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Note

ESTABLISHING TRUST IN THE COURT IN UKRAINE AS A STRATEGIC TASK FOR JUDICIAL REFORM

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DISCLAIMER

The authors declare that they were not involved in the analysed law drafts during their collaboration with the legislative body.

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ESTABLISHING TRUST IN THE COURT IN UKRAINE AS A STRATEGIC TASK FOR JUDICIAL REFORM

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Abstract This article highlights the key conclusions of international and national sociological research and observations on the current state of the judicial system of Ukraine. It analyses the achievements and failures at the main stages of the implemented judicial reform and highlights the importance of standards and recommendations for the proper organisation and functioning of the judiciary. Particular attention is paid to the conclusions of the ECtHR, which enshrine legal positions on issues that are essential for the implementation of effective justice: the inadmissibility of the use of independence guarantees of judges to avoid legal liability; the need to improve the institution of the jury; and balanced and strategic planning of further reforms in the field of justice.

Keywords: *judicial reform, virtue, rule of law, judiciary, public trust, independence of judges, international standards*

1 INTRODUCTION

The justice system in Ukraine is in a permanent state of reform, primarily due to the crisis of its legitimacy. Given that this system is a defining element of the national mechanism of legal protection, the level of its legitimacy is an indicator of the effectiveness of the judiciary through the prism of Art. 3 of the Constitution of Ukraine, according to which the establishment and protection of human rights and freedoms is the main duty of the state and determines the content and direction of its activities.

The extent to which the state fulfils this obligation is subject to evaluation based on the results of both international and national sociological surveys and observations. In 2020, Ukraine ranked 72nd among 128 countries on the rule of law, as is published on the website of the World Justice Project, an international, non-governmental organisation.¹ The Index relies on national surveys of more than 130,000 households and 4,000 legal practitioners and experts to measure how the rule of law is experienced and perceived worldwide. Ukraine's highest levels of progress were noted in such elements of the rule of law as Open Government

1 WJP Rule of Law Index 2020 <https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf> accessed 10 April 2021.

(ranking 42nd among other countries) and Fundamental Rights (ranking 49th). Ukraine took the worst position in terms of such criteria as Absence of Corruption and Regulatory Enforcement (ranking 100th). At the same time, the assessment of the state of affairs in the field of Civil Justice determined that Ukraine took 61st place in the global ranking. In the field of Criminal Justice, unfortunately, the situation seems much less optimistic: Ukraine ranked only 90th out of the 128 countries in the world in which the survey was conducted. These results are unlikely to satisfy the aspirations of civil society and confirm the need for radical progress in ensuring the judicial protection of human rights.

2 STAGES OF REFORM

The legislator is currently seeking to overcome the crisis of the legitimacy of the justice system in Ukraine by reforming it. The primary stage of this reforming is the so-called 'personnel reset'. This personnel replacement is regulated by the provisions of the new Law of Ukraine 'On the Judiciary and the Status of Judges',² the task of which was, *inter alia*, to strengthen the responsibility of the judiciary to society and to optimise and update the judiciary, creating an effective model of judiciary standards. It is designed to meet the public demand for a fair trial in the best way possible. A key innovation in the field of judicial staffing has been granting the opportunity to become a judge of the Court of Appeal, a higher specialised court, as well as a judge of the Supreme Court, to persons who do not have experience as judges, such as lawyers and scholars. Thus, according to the results of the competition in 2018, more than a third of the vacancies of judges in the newly created Supreme Anti-Corruption Court were filled by persons of this category.

