recently released second edition of the White Paper on Legal and Governance Reform in Ukraine.

[Read the White Paper here in English or Ukrainian](#)

The White Paper was developed under the auspices of the U.S.-Ukraine Business Council and is focused on an overall strategic vision for legal and governance reform in 21 sectors.

The first edition of the White Paper was released a year ago, before the new Verkhovna Rada and the new government came into place, but our main conclusion then and now remains the same: Ukraine's current post-Soviet oligarchic and kleptocratic system needs to be entirely dismantled and replaced by a brand new, modern, fair, civilized and service-based legal and governance system.

Overall, it is disappointing that after one year of having been in office, the Rada and the government have not succeeded in dismantling the current system, let alone replacing it with the new one. We have observed various sporadic attempts and efforts, some of them progressive and effective, but none of them amounting to radically reforming fundamental pillars of the current system: legislation, governance structure, public administration, institutions, judiciary, law enforcement and others.

The Rada did produce numerous new laws and amendments, but this was done within the framework of the old system, and often resulted in making our legislation even more complicated, contradictory and confusing. The language of the new legislation has not changed either – the new laws are still drafted using the same archaic, often incomprehensible, legalistic language.

It seems that the Rada is measuring its success by how many new laws it

adopts, which is an entirely wrong criterion. At his lecture at the Kyiv School of Economics on May 29, the architect of Polish reforms, Leszek Balcerowicz, called this “the more legislation the better” approach “a socialist way.” What is needed, he said, is “not many laws, but good laws; good enforcement of bad laws is bad.

‘Massive, post-Soviet mess’

Existing Ukrainian legislation is a massive, post-Soviet mess, which incorporates numerous special interests and corrupt schemes accumulated over 20 years. It is worsened by ongoing manipulations with the Constitution, swinging the country back and forth from presidential-parliamentarian to parliamentarian-presidential system, yet always preserving intact the insane duality of power (the “worst possible solution,” as it was defined by Ivan Miklos, a former deputy prime minister and minister of finance of the Slovak Republic).

Piling up new laws on top of this mess will not miraculously turn it into a new system, but will continue to prevent Ukraine from becoming a true “rule of law” country.

Rule of law means, among other things, strict enforcement of the existing laws, but if the entire body of current outdated and often absurd legislation gets enforced, the country will be paralyzed. This is why the current system cannot function without selective enforcement, which gives the vast bureaucratic class, including law enforcement and the judiciary, enormous discretionary power over the ordinary citizens and businesses, and feeds systematic corruption.

Eliminate the breeding ground

No anticorruption measures can succeed if they are undertaken within this system, which itself is a Petri dish for corruption. Corruption, as a consequence, cannot be fought in isolation from its basis. The only effective tool to fight it is to eliminate its breeding ground, to throw away the Petri dish. Until this happens, any anticorruption measures will be ineffective and will turn into a camouflage for more corruption.

It is therefore no surprise that the current legal and governance system feeds corruption and corruption feeds it back, locking Ukraine into a vicious cycle, which no number of new laws and anticorruption agencies can break, and in which no meaningful “rule of law” can be installed. This situation also breeds cynicism in the public, as summarized in the anecdote: “The Ukrainian people want two things: (1) to get rid of corruption in the country; and (2) to be able to evade any law for as small a bribe as possible”.

Current system ‘beyond repair’

Evidently, before demanding “rule of law” and eliminating corruption, we need to change the system since the current one is beyond repair – in response to any attempt to improve it, the system simply mutates and adjusts, breeding a new class of corrupt public servants.

There is a common sense solution to this ongoing crisis:

Ukraine can borrow the most modern, simple, uncorrupt and well-tested legal and governance system from the most successful countries in our neighboring region, and install the best components from each.

As an overall model, we can use the Estonian system because it is 100 percent European Union-compatible, is oriented at freedom of entrepreneurship, but also at social and environment protection, has no corruption component, and perfectly fits into modern information technology solutions. The tax system

can be borrowed from Slovakia. The anticorruption, law enforcement and customs components can be borrowed from the Georgian experience, especially given that the first steps with creating the new patrol police according to the Georgian model and with the help of Georgian experts proved to be quite successful.

Then Ukraine will need to place a five-year moratorium on changing any new laws (most of corrupt schemes are installed through never-ending legislative amendments), which would ensure stability and trust in the new system in the society.

The experts, who designed and implemented the best reforms in the countries of the region (Estonia, Slovakia, Poland, etc.) and who are fluent in EU requirements, should train the new cadre of Ukrainian civil servants and judges, and carry out the selection process (all previous ones must leave, but apart from those who were lustrated, should be allowed to participate in the new selection process). Georgian experts should help to reform the law enforcement, prosecutors' office (prokuratura) and customs service, and be given a full mandate to eliminate corruption.

Ukrainians ready for change

Ukrainian society and business are ready for this. They have been suffocated by the current system for a long time. They have nothing to lose and a lot to gain if a new, transparent and simple legal system, modeled after the least corrupt and most successful countries, is introduced in Ukraine.

