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## THE UKRAINIAN JUDICIARY UNDER 21st-CENTURE CHALLENGES\*

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## COVID-19 Pandemic as a New Challenge to Ukraine's Justice. – 8. Concluding Remarks.

*Thirty years after the declaration of its independence, Ukraine, unfortunately, has not yet managed to modernize its legal system to a level of proper efficiency. This is largely due to the dichotomy of the previous international strategy of our state between the two vectors of development, the old eastern and the new western one, which actually retarded the movement forward. The contradiction between these views on the prospects of Ukraine's development of the younger generation and the generation that continued to carry the memory of its historical past, was no less significant. Corruption is deeply rooted in the system of public administration and was purposefully supported by internal and external opponents of Ukraine's independence and overcoming these relics is a fundamental task in asserting sovereignty.*

*Remnants of the post-Soviet legal doctrine, which preserve the defining categories of judicial law in an ossified form, such as 'court', 'judiciary', 'justice', have become a serious obstacle to the formation of the new state and its legal system. This significantly limits the ability to ensure effective legal regulation of relations connected with the administration of justice in the state.*

*An overview of the theoretical and normative foundations that underlie the Ukrainian judiciary and the justice system points to obvious gaps and inconsistencies. It is indisputable that the modernization of the legal system of Ukraine, in particular, in the sphere of the organization of the judiciary, requires a renewed scientific vision based on the doctrine of judicial law and which should attempt to combine Ukrainian traditions and the Western European viewpoint.*

*Key words: access to justice, rule of law, court, judiciary, judicial law, the EU-Ukraine Association Agreement, COVID-19 pandemic, justice under COVID-19.*

## 1. INTRODUCTION

The formation of Ukraine as a sovereign republic<sup>1</sup> after the collapse of the USSR proved to be a strategically difficult task. In fact, in the early 1990s, the state did not go through a stage of passionate explosion of the young political nation of the Ukrainian people, because at that time the dominant part of social structure was the so-called 'Soviet Man' and the political nation of independent Ukraine was just emerging. In reality, Ukraine went through an economic, political, and historical rejection<sup>2</sup> of the system of government, which was already dead but deeply rooted. That is why for a long time Ukraine remained a post-Soviet republic with relevant traditions and experiences of the past, in particular, concerning the formation of legal doctrine.

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1 Declaration of State Sovereignty of Ukraine [1990] Vidomosti of the Verkhovna Rada 31/429 <<https://kon.rada.gov.ua/laws/show/55-12#Text>> accessed 22 July 2020.

2 Resolution of the Verkhovna Rada of the Ukrainian SSR 'On the Proclamation of Independence of Ukraine' [1991] Vidomosti of the Verkhovna Rada 38/502 <<https://zakon.rada.gov.ua/laws/show/1427-12#Text>> accessed 22 July 2020.

At the same time, Ukraine's unique geopolitical position at the intersection of Europe and Eurasia has determined the desire of each of these regions, represented by the EU and the Russian Federation respectively, to bring it into the orbit of its own influence. The choice of a specific strategic course for Ukraine involved not only joining certain (European or Eurasian) integration transnational structures,<sup>3</sup> but above all it was a factor in choosing one of the models (Western or Eastern) of state and legal development with its inherent institutions, principles, world views, etc. In fact, it was a question of determining the civilizational vector of Ukraine's further development in the long run.

For some time, Ukraine managed to adhere to the policy of so-called 'multi-vector balancing'. On the one hand, European integration was proclaimed the priority of foreign policy,<sup>4</sup> on the other, Ukraine participated in some integration projects within the CIS<sup>5</sup> and built bilateral relations with other former Soviet republics based on the principles of good neighborliness, cooperation and partnership.<sup>6</sup> One of the purposes of such balancing was to obtain political and economic preferences and international financial assistance.<sup>7</sup> In fact, Ukraine has become a strategic corridor for the transit of energy from the Russian Federation to the EU and Eastern Europe, which has long determined its position on the 'political map' and at the same time influenced the course of reforms, including in the judiciary.

At the same time, after the Orange Revolution (2004-2005) and especially after the Revolution of Dignity (2013-2014), Ukraine enshrined at the constitutional level that the priority direction of its further development is the European one. Thus, in 2018, Ukraine renounced its international 'neutrality' and at the constitutional level proclaimed the 'European identity of the Ukrainian people and the irreversibility of Ukraine's European and Euro-Atlantic course.'<sup>8</sup> An important factor in this movement of the state was the definition of a strategic course to reform the justice system (towards

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3 The Law of Ukraine 'On Accession of Ukraine to the Council of Europe' [1995] Vidomosti of the Verkhovna Rada 38/287 <<https://zakon.rada.gov.ua/laws/main/398/95-bp#Text>> accessed 23 July 2020. Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine [1994] OJ L49/3 <<https://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=659>> accessed 10 August 2020.

4 Decree of the President of Ukraine № 615/98 of 11 June 1998 'On Approval of the Strategy of Ukraine's Integration into the European Union' [1998] Official Gazette of Ukraine 24/870; Decree of the President of Ukraine № 1072/2000 of 14 September 2000 'On the Program of Ukraine's Integration into the European Union' [2000] Official Gazette of Ukraine 39/1648; the Law of Ukraine on the National Program of Adaptation of the Legislation of Ukraine to the Legislation of the European Union № 1629-IV of 18 March 2004 [2004] Vidomosti of the Verkhovna Rada 29/367.

5 See, for example, the Resolution 'On the Accession of the Verkhovna Rada of Ukraine to the Agreement on the Interparliamentary Assembly of the Member States of the Commonwealth of Independent States' of 3 March 1999 [1999] Vidomosti of the Verkhovna Rada 16/110.

6 See, for example, the Treaty of Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, signed on 31 May 1997, ratified on 14 January 1998, expired on 1 April 2019.

7 See, for example, the Order of the Cabinet of Ministers of Ukraine 'On Signing the Agreement on Financing (State Building Contract for Ukraine)' № 452-p of 7 May 2014 <<https://zakon.rada.gov.ua/laws/show/452-2014-p#Text>> accessed 23 July 2020.

8 The Law of Ukraine 'On Amendments to the Constitution of Ukraine (regarding the strategic course of the state for acquiring full-fledged membership of Ukraine in the European Union and the North Atlantic Treaty Organization)' [2019] Vidomosti of the Verkhovna Rada 9/50 <<https://zakon.rada.gov.ua/laws/show/2680-19#n6>> accessed 22 July 2020.

its democratization and efficiency) to stabilize the internal situation in Ukraine and to prevent possible social crises in the future.<sup>9</sup>

However, the current stage of structural reforms of the justice system is complicated by a number of factors of both legal and non-legal nature, including: doctrinal incoherency and conceptual uncertainty of the reform process; inconsistency of constitutional and legislative provisions; internal terrorist separatism and external military aggression; coronavirus pandemic, etc. The above and other challenges clearly demonstrate the instability of the judiciary and its unwillingness, as a part of the state mechanism, to effectively perform its functions. The causes and grounds of this phenomenon, as well as possible ways of improvement, will be discussed later in this article.

## 2. JUDICIARY REGULATION IN UKRAINE AND THE THEORETICAL DOGMAS

The basis of the Ukrainian legal system organization is the Constitution of Ukraine of 1996 (hereinafter – the CU). In 2016, after the Revolution of Dignity, it underwent significant reforms, especially in the organization of the domestic justice system. In the current version, the CU operates with such defining categories as ‘judicial power’ (Art. 6), ‘court’ (Art. 124) and ‘the system of justice’ (Art. 131). These categories are interrelated and reveal their meaning through each other and generally form the legal basis of judicial law.