Further reform of the judicial system was marked by an attempt to restart the work of the High Qualifications Commission of Judges of Ukraine, which was carried out on the basis of the Law of Ukraine 'On Amendments to the Law of Ukraine "On the Judiciary and Status of Judges" and Some Laws of Ukraine on Activities of Judicial Authorities',³ which provided for the reduction of personnel and the appointment of all members of the High Qualifications Commission of Judges of Ukraine (HQCJ) as a single entity –the High Council of Justice (HCJ). However, the Constitutional Court of Ukraine, in its decision of 11 March 2020 No. 4-p/2020, recognised these legislative provisions as unconstitutional, noting that the change in the number and subjects of appointment of HQCJ members without the introduction of a transitional period is recognised as such, which created significant obstacles to the functioning of effective justice and in some cases made it impossible to exercise everyone's right to access to justice as a requirement of the rule of law.⁴

Also, in accordance with the requirements of this Law, the powers of all the members of the HQCJ were terminated, but a new composition of this body has not yet been formed. This contradicts the provisions of Art. 92 of the Law of Ukraine 'On the Judiciary and the Status of Judges', which secures the status of the HQCJ as a body of judicial governance, operating in the justice system of Ukraine on a *permanent basis* (emphasis added by the authors). Meanwhile, without an acting HQCJ, which is responsible for the selection of candidates for judicial positions and the qualification evaluation of judges, it is impossible to fill vacancies in courts, the number of which has already reached about two thousand and continues to grow.

2 Law of Ukraine No 1402-VIII 'On the Judiciary and Status of Judges' of 2 June 2016 <<https://zakon.rada.gov.ua/laws/show/1402-19>> accessed 10 April 2021.

3 Law of Ukraine No 193-IX 'On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and Some Laws of Ukraine on the Activities of Judicial Authorities' of 16 October 2019 <<https://zakon.rada.gov.ua/laws/show/193-20>> accessed 10 April 2021.

4 Decision of the Constitutional Court of Ukraine of 11 March 2020 No 4-p/2020 in case No 1-304/2019(7155/19) <<https://zakon.rada.gov.ua/laws/show/v004p710-20>> accessed 10 April 2021.

Transitional provisions of the Law of Ukraine of 4 June 2020 No. 679-IX,⁵ according to which the HCJ, in the absence of plenipotentiary composition of the HQCJ, is authorised to make the decision to send a judge to another court, transfer a judge, or submit the position of a judge to the President of Ukraine in the cases specified by this Law without recommendation or submission of the HQCJ, did not significantly improve the situation with the staffing of courts. Due to the lack of judges, cases in the courts have been waiting for years to be resolved, which creates obstacles to access to justice. Therefore, on 3 March 2021, the parliament adopted the draft Law 'On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and Some Laws of Ukraine on the Resumption of the High Qualifications Commission of Judges of Ukraine' in the first reading.⁶ The draft Law provides for additional qualification requirements for HQCJ members, and the HQCJ itself is to be formed on a competitive basis out of sixteen members, eight of whom are appointed from among judges or retired judges.

Lack of staff, which prevents the court from fully administering justice, indirectly affects the efficiency of the prosecutor's office in Ukraine as a related legal institution in the justice system and determines the appropriate level of public trust in the prosecutor's office as a whole.

The institutional reform of the Prosecutor's Office of Ukraine, based on the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Concerning Priority Measures to Reform the Prosecutor's Office,'⁷ has now been completed. Renewed prosecutor's offices at all levels – the Office of the General Prosecutor and regional and district prosecutor's offices, the staff of which has passed the certification procedure – have started their work. It is noteworthy that the criterion of low-level civil society trust in the prosecutor's office in Ukraine was used to justify the timeliness and demand for such a reform. In such circumstances, the authors of the draft Law saw the possibility of further reforming the prosecutor's office only if the priority measures to assess the compliance of current prosecutors with the criteria of professional competence, integrity, and professional ethics are implemented, and on the condition that opportunities for external candidates with relevant training and experience in the field of law to hold positions in the prosecutor's office of all levels are provided.

