

Bohdan A. Futey

Senior Judge on the United States Court of Federal Claims in Washington, DC

The Rule of Law and Judicial Independence



Bohdan A. Futey is a Senior Judge on the United States Court of Federal Claims in Washington, DC, appointed by President Ronald Reagan in May 1987. Judge Futey has been active in various Rule of Law and Democratization programs in Ukraine since 1991. He served as a member of the working group on Ukraine's Constitution adopted on June 28, 1996. Judge Futey is a professor at the Ukrainian Free University in Munich, Germany and a visiting professor at the National University of Kyiv-Mohyla Academy in Kyiv, Ukraine. In March 2015, he was appointed by the President of Ukraine to serve as a consultant on the Constitution Commission.

The Rule of Law is the lynchpin to promote democracy throughout the world, and democracy, in turn, will provide a more prosperous economic life.

There are many characteristics of the Rule of Law. I will focus on those I consider to be essential. First, the supremacy of law, which means that all persons are subject to the law. No person is above the law regardless of his status. Second, a concept of justice which emphasizes interpersonal adjudication, law based on standards and the importance of procedures. The source of the law must be the people themselves.

President Abraham Lincoln, speaking before Congress in 1861 about the establishment of the U.S. Court of Claims, said: "It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same, between private individuals." Fourth, it is important to preserve individual liberties. Fourth, the implementation of the doctrine of judicial precedent. Sixth, an independent judiciary is crucial.

As there cannot be a market economy without private ownership of property, there cannot be respect for the Rule of Law unless there is an independent judiciary. We look forward to the courts to promote democracy and the Rule of Law.

Although the requirement for judicial independence may vary among countries, the reality of that independence is essential for the judiciary's performance of its key function of assuring that the Rule of Law prevails. The Rule of Law, in English law, meant that governmental actions should never be above the law. The Rule of Law guarantees meaningful access to courts or other adjudicative bodies where a neutral and independent decisionmaker will determine whether actions were inconsistent with law.

The aim of any judicial system, either civil law or common law, is to provide stability through the consistent application of the law and adherence to the Constitution. The whimsical and contradictory application of judicial rulings has far reaching negative affects. It instills uncertainty and confusion not only

in legal circles, but in the people of a given country as well as in the international community.

Regardless of the common law or civil law legal systems, the following reforms are recommended: (1) strengthen judicial independence in general, (2) enforcement of judicial decisions, (3) adopt a code of conduct for judges.

Judges should not only avoid conduct which on its face is improper, but also conduct which creates an appearance of impropriety. Appearance of impropriety is sometimes as damaging as the act itself. Courts need to do away with visiting hours/ex-parte communications where parties can meet individually with judges behind closed doors without any record.

Judges must eliminate conflict of interest and file financial disclosure reports.

Judicial independence does not mean the Judges do as they choose, but do as they must in accordance with the Constitution and laws of the country. Judicial independence in the final analysis will depend largely on the conscience and courage of the Judges themselves. Judges will not be respected until they respect themselves.

There are two aspects in which judges must be independent. First, they must be honest-brokers, in that they are independent from and neutral among the parties that appear before them. Judges must decide matters before them impartially, on the basis of the facts and the law, without any restrictions, improper influences, inducements, or threats, direct or indirect, from any party or institution or for any reason. A judge's moral commitment to this form of independence eliminates favoritism and corruption from the nation's judicial system. If judges fail in this duty, the public will lose confidence in the basic equity of its society, generating cynicism, anger and instability.

Justice Felix Frankfurter said it best "The Court's authority, possessed of neither the purse nor the sword, ultimately rests on sustained public confidence in its moral sanction."¹

Second, the judiciary, and hence each individual judge, must act as co-equal and independent of the other branches of government. Judges are independent in this sense if they are not beholden to any other branch of government or political party. It is vital that courts have jurisdiction and the power to restrain the legislature or executive by declaring laws and official acts unconstitutional when they abridge the rights of citizens. Further, for judicial independence to have practical effect, the courts' interpretation must be accepted and enforced by the legislative and executive branches of government.

In the United States, becoming a judge represents the professional achievement of a legal career. Being

a judge means holding one of the most respected positions in American society. Because of the respect accorded to judges, the courts have great credibility and the confidence of the people. A September 2017 Gallup poll shows that 68% of Americans had trust in the judicial branch of the federal government.