Defining the meaning of ‘judicial power’, the legislator in Art. 1 of the Law of Ukraine ‘On the Judiciary and the Status of Judges’ of 2016<sup>10</sup> (hereinafter - the Law), indicated that in accordance with the constitutional principles of separation of powers, the judicial power in Ukraine is exercised by independent and impartial courts formed in accordance with the law. Herewith, the judicial power is exercised by judges and jurors, in cases determined by law and by the administration of justice within the framework of the respective court procedures.

The analysis of the norms of the Law indicates that the legislator, unfortunately, did not give a clear definition of the judiciary, but only formulated the general criteria and features of the judiciary that are characteristic of Ukraine. First of all, the legislator turned to the classical theory of separation of powers, according to which the *judiciary should be a separate component of a single state power*.<sup>11</sup> One of the key features of the judiciary is that it should come from a single sovereign power in the state, as well as that it should be separated from other forms and types of state power.

The doctrine of separation of powers and judicial independence came to fruition in the development of the Constitution, and Alexander Hamilton formulated the familiar characterization of the judiciary as the weakest of the three branches of government -

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9 OV Streltsova, *Konstytutsionalizatsiia protsesu asotsiatsii Ukrainy z Evropeiskym Soiuzom: teoriia i praktyka* [Constitutionalization of the process of association of Ukraine with the European Union: theory and practice] (Alerta 2017).

10 The Law of Ukraine ‘On the Judiciary and Status of Judges’ [2016] Vidomosti of the Verkhovna Rada 31/545 <<https://zakon.rada.gov.ua/laws/show/1402-19#Text>> accessed 22 July 2020.

11 A Hamilton, J Jay, J Madison, *The Federalist: A Commentary on the Constitution of the United States* (JB Lippincott & Co 1864).

no liberty, if the power of judging be not separated from legislative and executive powers.<sup>12</sup> (P. 1346-1347) At the same time, the courts remain the standard-bearer of good government among the three branches, because judges enjoy independence from political windstorms, as a result of both their service during ‘good behavior’ and the strict prohibitions against political activity.<sup>13</sup>

In Ukraine, the constitutional provision of the Art. 6 of the CU established that the state power in Ukraine is exercised on the principles of its division into legislative, executive and judicial powers and the bodies of legislative, executive and judicial power shall exercise their authority within the limits established by this Constitution and in accordance with the laws of Ukraine. Thus, the legislator identified three main features of the judicial power in Ukraine: 1) the judicial power is exercised by the courts; 2) such courts must be established by law; 3) such courts must be independent and impartial.

Problems related to the organizational and procedural unity of the judicial power have become one of the cornerstones of the Ukrainian judicial system today. Uncertainty about the balance of autonomy, independence and unity of the judicial power has led to an imbalance in the judiciary. The distortion of the role of the structure of the judicial system brought about the absolutization of the autonomy of its respective branches and caused attempts to create independent judicial subsystems, without taking the connecting factors into account.<sup>14</sup>

This state of affairs is largely due to the fact that the problems of the unity of the judicial powers are quite new for the Ukrainian jurisprudence and practice and their theoretical understanding and doctrinal disclosure is still under development.

The Art. 124 of the CU established that justice in the state is administered exclusively by the courts and the delegation of the court functions or the appropriation of these functions by other bodies or officials is not permitted. At the same time, Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention)<sup>15</sup>, which became an integral part of national legislation, established that everyone has the right to a fair and public trial within a reasonable time by an independent and impartial court or tribunal established by law.

Thus, the constitutional and convention provisions must be consistent and not contradict each other.

At first glance, the above constitutional provisions are as clear and definite as possible. For the Ukrainian legal opinion, the perception of the court solely as a state body whose legal status is determined by the judicial system is quite archaic. Being a body of state power and the bearer of judicial power as a kind of state power, the court can only be in the form of state courts defined by the Constitution and laws of Ukraine and therefore no other bodies can be endowed with the functions of exercising judicial power.

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12 Ronald M George, ‘Challenges Facing an Independent Judiciary’ (2005) 80 NYU L Rev 1345.

13 Joan Humphrey Lefkow, ‘Thinking about an Independent Judiciary’ (2006) 33 Litig 3.

14 IV Iurevych, ‘Pryntsypy jednosti sudovoi vlady’ [‘The principles of unity of the judiciary’] (Candidate of Law thesis, Yaroslav Mudryi Ukrainian National Academy of Law 2012).

15 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* [1950] ETS 5 <[https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)> accessed 22 July 2020.

Undoubtedly, the court, which is held by the state and on behalf of the state, is one of the most widespread and stable incarnations of Ukrainian social institutions today.

In the domestic legal circulation, the concept of 'court' has a number of different meanings. Thus, in the general theory of law and in constitutional law, the term 'court' is understood mostly as a generalized concept of a body empowered to exercise one of the branches of state power - the judicial one.<sup>16</sup> In this sense, the court is a body of judicial power without specifying which court it is, where it is located, what its competences are, and so on.

In the second sense, the court is a specific judicial institution that has additional characteristics that clarify and individualize, as well as determine its territorial and substantive jurisdiction.

The third meaning is clearly related to persons who pass on judgements, i.e. judges, regardless of their number. Both a judge who renders a sentence or decision alone and a court composed of several judges all act as a court.

Thus, in the state approach, the term 'court' usually refers to:

(a) a state body, a body of the judicial power; (b) an element of the judicial system which, in combination with other similar elements, forms a systemic integrity – the system of courts; (c) a party to judicial proceedings.<sup>17</sup>

In addition, the legislation of Ukraine uses such terms as '*the system of judiciary*'<sup>18</sup>, '*the system of justice*'<sup>19</sup>, '*system of courts*'<sup>20</sup> and '*system for ensuring the operation of the judiciary*'<sup>21</sup>.

The unity of the judicial system is ensured by: 1) uniform principles of organization and activity of courts; 2) a single status of judges; 3) binding rules of procedure defined by law for all courts; 4) unity of judicial practice; 5) obligatory execution of court decisions in the territory of Ukraine; 6) a single procedure for organizing and thus insuring the operation; 7) financing of courts exclusively from the State Budget of Ukraine; 8) resolving issues of internal activity of courts by bodies of judicial self-government.

A systematic analysis of the above provisions of the law gives grounds to claim that the concepts of '*the system of judiciary*' and '*system of courts*' have the same meaning and are therefore synonymous. At the same time, the '*the system of justice*' is much broader in its content and includes, among other things, the '*system of courts (of judiciary)*', and accordingly, the system of judiciary is a component of the system of justice. This is discussed in more detail below.

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16 IE Marochkin, LM Moskvych (eds), *Porivnialne sudove pravo [Comparative judicial law]* (Pravo 2008).

17 D Baronin, 'Pravovyi status sudu v Ukraini' ['Legal status of the court in Ukraine'] (Candidate of Law thesis, Yaroslav Mudryi National University of Law 2015).