Among the main steps identified for this reform, emphasis was placed on the reorganisation of the prosecutor's office, which consisted of reloading and optimising the organisational structure of the prosecutor's office in accordance with strategic activities and requirements of society, as well as a new model of human and managerial development, conduct, and disciplinary liability of prosecutors. The relevant legislative initiative to address these issues has been supported by the Office of the General Prosecutor and is already under the consideration of the parliament.⁸

Currently, a number of non-governmental organisations are calling for judicial reform to reset the HCJ, the judiciary body responsible for forming a conscientious and highly professional

5 Law of Ukraine No 679-IX 'On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" on the Travel of Judges and Settlement of Other Issues of Ensuring the Functioning of the Justice System in the Absence of the Plenipotentiary Composition of the High Qualification Commission of Judges of Ukraine' of 4 June 2020 <<https://zakon.rada.gov.ua/rada/show/679-20>> accessed 10 April 2021.

6 Draft Law 'On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and Some Laws of Ukraine on the Resumption of Work of the High Qualification Commission of Judges of Ukraine' register No 3711-д of 29 January 2021 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70949> accessed 10 April 2021.

7 Law of Ukraine No 113- IX of 19 September 2019 'On Amendments to Some Legislative Acts of Ukraine on Priority Measures for Reform of Prosecutor's Bodies' <<https://zakon.rada.gov.ua/laws/show/113-20>> accessed 10 April 2021.

8 Draft Law 'On Amendments to Certain Laws of Ukraine on Improving the Selection and Training of Prosecutors', register No 5158 of 25 February 2021 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71239> accessed 10 April 2021.

judiciary in Ukraine, which they believe is a major obstacle to the cleansing of judicial power.⁹ Moreover, in 2020, Ukraine made a commitment to the International Monetary Fund, including those points that concern judicial reform. Thus, the Memorandum of Economic and Financial Policy of 2 June 2020¹⁰ outlines the intention to amend the Law defining the legal status of the HCJ in order to strengthen the quality of selection so that members of the HCJ would be people with impeccable reputation and integrity. This document also refers to the establishment of a commission to pre-evaluate potential candidates for the HCJ and assess their integrity, as well as to conduct a similar one-time evaluation of current members of the HCJ. It is projected that at least half of the committee members will be respected experts with recognised ethical standards and judicial experience, including relevant experience from other countries, to whom the Commission will give a decisive role and voice.

In order to legislate these intentions, on 15 February 2021, draft Law No. 5068 was registered in the parliament, which stipulates that members of the HCJ must meet the criteria of professional ethics and integrity. The Ethics Council was created to confirm the compliance of candidates for the HCJ with these criteria and perform one-time evaluations of the members of the HCJ elected (appointed) before the entry into force of this Law.¹¹ It is meant to include three persons from among judges or retired judges appointed by the Council of Judges of Ukraine, as well as three persons designated by international organisations with which Ukraine has been cooperating for at least the last three years in the field of preventing and combating corruption and/or the judiciary reforms in accordance with international treaties of Ukraine.

Currently, it is premature to assess the effectiveness of the reforms in the field of justice, given their incompleteness. At the same time, in the process of monitoring the progress of these reforms, one of the defining indicators of their prospects is, quite rightly, considered to be how they are perceived by civil society in general and by the expert professional (legal) community in particular.

Thus, the results of a survey conducted by the Razumkov Centre's sociological service, together with the Ilko Kucheriva Democratic Initiatives Foundation of 3 to 9 July 2020 on the assessment of citizens' activities and the level of trust in social institutions, have attracted attention to the perception of these reforms by civil society. The poll showed distrust, expressed towards the judiciary as a whole (77.5%) and towards the prosecutor's office (73%).¹² It is noteworthy that according to a survey conducted by the Razumkov Centre's sociological service on citizens' assessment of government activities, the level of trust in social institutions as of 6–11 September 2019, i.e., before the above-mentioned personnel reforms in the justice system, showed that distrust towards the judiciary, in general, was at 72% and towards the prosecutor's office, 61%,¹³ which indicates the unresolved problem of ensuring the legitimacy of the judiciary and the prosecutor's office in Ukraine at the intermediate stage of reforms of these institutions.

9 The public calls on the parliament to ensure a fair composition of the judiciary and the Constitutional Court <<https://dejure.foundation/tpost/z6h994xy1-gromadskst-zaklika-parlament-zabezpechit>> accessed 10 April 2021.