A modern, globalized and free-market Ukraine will no longer need a separate law for every step of the way, with a vast bureaucracy to selectively enforce it (in the civilized world there is no need for a separate Law "On Milk and Dairy Products," "On Libraries and Librarian Activities," or "On Grapes and Grape Wine"). The current legislation, on the other hand, is so massive and inconsistent that compliance often is just not possible, but there stand "on guard" the law enforcement, the tax authorities and the judiciary, which continues to blackmail the society and extort bribes because they are an integral structural part of the current system.

Special interests dominate

At present, when a real reform is needed, the government often claims to be helpless. Why? Because "we need a new law" to do this. However, every time the government wishes to introduce new restrictions and hurdles, it goes ahead and does it without the need for a "new law," and sometimes in direct contradiction with existing laws. A similar situation is at the Rada: if a special interest needs a new law or an amendment, it gets adopted in record time, but if a new bill is needed in the interest of general public, it goes through many weeks and months of agony, before it finally gets passed in a neutralized version.

Under the current dual governance system, nobody takes responsibility, but it is always a legal technicality that both prevents a branch of power from making a progressive effort, and also keeps corrupt officials or judges in their job. There are many examples when legal technicalities are successfully used to stop a progressive effort: thus during the selection process for new key officials, somehow the candidates, who are best qualified, but independent, are disqualified because of legal technicalities.

The society no longer accepts the "we need a new law" and "legal technicalities" excuses, exemplified in a typical dialogue between a new, supposedly progressive, ministers and business:

Minister: Our ministry is in the avant-garde of reforms: we cut our staff by 1.2

percent, lustrated 1.1 employees, developed 1,500 new regulations and 370 bills, we decisively fight corruption, and by 2050 we will introduce electronic documentation database.

Business: Your Ministry still has a number of anti-business corrupt practices, for example Practice X, why you do not cancel them?

Minister: Yes, I am aware of that. Personally, I dislike Practice X, but there is nothing we can do, a new law and a dozen amendments to existing laws are required, everything depends on the Rada, but you understand what kind of situation there is there.

Business: Practice X was introduced by the Order of your Ministry and was further reinforced by the amendment to this order, signed by you.

Minister [hesitating at first, but then making a fast recovery]: I understand your concern, I am on your side, but in order to get rid of this corrupt Practice X, we need also to eliminate relevant Practices Y and Z, and this we cannot do, a new law and a dozen of amendments in the existing laws are required, everything depends on the Rada, but you understand what kind of situation is there.

[End of constructive dialogue.]

The inability of the current system to cope with modern challenges forces the public and businesses to resort to various parallel structures – all kinds of ombudsmen, or even to the so-called “garbage bin lustration” (when the frustrated public throws most notorious politicians into garbage bins) – these measures, although useful during the transition period, ultimately only have a cosmetic effect on the current system, and in the long run they will help it to survive. Even the current deregulation will not work because no meaningful deregulation is possible at the level of secondary legislation (regulations by the ministries), when overregulation continues at the level of primary legislation (laws adopted by the Rada), and when the same unreformed public administration makes sure this vicious circle continues. At present, cancellation of one regulation by a ministry is followed by adoption of the new law by the Rada, which requires yet another regulation.

Ukraine need a clean break from its Soviet past. It is not by chance, however, that a new book by Anders Åslund is entitled: Ukraine: What Went Wrong and How to Fix It – because before fixing the problem, it needs to be acknowledged first, which our political class refuses to do. One of the White Paper Commentators, Bohdan Vitvitsky, who served as a U.S. Federal Prosecutor and a Resident Legal Advisor at the U.S. Embassy in Ukraine, stated in his interview to Alexander J. Motyl: “...one thing that needs to be addressed, which few in Ukraine seem to realize, is the systemic deformities in the entire legal system going back to Soviet times... Since a well-functioning legal system is necessary for a country’s normal political and economic development, a successful anticorruption drive and real reforms of the legal system need to be attempted in tandem”.

We need a breakthrough - installation of a civilized legal and governance system just in two or three years will push Ukraine from the Stone Age into the 21st century, it will liberate and restart the economy and will result in significant domestic and foreign investment.

Can it be done? It absolutely can. Other countries in the region, under similar circumstances, including war, have done it. Ukraine’s current leadership, instead of finding ridiculous excuses every time (Georgia is too small, Poland is too big, Estonia and other Baltic countries had spent less time under Soviet occupation, etc.) must express a decisive political will and move ahead with

these radical changes.

Historically it was even done in this land.

Prince Vladimir, who ruled Kyivan Rus in X-XI centuries, came to understand that the pagan system was outdated and was slowing the country's progress compared to more advanced neighbors who practiced mainstream religions. He sent envoys to study different religions and laws, ultimately deciding to adopt Christianity and "Christian Law."

History can be the judge on whether it was the right choice, but definitely at that time this was a major breakthrough for Kyivan Rus. So we do have a historic precedent, when one of the most revered leaders of Kyivan Rus acknowledged that the current system was outdated, looked abroad for a new system, studied and compared what would work best, and then radically and successfully replaced the old system with a new one. That happened 1,000 years before the information age. Today Ukraine can do this too.

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