18 The Law (n 10) Art. 125 CU, Art. 3, 17, 19, 31, 36, 39, 46, 52 etc.

19 Art. 131 of the CU, Art. 15, 92, 93, 104, 147, 148, 150, 151, 153, 160, 161 of the Law (n 11).

20 Paragraph 12 of the Transitional Provisions of the CU, Art. 126 of the Law.

21 Art. 147 of the Law (n.10).

### 3. TWO VIEWS ON THE 'COURT' CONCEPT AND THEIR IMPLEMENTATION IN UKRAINE

Ukraine's entry into the European legal space was conditioned by the need to adopt common legal values and, in our opinion, the way of European legal thinking, where the legal phenomenon of the court is not limited to its understanding as a body of state power.

Thus, Western European legal understanding allows for the existence and operation of a non-state court, whose decisions are recognized by the state and ensured by public coercion.

The ECtHR in the case of *Romashov v. Ukraine*<sup>22</sup> found that according to Art. 221 of the Labour Code of Ukraine, the commission in the field of labour disputes is the first instance the appeal to which should be used in accordance with paragraph 1 of Art. 35 of the Convention. The ECtHR thus ruled that the decision of the labour disputes commission in the applicant's case can be equated to a court decision and that the state is liable for its non-execution. The ECtHR also noted that the execution of a judgment must be regarded as an integral part of the trial, in this case – of the proceedings before the labour disputes commission.

In addition, the ECtHR noted that Art. 6 of the Convention secures everyone's right to have any claim relating to his civil rights and obligations brought before *a court or tribunal*; thus, in this way it embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. By this, the ECtHR recognized the labour disputes commission as a court of first instance, whose decision is binding and must be enforced by the state.

However, such a comprehensive approach of the ECtHR to the court as a unique social and legal institution, directly contradicts Art. 124 CU and the national doctrine on the basis of which this norm was formed. Therefore, paraphrasing A. Lewis, if the courts will deal with the basic values of a society, when they limit the power of the state, when they find that the wishes of a majority overstep constitutional boundaries, they are likely to be attacked<sup>23</sup>.

A reflection of this doctrine is an opposite to the ECtHR's view of the court, which has developed in the practice of the Constitutional Court of Ukraine (hereinafter - CCU). The domestic body of constitutional judicial control in *the case on the tasks of arbitration tribunals*<sup>24</sup> established that the possibility of submission by the state to arbitration tribunals, disputes between parties in the field of civil and commercial law are recognized as a foreign practice based, inter alia, on international law.

The CCU also referred to the case law of the ECtHR and stated that it was lawful for individuals and / or legal persons to apply to an arbitration tribunal, if the refusal from

22 *Romashov v. Ukraine* (App no 67534/01) ECHR 27 July 2004 [https://zakon.rada.gov.ua/laws/show/980\\_227#Text](https://zakon.rada.gov.ua/laws/show/980_227#Text) accessed 22 July 2020.

23 Anthony Lewis, 'An Independent Judiciary' (1999) 43 St Louis U LJ 285.

24 Decision of the Constitutional Court of Ukraine in the case N 1-3/2008 on the constitutional petition of 51 People's Deputies of Ukraine on the constitutionality of the provisions of paragraphs seven, eleven of Article 2, Article 3, paragraph 9 of Article 4 and Section VIII 'Arbitration Self-Government' of the Law of Ukraine 'On Arbitration Courts' (case on the tasks of the arbitration court) 10 January 2008 <<https://zakon.rada.gov.ua/laws/show/v001p710-08#Text>> accessed 22 July 2020.

state court services was a free decision of the parties to the dispute (Decision in the case *Deweere v. Belgium* of 1980<sup>25</sup>).

However, the CCU came to the conclusion that justice is an independent branch of state activity, which courts carry out in a court hearing and deciding civil, criminal and other cases in a special, statutory procedural form.

Arbitration of disputes between the parties in the field of civil and commercial relations is a type of non-state jurisdictional activity, which arbitration courts carry out on the basis of the laws of Ukraine by applying, in particular, arbitration methods.

The function of protection, provided for in paragraph 7 of Art. 2 and Art. 3 of the Law 'On Arbitration Courts' (2004)<sup>26</sup>, is implemented by arbitration courts in the settlement of disputes between the parties in civil and commercial relations within the law defined by Art. 55 CU by arbitration rather than administration of justice.

Thus, by not recognizing the functions of justice in arbitration courts, the constitutional jurisdiction deprived them of the legal status of a court, because justice in Ukraine is administered exclusively by courts (Art. 124 CU).

However, while not recognizing arbitration courts as judicial bodies, the state ensures the enforcement of their decisions. In this regard there was an independent decision of the CCU (case on the execution of arbitral awards),<sup>27</sup> which stated that arbitral awards are executive documents and therefore enforceable.

Another deviation from the classical understanding of 'court' are the relevant state bodies, which are not part of the court system, but are endowed with judicial jurisdiction. Thus, to ensure the realization of the fullness of state power within the national legal systems, bodies may be formed and function, the powers of which include the exercise of court jurisdiction among other things. In Ukraine, an example of such a body is, in particular, the High Council of Justice, which exercises specialized disciplinary jurisdiction in the field of justice.

The decision of the ECtHR in the case of *Oleksandr Volkov v. Ukraine*<sup>28</sup> states that there is nothing to prevent a specific national body, which is not part of the judiciary, from being called a 'court'. An administrative or parliamentary body can be considered a 'court' in the substantive sense of the term, which will lead to the possibility of applying Art. 6 of the Convention to civil service disputes.

In addition, the ECtHR noted that the High Council of Justice, the Parliamentary Committee and the plenary of the parliament jointly served as a court in deciding the

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25 *Deweere v. Belgium* (App no 6903/75) ECHR 27 February 1980 <<http://hudoc.echr.coe.int/eng?i=001-57469>> accessed 21 August 2020.

26 The Law of Ukraine 'On Arbitration Courts' [2004] Vidomosti of the Verkhovna Rada 35/412 <<https://zakon.rada.gov.ua/laws/show/1701-15#Text>> accessed 21 August 2020.

27 Decision of the Constitutional Court of Ukraine in the case N 1-8/2004 on the constitutional appeal of the joint venture 'Mukachevo Fruit and Vegetable Cannery' on the official interpretation of the provisions of paragraph 10 of Article 3 of the Law of Ukraine 'On Enforcement Proceedings' (case on enforcement of arbitral awards) 24 February 2004 <<https://zakon.rada.gov.ua/laws/show/v003p710-04#Text>> accessed 22 July 2020.

28 *Oleksandr Volkov v. Ukraine* (App no 21722/11) ECHR 9 January 2013 <<https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-115871%22%5D%7D>> accessed 22 July 2020



applicant's case and making a binding decision. The binding decision to dismiss the applicant was subsequently reviewed by the Supreme Administrative Court of Ukraine, which is a court within the national judicial system in the classical sense of the word.

The ECtHR in its case law indicates that Art. 6 of the Convention 'does not preclude the setting up of arbitration tribunals in order to settle certain disputes. The word "tribunal" is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country'.<sup>29</sup>

The key features that such a body must have in order to be a 'court' are: the ability to make binding decisions (*power of decision*); acting on the basis of the law and within the established procedure; acting within its own competence (and not outside it); independence and impartiality.<sup>30</sup>

The ability to pass a binding judgement in a case is an element of the broader sense of a 'fair trial', the so-called '*full jurisdiction*' in matters of fact and law. It includes, in particular, the power to overturn, in matters of facts and law, decisions of lower bodies, as well as the possibility of a comprehensive study of the facts and a complete review of the legal assessment of the circumstances of the case by lower courts (*sufficiency of review*).