10 Memorandum of Economic and Financial Policies of 2 June 2020 <https://mof.gov.ua/uk/memorandum_of_economic_and_financial_policies_by_the_authorities_of_ukraine-435> accessed 10 April 2021.

11 Draft Law 'On Amendments to Certain Laws of Ukraine Concerning the Procedure for Election (Appointment) to the Positions of Members of the High Council of Justice and Activities of Disciplinary Inspectors of the High Council of Justice', register No 5068 of 15 February 2021 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71089> accessed 10 April 2021.

12 The beginning of a new political year: Trust in social institutions (July 2020) <<https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/pochatok-novogo-politychnogo-roku-dovira-dosotsialnykh-instytutiv-lypen-2020r>> accessed 10 April 2021.

13 The level of trust in public institutions and electoral orientations of Ukrainian citizens <<http://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/riven-doviry-do-suspilnykh-instytutiv-ta-elektoralni-orientatsii-gromadian-ukrainy>> accessed 10 April 2021.

3 INTERNATIONAL STANDARDS AND RECOMMENDATIONS

In a democratic society, the justice system operates in accordance with the standards of productivity and efficiency of its procedures, the quality of its services, and the expectations of people who are the users of this system. At the same time, the assessment of the justice system is plausible if it is based on specific quality standards, the assessment of which is carried out on the basis of proven, reliable methods. Obviously, the basis for these standards is public expectations about the quality of services such a system provides.

Today, there is a process of reforming the justice system towards building an optimal model, taking into account the requirements and recommendations of European institutions, as well as national legal traditions of its operation in Ukraine. At the level of the Basic Law, the Ukrainian state declared the irreversibility of Ukraine's European course, which was initiated by joining the Statute of the Council of Europe.¹⁴ Thus, the Opinion of the Parliamentary Assembly of the Council of Europe No 190 (1995) of 26 September 1995¹⁵ on Ukraine's accession to the Council of Europe states that, *inter alia*, the state has committed to the following: the role and functions of the prosecution will be changed by transforming this institution into a body that will comply with the principles of the Council of Europe (para 11.6); the independence of the judiciary, in line with Council of Europe standards, will be ensured, in particular with regard to the appointment and holding of judges; a professional association of judges will be involved in the procedure for appointing judges (para 11.8).

At the present stage, the European institutions set a number of requirements, including some for the reform of the justice system in Ukraine, taking European standards into account, which are mainly presented in the form of 'soft law' instruments. They embody the visions of the European institutions on the functioning of the justice system and set out a general framework approach in this area, in particular for the judiciary,¹⁶ the public prosecution service,¹⁷ and their interaction, the ultimate goal of which is to ensure the efficiency of the justice system.

Among the leading organisations whose activities are aimed at the unification of approaches and the formation and implementation of standards in the field of justice, the Consultative

14 Law of Ukraine Nos 398-95 'On Ukraine's Accession to the Statute of the Council of Europe' of 31 October 1995 <<https://zakon.rada.gov.ua/laws/show/398/95-%D0%B2%D1%80>> accessed 10 April 2021.

15 Opinion 190 (1995) Application by Ukraine for membership of the Council of Europe <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=13929&lang=en>> accessed 10 April 2021.

16 Recommendation CM/Rec (2010)12 'Judges: Independence, Efficiency and Responsibilities' adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies and explanatory memorandum <<https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilities-of-judges/16809f007d>> accessed 10 April 2021; Venice Commission, 'Report on the Independence of the Judicial System Part I: The Independence of Judges' adopted at 82nd Plenary Session (Venice, 12-13 March 2010). CDL-AD(2010)004-e <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2010\)004-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e)> accessed 10 April 2021.