All Article III federal judges hold office during good behavior and can be removed only through impeachment by Congress. Judicial immunity extends only to judicial acts during the process of rendering decisions. Judges have no immunity for violation of criminal statutes or their contractual obligations.

There is a First Amendment right for the public and the press to attend criminal trials. By informing the public about court proceedings, the press helps to keep a check on the independence of the judiciary.

Ukraine's transition from a command system to one based on the Rule of Law began with the Act of Declaration of Independence of August 24, 1991, and was affirmed by 90% of Ukraine's population in a nationwide vote held on December 1, 1991. Then, Ukraine's Parliament, in an overnight session from June 27-28, 1996, debated and eventually passed the Constitution by 315 votes. With the adoption of its Constitution on June 28, 1996, Ukraine took yet another step toward joining the community of democratic nations that place the Rule of Law and a free market economic system among its highest values.²

The Constitution addressed the concerns of Ukrainians about their national interests, the establishment of their statehood, as well as the suppression of rights by the Soviet Union and, at the same time, what kind of social changes a democratic future would bring. The Constitution was commended by a number of international organizations including the Venice Commission, particularly for the guarantee of many individual rights.

Even after almost twenty-two years, Ukraine's Constitution remains a work in progress. With every election of a new President, there is an attempt to amend or adopt a new Constitution.

The present government of Ukraine has also moved in that direction. President Poroshenko by decree has established a new Constitutional Commission. The aim is to make changes more democratic and closer to international standards as the government of Ukraine moves forward with reforms for a European integration. The Venice Commission and EU experts are playing an important role. I am honored to be appointed to serve in the Commission as a consultant.

The long expected judicial reform came into being on June 2, 2016, by the vote of the Parliament when 335 deputies voted for the Constitutional changes.

¹ Baker v. Carr, 82 S.Ct. 691 (1962).

² Bohdan A. Futey, "Comments on the Constitution of Ukraine," East European Constitutional Review 2-3 (Spring/Summer 1996):29-34.



Bohdan Futey (on the right) and Andriy Futey (on the left) with Patriarch Sviatoslav.

The aim being to secure Judicial independence in accordance with the principles, as previously above stated, and elimination of corruption within the Judiciary.

Judicial reform in Ukraine has progressed slowly, but now it is moving in the right direction. One thousand four hundred and thirty-six (1,436) candidates submitted applications for consideration as judges to the Supreme Court. Only one hundred fifteen (115) have been selected and approved. The Higher Council of Justice has forwarded the names to the President for appointment. For the first time, the Public Integrity Council, Civil Society representatives, participated in the selection process, presenting evidence against many applicants, especially former judges.

On November 11, 2017 President Poroshenko signed the decree of appointment for all 115 judges to the Supreme Court and the oath of office was administered on the same day. On November 20, 2017 all, of these judges, participated in an Ethics Conference. The first Plenary Session of the new Supreme Court was held on November 30, 2017 and Judge Valentyna Danyshevskya was elected Chief Judge of the Court.

So, the Supreme Court of Ukraine, is now formed and it has started its work on December 15, 2017.

On June 7, 2018 after months of debate and discussions the Verkhovna Rada adopted the law on the Anti- Corruption Court.

Also, progress has been made, in reforming the Constitutional Court. Now individuals will have the right to file a constitutional complaint.

Education is equally critical in establishing a credible and respected independent judiciary. Ukrainians require access to information about the ongoing process of reform, especially concerning the radical changes occurring in the Ukrainian judicial process. Judges, too, must be educated about the new system, and their roles within it. In this regard , lawyers' groups , and bar associations and law schools will be helpful in encouraging that democratic principles based on the rule of law become firmly entrenched in the judicial culture of Ukraine. A good start has been made, but acceleration is needed.

The transition from a command system to a system based on the Rule of Law is not easy, but the recent events throughout Ukraine and the peoples' revolutionary expression at the Maidan during the Revolution of Dignity, hopefully, will be an irrevocable incentive and mandate for the implementation of these reforms as the country is watchful over its independence and territorial integrity and moves forward to integrate with the European Union. ■■■■■