The criterion of full jurisdiction includes, inter alia, the quality of the judgment, including the sufficiency of the established circumstances, the comprehensiveness of the legal assessment, the validity and proper motivation of such assessment (conformity of the assessment to the established circumstances, basis of the assessment on the provisions of legislation while taking into account the ECtHR case law).

All of this, as a result, has a direct impact on the effectiveness of the decision of the relevant instance on the actual restoration of rights, which have been the subject of judicial protection. The failure to provide any of the above-mentioned aspects of 'full jurisdiction' has the effect of violating the guarantee of consideration of the case by the 'court' within the meaning of Art. 6 of the Convention.<sup>31</sup>

#### **4. THE 2016 JUDICIARY REFORM IN UKRAINE IN THE LIGHT OF THE EU UKRAINE ASSOCIATION AGREEMENT**

The process of the substantive updating of the CU in 2016 was aimed at forming constitutional principles for the democratization of socio-political life in Ukraine, the approximation of the national political and legal system to European values and principles and the improvement of domestic legislation. These are the changes that have been on the agenda for a long time in the context of the constitutional reform in Ukraine.

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29 *Transado-Transortes Fluviais do Sado, S.A. v. Portugal* (App no 35943/02) ECHR 16 December 2003 <<http://echr.ketse.com/doc/35943.02-en-20031216/view/>> accessed 22 July 2020.

30 Martin Kuijer, 'The Right to a Fair Trial and the Council of Europe's Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings' (2013) *Human Rights Law Review* 13(14) 777-794.

31 Maryna Magrelo, 'Avtonomna kontseptsiiia poniattia "sud" iak osnova instytutu spravedlyvoho sudu' ['An autonomous concept of "court" as the basis of the institution of a fair court'] (2013) *Visnyk Akademii Advokatury Ukrainy* 2 (27) 70-77.

At the same time, these are the constitutional transformations that the European Union insists on, considering them as a necessary condition for the further development of associative relations with our state and the realization of its European integration aspirations.

This approach is reflected directly in the text of the Association Agreement between Ukraine and the EU.<sup>32</sup> Thus, Art. 3 and 6 of the Agreement define the desire of Ukraine and the EU to cooperate to ensure that their internal policies are based on common principles, such as the stability and effectiveness of democratic institutions, the rule of law and respect for human rights and fundamental freedoms, good governance, market economy, balanced development, etc.

Specifying these provisions, Art. 14 of Chapter III ‘Justice, Freedom and Security’ stipulates that in the framework of cooperation on justice, freedom and security, the Parties shall attach particular importance to the consolidation of the rule of law and the reinforcement of institutions at all levels, in the areas of administration in general and law enforcement and the administration of justice in particular. It is emphasized that, among other things, the cooperation of the Parties will aim at strengthening the judiciary, improving its efficiency, safeguarding its independence, impartiality and combating corruption.

This EU approach to supporting and promoting internal reforms in Ukraine has been detailed in other documents concluded between the Parties.<sup>33</sup>

#### *4.1. The System of Courts*

An important novelty of the CU in the version of 2016 is that from now on, individual courts, as bodies of state power, can be formed, reorganized or dissolved only by adopting a separate law. The draft of such a law should be submitted to the Verkhovna Rada of Ukraine only by the President of Ukraine after consultations with the High Council of Justice (hereinafter – the HCJ).

Prior to these changes, the establishment of courts was the exclusive prerogative of the President of Ukraine, which created the preconditions and a significant lever of presidential influence on the judiciary. The new procedure aims at increasing the level of independence of the judiciary from political influence by protecting it from artificial manipulation with the organization of individual courts.

As the Venice Commission rightly pointed out, the stability of the judiciary and its independence are closely linked. Citizens’ trust in the judiciary can only grow in a stable constitutional and legislative framework.<sup>34</sup>

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32 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L 161/ < [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:2014A0529\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:2014A0529(01)&from=EN) > accessed 22 July 2020.

33 EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement < [https://www.kmu.gov.ua/storage/app/imported\\_content/news/doc\\_248012532/en15.pdf](https://www.kmu.gov.ua/storage/app/imported_content/news/doc_248012532/en15.pdf) > accessed 23 July 2020.

34 Opinion No 969/ 2019 on the Legal framework in Ukraine governing the Supreme Court and judicial self-governing bodies [2019] CDL-AD 027 <[https://venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)027-e](https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)027-e)> accessed 22 July 2020.

In accordance with Part 3 of Art. 125 CU, the highest court in the judicial system of Ukraine has now become the Supreme Court, which replaced the previous Supreme Court of Ukraine.

The novelty of the CU has become the consolidation of a separate specialization of courts in administrative cases. In particular, Part 5 of Art. 125 CU establishes that administrative courts act in order to protect the rights, freedoms and interests of a person in the field of public relations.

The innovations also affected the structuring of Ukraine's system of courts. In particular, in accordance with Art. 125 CU, the judicial system in Ukraine is built on the principles of territoriality, specialization and is determined by law. The new version of the Law, specifying the constitutional provisions, stipulates that the system of courts is built on the principles of territoriality, specialization and instance hierarchy (Art. 17).

According to the new model, the court system of Ukraine is comprised of: 1) local courts; 2) courts of appeal; 3) The Supreme Court as the highest court in the court system. In addition, to consider certain categories of cases, the legislative possibility of establishing high specialized courts in the court system of Ukraine is established. Detailing these provisions, the Law in Section 4 'High Specialized Courts' provides for two types of high specialized courts in the court system of Ukraine to hear certain categories of cases, namely: the High Court on Intellectual Issues<sup>35</sup> and the High Anti-Corruption Court.<sup>36</sup>

#### 4.2. Status of Judges

The problem of the independence of the judiciary is directly related to the organization of the status of judges in accordance with the principles of a democratic system<sup>37</sup>. It is the independence of judges that has been a stumbling block on the path to radical change during all the thirty years since the proclamation of independence of Ukraine. That is why the second important aspect of the constitutional changes in the field of justice was the reform of the constitutional and legal status of judges, as a result of which it underwent significant changes.

The most important achievement is that at the constitutional level, the classical mechanism of irremovability of judges has been established, which is not limited to any probation period. Thus, according to Part 5 of Art. 126 of the CU it is established that the judge holds a position indefinitely.

The innovations also affected the regulation of judicial qualifying requirements. On the one hand, they were raised, in particular: the age threshold was raised from 25 to 30 years and the maximum limit for holding a judicial position was set, which must not

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35 Decree of the President of Ukraine № 299/2017 on the establishment of the Supreme Court of Intellectual Property <<https://zakon.rada.gov.ua/laws/show/299/2017#Text>> accessed 22 July 2020.

36 The Law of Ukraine 'On High Anti-Corruption Court' [2018] Vidomosti of the Verkhovna Rada 24/212 <<https://zakon.rada.gov.ua/laws/main/2447-19#Text>> accessed 22 July 2020.

37 See more in: Izarova Iryna, 'Independent judiciary: experience of current reforms in Ukraine as regards appointment of judges' in Katarzyna Gajda-Rosczyńska and Dobrosława Szumilo-Kulczycka (eds), *Judicial Management Versus Independence of Judiciary* (Walters Kluwer 2018) 242–263.

exceed 65 years; the requirements for professional experience in the field of law were increased from three to at least five years; the novel criteria for evaluating a candidate for the position of a judge - competence and fair practice were introduced.