17 Recommendation Rec (2000)19 'On the Role of Public Prosecution in the Criminal Justice System' adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 and Explanatory Memorandum <<https://rm.coe.int/16804be55a>> accessed 10 April 2021; Parliamentary Assembly Recommendation 1604 (2003) (Reply adopted by the Committee of Ministers on 4 February 2004 at the 870th meeting of the Ministers' Deputies) 'Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law CM/AS (2004). Rec 1604 final 6 February 2004 -<<https://rm.coe.int/16805dde1c>> accessed 10 April 2021; Recommendation CM/Rec (2012)11 of the Committee of Ministers to member states 'Role of Public Prosecutors outside the Criminal Justice System' adopted by the Committee of Ministers of the Council of Europe on 19 September 2012 at the 1151st meeting of the Ministers' Deputies and explanatory memorandum <<https://rm.coe.int/16807096c5>> accessed 10 April 2021; Venice Commission, 'Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service' adopted at 85th plenary session (Venice, 17-18 December 2010). CDL-AD(2010)040-e <[https://www.venice.coe.int/webforms/documents/default.aspx?ref=cdl-ad\(2010\)040&lang=EN](https://www.venice.coe.int/webforms/documents/default.aspx?ref=cdl-ad(2010)040&lang=EN)> accessed 10 April 2021.

Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) play an important role. The so-called 'legal legacy' of the CCJE includes the Magna Carta of Judges (Fundamental Principles)¹⁸ and conclusions on various aspects of the organisation and functioning of the judiciary.¹⁹ In turn, the CCPE's findings reflect the best practices of Council of Europe member states on issues related to the prosecution service.²⁰

In reforming the judiciary, Ukraine is also actively using the consultative conclusions of the European Commission 'For Democracy through Law'. In particular, the Conclusion of the Venice Commission on amendments to the legislation of Ukraine regulating the status of the Supreme Court and judicial authorities emphasised that trust in the judiciary can grow only within the framework of a stable system. While judicial reforms in Ukraine have been considered necessary in order to increase public trust in the judicial system, persistent institutional instability where reforms follow changes in political power may also be detrimental to the public trust in the judiciary as an independent and impartial institution (para 13 of the Conclusion).²¹ According to the Conclusion of the Venice Commission

Draft amendments to the Law "On the Judiciary and the Status of Judges" and certain laws on the activities of the Supreme Court and Judicial Authorities", Draft Law No 3711 maintains a mixed national / international body, the Competition Committee for the selection of the new members of the HQCJ. This follows the successful model chosen for the Anti-Corruption Court and is welcome (para 78 of the Conclusion).²²

4 THE PRACTICE OF THE ECtHR

It should be noted that according to ECtHR statistics for the entire period of its activity, almost half of all violations of the European Convention on Human Rights (ECHR) recognised by the ECtHR were violations of the right to a fair trial, a significant part of which are violations of reasonable time and enforcement. This indicates the existence of problems in the field of compliance with a reasonable time of a trial and enforcement proceedings in general at the level of the European region.

Non-compliance with national court decisions is also a serious problem for the judicial system in Ukraine. Its systematisation was established in the pilot decision in *Yuriy Nikolayevich Ivanov v. Ukraine*,²³ in which the ECtHR stated that the violations of human rights originated in a practice incompatible with the ECHR consisting in the respondent state's recurrent

18 'Magna Carta of Judges (Fundamental Principles)' CCJE (2010)3 Final. Strasbourg, 17 November 2010 <<https://rm.coe.int/2010-ccje-magna-carta-anglais/168063e431>> accessed 10 April 2021.

19 AO Kavakin (ed), *Documents of the Consultative Council of European Judges* (3rd ed, Ratio Decidendi Publishing House 2020).

20 'Opinions of the Consultative Council of European Prosecutors' <<https://rm.coe.int/compilation-of-opinions-of-the-consultative-council-of-european-prosec/168074fa32>> accessed 10 April 2021.

21 Venice Commission, 'Opinion on the Legal Framework in Ukraine Governing the Supreme Court and Judicial Self-governing Bodies' CDL-AD (2019)027-e, adopted at the 121st Plenary Session (6-7 December 2019) <[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 10 April 2021.

22 Venice Commission, 'Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft amendments to the Law "On the Judiciary and the Status of Judges" and certain Laws on the activities of the Supreme Court and Judicial Authorities (draft Law no 3711)' CDL-AD(2020)022-e Ukraine, adopted at the 124th online Plenary Session (8-9 October 2020) <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)022-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)022-e)> accessed 10 April 2021.

23 *Yuriy Nikolayevich Ivanov v Ukraine* App no 40450/04 (ECtHR, 15 October 2009) <<http://hudoc.echr.coe.int/eng?i=001-95032>> accessed 10 April 2021.

failure to comply in due time with domestic decisions for the enforcement for which it is responsible and in respect of which aggrieved parties have no effective domestic remedy.

Despite this decision of the ECtHR and the fact that a long time has passed since its adoption, this problem still remains unresolved in Ukraine. Moreover, a significant number of similar complaints submitted after the pilot decision prompted the ECtHR to take drastic action, which resulted in the decision in *Burmych and Others v. Ukraine*. In this decision, the Court expressed concern that it runs the risk of operating as part of the Ukrainian legal enforcement system and substituting itself for the Ukrainian authorities, noting that the task is not compatible with the subsidiary role which the Court is supposed to play in relation to the High Contracting Parties.²⁴

5 EVALUATION OF INTERNATIONAL INSTITUTIONS

The restoration of the legitimacy of the judiciary is possible only with the help of the best international experience in the construction and operation of judicial systems. Information on such practices is contained, in particular, in the reports of the European Commission for the Efficiency of Justice (CEPEJ),²⁵ which functionally pays considerable attention to the monitoring and evaluation of the performance of courts in member states of the Council of Europe. The CEPEJ was established in September 2002 to develop acceptable solutions aimed at effectively implementing the fundamental principles of the Council of Europe on the administration of justice, ensuring that state policy on the functioning of courts meets the needs and expectations of judicial users, and reducing the burden on the ECtHR by making proposals on effective ways to resolve disputes before applying to the ECtHR and preventing violations of the right to a fair trial.

In its regular biennial reports, CEPEJ emphasises the importance and necessity of monitoring the efficiency and quality of the judiciary. The latest report, published in October 2020, examines indicators that provide an opportunity to assess the state of the judicial system of individual countries and better understand the specifics of the functioning of national courts. The ultimate goal of the periodic evaluation process is to develop recommendations and propose specific tools to improve the quality, impartiality, and efficiency of judicial systems.

Among the conclusions reached by CEPEJ, the following trends should be noted. As stated by the Venice Commission

In order to maintain the independence of the court system, it will be necessary to provide the courts with resources appropriate to enable the courts and judges to live up to the standards laid down in Article 6 of the ECHR and in national constitutions and perform their duties with the integrity and efficiency which are essential to the fostering of public trust in justice and the rule of law.²⁶

According to the latest report, the member states have slightly but consistently increased the average budget allocated to the judicial system. It should be noted that the strongest

24 *Burmych and Others v Ukraine* App no 46852/13 (ECtHR, 12 October 2017) para 155 <<http://hudoc.echr.coe.int/eng?i=001-178082>> accessed 10 April 2021.

25 Council of Europe European Commission for the efficiency of justice (CEPEJ) <<https://www.coe.int/en/web/cepej/home>> accessed 10 April 2021.

26 Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010). CDL-AD(2010)004-e <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2010\)004-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e)> accessed 10 April 2021.

increases are registered in Ukraine (+83%, +105% in local currency). Ukraine, as part of its judicial reform, invested heavily in the judiciary by increasing the salaries of judges and court staff, improving conditions of accessibility for court users, equipping courts with videoconferencing systems, and renovating court buildings.²⁷

Thus, Ukraine demonstrates compliance with European standards for adequate budget funding of the justice system to ensure its independence. Nevertheless, the cost of resolving a dispute in court is often a barrier to access to justice. According to the World Bank, today, the cost of resolving a commercial dispute through a court of first instance in Ukraine is on average 46.3% of the value of the claim, which includes legal aid (25% of the price of the claim), court fees (9.9%), and executive fees (11.4%).²⁸ For comparison, in Turkey, such costs collectively reach 24.9% of the value of the claim (almost half of the costs in Ukraine); in Slovakia, these are 20.5%, and in Poland, 19.4%.