At the same time, the requirement that a candidate for the position of a judge must have resided in Ukraine for at least ten years has disappeared from the provisions of the CU (Part 3 of Art. 127). Such a constitutional digression, in our opinion, unjustifiably weakens the classical idea of patriotism and the personal connection of a citizen with his country.

The changes also affected the mechanism of forming the judiciary. In Part 1 of Art. 128 CU it is established that the appointment to the position of a judge is carried out by the President of Ukraine on the proposal of the High Council of Justice in the manner prescribed by law. Thus, the following provisions were cancelled: five-year probation period for judges who were appointed for the first time; gradual formation of the composition of judges with the participation of various branches of government (first appointment by the President, subsequent appointment by parliament). Also, to replace the High Council of Law ('Vyscha Rada Yustytzii'), a modernized body was introduced under the new name of the High Council of Justice ('Vyscha Rada Pravosuddia').

It can be assumed that in the near future this mechanism, combined with the principle of irremovability of judges, will significantly reduce both political and corrupting influences on judges during their selection and appointment. However, the judicial system, in a sense, floats on a sea of public opinion, as it was rightly noted<sup>38</sup>, and the great crisis of its legitimacy continues to be an indisputable reality of the domestic judicial system.

#### *4.3. Related Institutions of the Judiciary*

##### *4.3.1. High Council of Justice*

The reorganization of the High Council of Justice was an important transformation of 2016. According to the new version of Art. 131 CU, it was established that in Ukraine there is a High Council of Justice, which: 1) submits applications for the appointment of a judge; 2) make decisions regarding the violation of incompatibility requirements by a judge or prosecutor; 3) considers appeals against decisions of a relevant body on bringing a judge or prosecutor to disciplinary responsibility; 4) makes a decision on dismissal of a judge; 5) gives consent to the arrest of a judge or his detention; 6) makes a decision on temporary suspension of a judge from the administration of justice; 7) takes measures to ensure the independence of judges; 8) decides on the transfer of a judge from one court to another.

The HCJ consists of twenty-one members, ten of whom are elected by the Congress of Judges of Ukraine from among judges or retired judges, two are appointed by the President of Ukraine, two are elected by the Verkhovna Rada of Ukraine, two are elected by the Congress of Advocates of Ukraine, and two are elected by the All-Ukrainian

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38 Stephen Breyer, 'An Independent Judiciary' (2010) 20 Experience 20.

Conference of Prosecutors and two are elected by the congress of representatives of legal education institutions and scientific institutions. The procedure for electing (appointing) HCJ members is determined by law. The President of the Supreme Court is an ex-officio member of the HCJ.

It is worth noting that the current constitutional format of the HCJ fully (unlike the previous High Council of Law, which operated from 1998 to 2016) meets key European standards for such bodies. In particular, according to item 1.3. The European Charter on the Statute for Judges (1998)<sup>39</sup> it is stated that

‘In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit, are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.’

As further commented in the Opinion of the First Study Commission of the International Association of Judges on ‘The Role and Functions of the High Council of Justice or a Similar Body in the Organization and Management of the National Judicial System’,

A High Council of Justice may be a means of strengthening the independence of the judiciary and the judges in carrying out their judicial functions. Therefore, it is important that a High Council or analogous body enjoys a strong degree of independence or autonomy from other governmental powers. Where a High Council of Justice or analogous body is not structured in such a way that promotes and protects the independence of the judiciary there is always a danger that it may undermine that independence. It is essential that a High Council of Justice or analogous body has a majority of judges among its members. Such judges should be elected by their peers or be members by virtue of their specific judicial office, but not be selected by the government or parliament. In any case, such a body should be a means by which a buffer is placed between the judiciary and the other powers of government, so that it can protect the judiciary from undue influence from those powers rather than be an instrument of it. A High Council of Justice or an analogous body or the judiciary should play a major role in the appointment, promotion, discipline or training of judges.<sup>40</sup>

#### 4.3.2. Prosecution office

The reform has led to serious conceptual changes in the legal status of the prosecution office. A separate Chapter VII of the CU under the name ‘The Prosecution Office’ became void. Instead, the legislator introduced a new Art. 131-1 to section VIII ‘Justice’ which establishes the operation of a prosecution office in Ukraine. Once integrated into

39 European Charter on the Statute for Judges [1998] <<https://rm.coe.int/16807473ef>> accessed 6 August 2020.

40 First Study Commission of Judicial Administration and Status of the Judiciary, ‘Conclusions on the role and function of the High Council of Justice or Analogous Bodies in the organization and management of the national judicial system’ [2003] <<https://www.iaj-uim.org/iuw/wp-content/uploads/2013/02/I-SC-2003-conclusions-E.pdf>> accessed 23 July 2020.

the justice system, the prosecution office can now be seen as an independent institution of the judicial power. The fact that the prosecution office is an integral part of the justice system is evidenced by the powers vested in this body, in particular: 1) the maintaining public prosecution in court; 2) the organization and procedural leadership during pre-trial investigation, decision of other matters in criminal proceeding in accordance with the law, supervision of undercover and other investigative and search activities of law enforcement agencies; 3) the representation of interests of the state in the court in exceptional cases and under procedure prescribed by law.

In addition, the legislator extended some of the previous constitutional powers vested in the prosecution office. In particular, paragraph 9 of Section XV of the 'Transitional Provisions' of the CU states that the prosecution office continues to perform the function of pre-trial investigation until the agencies, to which the function is transferred under the law, will have been launched. The Prosecution office will continue to perform a supervising function concerning the observance of laws and enforcing court decisions in criminal cases and the application of other measures of coercion related to the restraint of the personal freedom of citizens, until the law on the establishment of a dual system of regular penitentiary inspections takes effect. In fact, the role of the prosecution office was reduced to the implementation of state policy on combating and prosecuting crime.

It is also worth noting that the prosecution office has lost such important constitutional powers as: representation of interests of citizens in court in cases as specified by law and the supervision of ensuring human and civil rights and freedoms, supervision of the observance of laws by the executive authorities, local governments, and their officials (Art. 121 CU). According to CCU judge opinion, by depriving the prosecution office of these functions, citizens will in fact be deprived of one of the institutional guarantees of rights and freedoms. From a formal point of view, this approach contradicts Art. 55, part 5 of the CU, which states:

*'Everyone has the right to protect his or her rights and freedoms from violations and illegal encroachments by any means not prohibited by law'.<sup>41</sup>*

Sharing this approach, we believe that by depriving the prosecution office of supervisory powers in the field of human rights protection, the legislator has significantly limited the guaranteed constitutional rights of citizens to legal protection and thus advocates the interests of the state. The means and mechanisms of the prosecutions response to identified violations of the public interest could be an important and valuable tool, in particular for the prompt pre-trial settlement of disputes.

At the same time, a violated but not protected private human right causes greater harm to public interests (morality, public rights and freedoms, universal values, etc.) than to a person, who does not insist on protecting his rights and freedoms in court.

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41 The Decision of the Constitutional Court of Ukraine in the case on the appeal of the Verkhovna Rada of Ukraine on issuing an opinion on the compliance of the draft law on amendments to the Constitution of Ukraine (on justice) with the requirements of Articles 157 and 158 of the Constitution of Ukraine, a separate opinion of the judge of the Constitutional Court of Ukraine I D Slidenko < <https://zakon.rada.gov.ua/laws/show/nb08d710-19#Text> > accessed 22 July 2020.

#### 4.3.3. *The Bar*

The constitutional novelty of 2016 was Art. 131-2, which determined the status of the bar. This norm established that the bar operates in Ukraine to provide professional legal assistance. It is noteworthy that the Constitution classifies the bar (as well as the prosecution office) to the justice system.

The bar is guaranteed its independence, which, in fact, gives grounds to talk about the formation of the principle of independence of the bar as one of the defining constitutional principles of its activities. The fundamentals of the organization and functioning of the bar and advocates' activity in Ukraine is defined by law.

The advocates' monopoly on judicial activity is enshrined at the constitutional level. In particular, it is imperatively established that only an advocate can represent another person before the court and defend a person against prosecution.

Minor exceptions to this rule are allowed. Thus, it is stipulated that the law may provide for exceptions to representation in court in 1) labour disputes; 2) social rights protection disputes; 3) disputes related to elections and referendums; 4) small claims, as well as 5) while representing minors or adolescents, who were declared legally incapable or partially legally incapable by law.

#### 4.3.4. *Constitutional Court of Ukraine*

The CCU place and role in the structure of the judiciary deserves a separate scientific and applied analysis. This is due to the fact that after the reform of 2016, this body has ceased to be part of the unified system of courts and justice of Ukraine, despite the fact that it is still called 'court'.

Within our study, we should underline, that the separation of the CCU from the unified system of the judiciary, and consequently the autonomous functioning of the body of constitutional judicial jurisdiction, seriously called into question the principle of unity of the judiciary and, consequently, the integrity and unity of the judiciary of Ukraine.

### **5. UKRAINE AND INTERNATIONAL COURTS' JURISDICTION: A CHALLENGE TO NATIONAL SOVEREIGNTY?**

A separate aspect that directly relates to the concept of the court deals with its supranational (international) level. In this regard, it should be recalled that international courts are not bodies of a particular state. However, states that have become founders or participants of international courts shall recognize their jurisdiction, submit to their decisions and enforce them.

In 2016 Art. 124 CU was supplemented with provisions stipulating that Ukraine may recognize the jurisdiction of the International Criminal Court (ICC) under the conditions laid down in the Rome Statute of the International Criminal Court.<sup>42</sup>

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42 Rome Statute of the International Criminal Court [1998] <<https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx> > accessed 7 August 2020.

Ukraine once failed to recognize the jurisdiction of the ICC and to ratify the Rome Statute, which was signed by Ukraine on 20 January 2000, because the CC found it unconstitutional. In its decision of 2001 on the constitutional petition of the President of Ukraine for an opinion on the compliance of the CU with the Rome Statute of the International Criminal Court (the Rome Statute case), the CCU clarified the following.<sup>43</sup>

Art. 1 of the Rome Statute, emphasizes that while being a permanent institution that has the power to exercise its jurisdiction over persons for the most serious crimes of international concern, the ICC complements national criminal jurisdictions. A similar provision is contained in Paragraph 10 of the Preamble to the Statute. Complementary to the national criminal jurisdictions nature of the ICC is specified in a number of other articles of the Statute, in particular, in paragraph 2 of Art. 4, according to which the Court may exercise its functions and powers on the territory of any State Party; in paragraph 1.a of Art. 17, according to which the Court accepts a case not only at the request of a State Party, but also on its own initiative, when the State over which it has jurisdiction is 'unwilling or genuinely unable to carry out the investigation or prosecution.'

This significantly distinguishes the ICC from other international judicial bodies, in particular the ECtHR, the possibility to apply for protection of the rights and freedoms to which are enshrined in Part 4 of Art. 55 of the CU. Such international judicial bodies initiate proceedings only upon the application of individuals and a person may apply to them only after the use of all domestic remedies.

Thus, in contrast to the international judicial bodies provided for in Part 4 of Art. 55 CU, the legal nature and jurisdiction of which are subsidiary, the ICC complements the system of national jurisdiction.

The possibility of such a supplement to the judicial system of Ukraine was not provided for in Section VIII 'Justice' of the CU. This gave the CCU reason to conclude that Paragraph 10 of the Preamble and Art. 1 of the Statute are not consistent with the provisions of Part 1, Art. 3. 124 CU, and therefore the accession of Ukraine to this Statute in accordance with Part 2 of Art. 9 CU is only possible after appropriate changes have been made.<sup>44</sup>

Thus, the necessary addition to the provisions of the CU paved the way for Ukraine to join the Rome Statute of the ICC and significantly expanded the nature and influence of the international court on the national legal system by recognizing its jurisdiction and the submission to national decisions. Therefore, after the final ratification of the Rome Statute of the ICC, the question of whether there is a single system of courts in Ukraine will be questionable.

To sum up, in the legal system of Ukraine there is a situation in which the concept of 'court' includes: state bodies (institutions) that are part of a single judicial system of Ukraine; the composition of the court (panel of judges, sole judge) which exercises state judicial power on behalf of Ukraine; a non-governmental body exercising judicial

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43 Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of the President of Ukraine to issue an opinion on the compliance of the Rome Statute of the International Criminal Court (the case of the Rome Statute) with the Constitution of Ukraine. Case № 1-35 / 2001 of 11 July 2001 № 3-B/2001 <<http://www.ccu.gov.ua/sites/default/files/ndf/3-v/2001.doc>> accessed 22 July 2020.

44 Decision (n 43).



jurisdiction recognized by the state; a state body that is not part of the unified system of the judiciary of Ukraine and exercises judicial jurisdiction; an international court whose jurisdiction is recognized in Ukraine.

## **6. UKRAINIAN JUSTICE UNDER INTERNAL SEPARATIST TERROR AND EXTERNAL MILITARY AGGRESSION**

Ukraine, being a unitary state, has a single system of state courts. The existence of a single and complete system of courts should make it impossible for the judicial power to be replaced by other bodies or subjects of power. The unity of the judicial system affirms the sovereignty of state power and strengthens it. However, the regions of Ukraine that have undergone temporary occupation or illegal change of their constitutional and legal status are under a special legal regime.

Due to the fact that the occupation authority of the Russian Federation has been established on the territory of the Autonomous Republic of Crimea, and accordingly, the judicial authorities of the occupying state operate on these territories, the exercise of judicial power in Ukraine is limited. As a result of this Ukrainian citizens cannot protect their constitutional rights and freedoms, in particular, to exercise their right to a fair trial. In order to restore and guarantee the constitutional right of a person to judicial protection (Art. 55 CU), the Law of Ukraine 'On Ensuring the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine' (2014)<sup>45</sup> was adopted. This law established that the occupied territory of Ukraine is an integral part of the state, to which the Constitution and laws of Ukraine apply. The date of the beginning of the temporary occupation is 20 February 2014.

According to the provisions of this Law, due to the impossibility of administering justice by the courts of the Autonomous Republic of Crimea and the city of Sevastopol on the temporarily occupied territories, their jurisdiction was changed.

Thus, with the help of legislative regulation the legal territorial jurisdiction of local courts under occupation was replaced with temporary jurisdiction on the territory of Ukraine, where its sovereign power is ensured.

At the same time, the Law of Ukraine 'On the Administration of Justice and Criminal Proceedings in Connection with the Anti-Terrorist Operation' (2014)<sup>46</sup> provides that due to the inability to administer justice by certain courts in the area of the anti-terrorist operation the territorial jurisdiction of cases in such courts shall be changed. The hearing of civil, administrative, commercial, criminal cases and cases of administrative offenses shall be held by local and appellate courts determined by the President of the Supreme Court.

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45 The Law of Ukraine 'On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine' [2014] Vidomosti of the Verkhovna Rada 26/872 <<https://zakon.rada.gov.ua/laws/show/1207-18#Text>> accessed 22 July 2020.

46 The Law of Ukraine 'On the administration of justice and criminal proceedings in connection with an anti-terrorist operation' [2014] Vidomosti of the Verkhovna Rada 39/2009 <<https://zakon.rada.gov.ua/laws/show/1632-18#Text>> accessed 22 July 2020.

Compiling a list of such local and appellate courts in the area of the anti-terrorist operation, which cannot administer justice, was the responsibility of the State Judicial Administration of Ukraine. Appropriate notices were then sent to the heads of the higher specialized courts (which operated until 2016) to make decisions under the above-mentioned law.

It is clear that such legislative measures have become only a formal means of legal recognition of the existing problem, for which Ukraine was not ready in advance. Fascinated by the concept of 'rule of law' and 'rule of law state', as well as relying on their formal neutrality in the geopolitical system of the world, the ruling Ukrainian elite in 2010 completely abandoned military justice,<sup>47</sup> and as a result significantly weakened the foundations of national sovereignty. The restoration of military justice (military courts, prosecution office and investigative bodies) is extremely important for Ukraine on the way to establishing its political, territorial and legal sovereignty.

The situation in which Ukraine finds itself is already forcing it to prepare the legal system for the format of 'transitional justice'. As it was rightly pointed out,

"Transitional Justice explores two principal questions: (1) "What legal approaches do societies in transition adopt in responding to their legacies of repression?" and (2) "What is the significance of these legal responses for these societies' liberalization prospects?". The answers posed by both realist and idealist accounts of justice in transition are unsatisfying both, for the failure to explain the significance of law's rule in periods of radical political change and the relation between normative responses to past injustice and a state's prospects for liberal transformation.<sup>48</sup>

## **7. THE GLOBAL COVID-19 PANDEMIC AS A NEW CHALLENGE TO UKRAINE'S JUSTICE**

The global pandemic of COVID-19 in 2020 which spread into most countries of the world and, in particular, into the territory of Ukraine, put a number of issues related to legal regulation and organizational support of justice in the new social realities on the agenda. Unprecedented and atypical measures to limit social contacts, introduced to prevent the spread of infection, also affected Ukraine. These measures influenced the practical implementation of constitutional and legislative provisions related to the observance of democratic principles of justice.

In particular, Art. 129 CU establishes one of the fundamental constitutional principles of justice - the publicity of the trial. Concretizing this constitutional norm, the Law<sup>49</sup> provided that the consideration of cases in courts is open, except in cases established by law. Any person has the right to be present at an open court hearing. If a person

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47 The Law of Ukraine 'On the Judiciary and Status of Judges' [2010] Vidomosti of the Verkhovna Rada 41-42, 43, 44, 45/529 <[https://zakon.rada.gov.ua/laws/show/2453-17?find=1&text=військ#w1\\_8](https://zakon.rada.gov.ua/laws/show/2453-17?find=1&text=військ#w1_8)> accessed 22 July 2020.

48 Laura Provenzano, 'Transitional Justice' (2001) 26 Yale J Int'l L 288.

49 The Law (n 10).

commits actions that indicate contempt of court or of the participants in the trial, such person may be removed from the courtroom by a reasoned court decision.

Persons present in the courtroom and media representatives may take photographs, video and audio recordings in the courtroom, using portable video and audio equipment without obtaining a separate court permit, but are subject to restrictions established by law. The court hearing is broadcast with the permission of the court. If all participants in the case participate in the court session by videoconference, the course of the court hearing must be broadcast on the Internet.

Photographs, video recordings, as well as broadcasting of the court hearing in the courtroom must be carried out in a way that does not create obstacles in the conduct of the hearing and the exercise by the participants of the trial of their procedural rights. The court may determine the place in the courtroom from which the photographs or video recording are to be taken.

Consideration of the case in a closed court session is allowed by a reasoned court decision only in cases specified by law.

When considering cases, the course of the trial is recorded by technical means in the manner prescribed by law.

Participants of the trial are provided with the opportunity to participate in the hearing by videoconference on the basis of a court decision in the manner prescribed by law. The obligation to arrange a videoconference rests with the court that received the court decision to hold the videoconference, regardless of the specialization and instance of the court that made the decision.

Court hearings are held exclusively in a specially equipped courtroom, which is suitable for the parties and other participants in the trial. This allows exercising the procedural rights granted to the participants to the case and performing their procedural duties.

This Law also stipulates that court decisions, court hearings and information on cases considered by the court are open, except in cases established by law. No one shall be restricted in the right to receive oral or written information in court on the results of his/her court proceedings. Any person has the right to free access to a court decision in the manner prescribed by law.

Information about the court hearing the case, the parties to the dispute and the subject of the claim, the date of receipt of the statement of claim, appeal, cassation appeal, application for review of the court decision, stages of the case, place, date and time of the hearing is open and must be immediately published on the official web portal of the judiciary of Ukraine, except the cases provided by law.

Given the threat of the mass spread of viral infection, especially in public places, which include courts, the question of the need to temporarily restrict (adjust) the implementation of the constitutional principle of publicity of the trial has become quite acute. To this end, the following regulations have been established by law.<sup>50</sup> First of

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50 The Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)' [2020] Vidomosti of the Verkhovna Rada 18/123 < <https://zakon.rada.gov.ua/laws/show/540-IX#Text> > accessed 22 July 2020.

all, in civil, administrative and commercial litigation, the court has the right to decide to restrict access of persons, who are not participants in the trial, to a court hearing during quarantine established by the Cabinet of Ministers of Ukraine in accordance with the Law of Ukraine 'On Protection of Citizens from Infectious Diseases',<sup>51</sup> if the participation in a court hearing will endanger the life or health of a person.

At the same time, during the quarantine established by the Cabinet of Ministers of Ukraine to prevent the spread of coronavirus (COVID-19), participants in civil, administrative and commercial proceedings were given the right to participate in court hearings by video conference outside the court, using their own technical means. Confirmation of the identity of the party to the case can now be carried out using an electronic signature. If the person does not have such a signature, the confirmation of his/her identity shall be done either in the manner prescribed by the Law of Ukraine 'On the Unified State Demographic Register and Documents Proving Citizenship of Ukraine, Identity of a Person or Special Status'<sup>52</sup> or by the judicial administration of Ukraine.

It is worth noting that in 2018 in Ukraine a system 'electronic court' began to work in a test mode.<sup>53</sup> By creating their personal account in this system, citizens, representatives of organizations and institutions have obtained the opportunity to significantly reduce their time to submit or receive various documents related to litigation. A person registers in this system with his/her own digital signature and creates an account through which he/she receives all documents electronically to his/her email address. What is very convenient, is that in the future the person does not need to register again. This system creates all procedural documents and, when a judge signs a decision with his / her digital signature, a copy is automatically sent to the single register of court decisions and to the person who has registered in the electronic court and is a party to the case.<sup>54</sup>

In addition, in the framework of civil, administrative and commercial litigation, procedural time limits have been extended for the period of quarantine. This concerns the time limits for changing the subject or grounds of the claim, increasing or decreasing the value of claims, submission of evidence, requesting evidence, providing evidence, and deadlines for revocation and response to revocation, objection, explanations of a third party on the claim or revocation, leaving the statement of claim without motion, return of the statement of claim, filing a counterclaim, administrative proceedings, appeal, consideration of appeal, cassation appeal, cassation appeal consideration, submission of an application for review of a court decision in newly discovered or exceptional circumstances, etc.

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51 The Law of Ukraine 'On protection of the population from infectious diseases' [2000] Vidomosti of the Verkhovna Rada 29/228 <<https://zakon.rada.gov.ua/laws/main/1645-14#Text>> accessed 22 July 2020.

52 The Law of Ukraine 'On the Unified state demographic register and documents which confirm citizenship of Ukraine certify person or its special status' [2012] Vidomosti of the Verkhovna Rada 51/516 <<https://zakon.rada.gov.ua/laws/show/5492-17#Text>> accessed 22 July 2020.

53 Order of the State Judicial Administration of Ukraine No 628 'On testing the subsystem "Electronic Court" in local and appellate courts' [2018] <[https://dsa.court.gov.ua/dsa/inshe/14/N-628\\_e\\_court\\_testing](https://dsa.court.gov.ua/dsa/inshe/14/N-628_e_court_testing)> accessed 22 July 2020. See also H Boscheinen-Duursma, R Khanyk-Pospolitak, 'Austria and Ukraine Comparative Study of E-Justice: Towards Confidence of Judicial Rights Protection' (2019) Access to Justice in Eastern Europe 4(5) 42-59.

54 Ihor Bahaiev, 'Quarantine restrictions have contributed to the development of distance litigation and e-court' <<http://rsu.gov.ua/ua/news/igor-bahaiev-clen-radi-suddiv-ukraini-karantinni-obmezennaspriali-rozvitku-distancijnogo-sudocinstva-ta-elektronnogo-sudu>> accessed 22 July 2020.

It was determined that the time limits set by the court may not be less than the period of quarantine related to the prevention of the spread of coronavirus disease (COVID-19).<sup>55</sup>

At the same time, due to the specifics of the respective legal relations, criminal proceedings in courts of all instances should be conducted openly. The investigating judge and the court received the right to decide on restricting access of persons, who are not participants in the trial, to the court session during the quarantine, established by the Cabinet of Ministers of Ukraine in accordance with the Law of Ukraine 'On Protection of Citizens from Infectious Diseases',<sup>56</sup> if the participation in the hearing threatens life or health of a person. The investigating judge and a court may decide to conduct criminal proceedings or a part of it in a closed court session, only if it is necessary to ensure the safety of persons involved in criminal proceedings.

Temporarily, for the period of quarantine established by the Cabinet of Ministers of Ukraine in order to prevent the spread of coronavirus disease in Ukraine (COVID-19), a special procedure has been established for judicial control over the rights, freedoms and interests of persons in criminal proceedings and consideration of certain issues during court proceedings. In particular, this concerns the procedure for appointing the investigating judge<sup>57</sup>. Thus, if it is impossible to appoint an investigating judge in the relevant court (other than the High Anti-Corruption Court), the local court must file a reasoned request to transfer the petition, which must be considered by the investigating judge to another court within the jurisdiction of one appellate court, or to the court within the jurisdiction of different courts of appeal.

## 8. CONCLUDING REMARKS

The experience of the Ukrainian state evolution over the past thirty years, in particular, the judiciary functioning, leads us to the following thoughts and comments.

A real state is formed when a political nation - a sovereign - is born from the mass of population. The Ukrainian people, as a political nation, first loudly declared themselves in 2004-2005 with their peaceful resistance (the Orange Revolution) to the mass violation of the fundamental foundation of a democratic republic - free and equal rights to elect. And it was then that the fire of constitutional disobedience was extinguished by legal means in the Supreme Court of Ukraine, when the highest court of the state applied the principle of the rule of law in practice.<sup>58</sup>

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55 The Law (n 50). **Editor's note:** For more information about timing in trial under COVID-19 pandemic, see O Rozhnov 'Towards Timely Justice in Civil Matters Amid the COVID-19 Pandemic' (2020) 2-3 (7) *Access to Justice in Eastern Europe* 100-114.

56 The Law (n 51).

57 **Editor's note.** For more information about access to justice in criminal matters amid COVID-19 in Ukraine, please, see O Kaplina and S Sharenko 'Access to Justice in Ukrainian Criminal Proceedings During COVID-19 Outbreak' (2020) 2/3 (7) *Access to Justice in Eastern Europe* 115-133.

58 Decision of the Judicial Chamber for Civil Cases of the Supreme Court of Ukraine on the case on the complaint against the decisions, actions and inaction of the Central Election Commission to establish the results of the repeat voting in the presidential election [2004] <<https://zakon.rada.gov.ua/laws/show/n0090700-04#Text>> accessed 22 July 2020.

The second and rather difficult step on the way to sovereignty was taken by the Ukrainian people in 2013-2014, when the breaking of the tyranny of the thoroughly corrupt government (the Revolution of Dignity) has led to a pre-planned terrorist operation, which prepared the springboard for a large-scale military invasion on the territory of Ukraine. Under these circumstances, a great demand from society to the current government was the introduction of an independent judiciary that will be able to provide affordable and effective judicial protection of individual rights. As a reaction, a constitutional judicial reform was carried out in 2016, the results of which have brought significant changes in the justice system. However, the effectiveness of these changes is still pending.

We believe that the second determining state-building factor, after the formation of a political nation, is a fair trial. As it was rightly pointed out at the time, ‘The foundations of every state and the foundation of any country rest on justice and fairness.’<sup>59</sup>

The fundamentals of the judiciary of Ukraine are still in the process of their formation and this is an inevitable process on the way to asserting the sovereignty of Ukraine.

Today, Ukraine’s legal system is still in the process of transformation. Integrating it into the European legal space, the country has a situation in which key legal categories and institutions are characterized by a certain eclecticism and combine features of post-Soviet and pro-European legal understanding. Thus, the concept of ‘court’ includes: state bodies (institutions) that are part of a single judicial system of Ukraine; the composition of the court (panel of judges, sole judge), which exercises state judicial power on behalf of Ukraine; a non-governmental body exercising judicial jurisdiction recognized by the state; a state body that is not part of the unified system of the judiciary of Ukraine and exercises judicial jurisdiction; an international court whose jurisdiction is recognized in Ukraine. This approach significantly erodes the archaic postulates of the court and justice, which were laid down in 1996 in Art. 124 CU. Therefore, it is indisputable that the modernization of the legal system of Ukraine requires a renewed doctrinal vision of justice. The issues of the organization of the judiciary of Ukraine should be based on the international doctrine of judicial law, which has deep domestic and Western European historical roots.

At the same time, given that the national judiciary is still in the process of formation, the problem of weakening the foundations of Ukraine’s national sovereignty as a result of integration into supranational judicial protection systems raises serious concerns.

Social, political, economic and environmental crises, both global and domestic, also have a significant impact on the democratic processes of reforming the national justice system. For Ukraine, these factors are largely related to military aggression, separatism and pandemics and point to the need for effective judicial mechanisms in such emergencies. In particular, we believe that there is an urgent need for Ukraine to revive military justice (military courts, prosecutors and investigators).

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59 Citary, ‘As-Samarkandi’ <<https://citaty.su/biografiya-i-aforizmy-as-samarkandi>> accessed 22 July 2020.