The explanatory note to para. 10 of the Bordeaux Declaration 'Judges and Prosecutors in a Democratic Society' states that

The highest level of professional skill is a pre-requisite for the trust which the public has in both judges and public prosecutors and on which they principally base their legitimacy and role.²⁹

In other words, the level of professionalism of prosecutors and judges can be objectively assessed by determining the level of trust of civil society in these institutions, which are the defining components of the justice system.

In this regard, the data of the Eurobarometer Standard are of interest, according to the methodology of which, with the support of the European Commission, a sociological survey of citizens of the EU member states and candidate countries is conducted, in particular, on trust in institutions representing justice. Thus, the results of a study published in October 2020 showed that

Trust in justice/the national legal system is predominant in 15 Member States (compared with 13 in autumn 2019). However, among these countries, trust levels range from 85% in Denmark and the Netherlands, where they are the highest, to 49% in Cyprus (vs. 46% 'tend not to trust'), where it is the lowest. Distrust is predominant in the other 12 EU Member States and is particularly high in Croatia (73%), Slovakia (72%) and Bulgaria (70%).³⁰

The 2020 EU Justice Scoreboard shows a continued improvement in the effectiveness of justice systems in the large majority of member states. Nevertheless, challenges remain to ensure the full trust of citizens in the legal systems of those member states where guarantees of status and position of judges, and thereby their independence, might be at risk.³¹

27 Evaluation of Judicial Systems <<https://www.coe.int/en/web/cepej/cepej-work/evaluation-of-judicial-systems>> accessed 10 April 2021.

28 Doing Business: Measuring Business Regulations. The World Bank <<https://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts>> accessed 10 April 2021.

29 Opinion No 12 (2009) of the Consultative Council of European Judges (CCJE) and Opinion No 4 (2009) of the Consultative Council of European Prosecutors (CCPE) to the attention of the Committee of Ministers of the Council of Europe 'On the Relations between Judges and Prosecutors in a Democratic Society' <<https://rm.coe.int/1680747391> <https://rm.coe.int/opinion-no-12-2009-on-the-relations-between-judges-and-prosecutors-in-/16806a1fbd>> accessed 10 April 2021.

30 Public opinion in the European Union. Standard Eurobarometer 93 (Summer 2020) <<https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/91061>> accessed 10 April 2021.

31 The 2020 EU Justice Scoreboard. European Commission <https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2020_en.pdf> accessed 21 June 2021.

6 THE NATIONAL DIMENSION

Against the background of these trends, it is of particular interest to assess the level of trust in Ukrainian courts. The United States of America's Department of State annually presents a Country Report on Human Rights Practices on all countries receiving assistance and all United Nations member states to the US Congress. The Denial of Fair Public Trial section of this report on Ukraine in 2020 states

While the constitution provides for an independent judiciary, courts were inefficient and remained highly vulnerable to political pressure and corruption. Trust in the judiciary remained low.³²

In the autumn of 2020, the Razumkov Centre's sociological service conducted two sociological surveys on 'Attitudes of Ukrainian citizens to the judicial system',³³ commissioned by the Office of the Council of Europe in Ukraine. Among the key findings of this study is the following:

Because most citizens do not have personal experience of communicating with the courts and determine their attitude to the judiciary on the basis of other people's experience or information in the media, the attitude of the general population to the judiciary is negative and trust is one of the lowest among state and social institutions (only 13% of respondents rather trust or fully trust the courts). However, the level of trust of citizens who have their own recent experience of communicating with the courts is much higher and is at 48%. At the same time, according to the results of a nationwide survey among respondents who have experience of interaction with the courts, and according to the results of the exit poll, most respondents believe that the court's decision was legal and fair.

Thus, one of the determining factors that support citizens' distrust of the judiciary is the disapproving information narratives that are actively spread in the media. The confirmation of these destructive processes is found in specialised media studies. In particular, according to the Institute of Mass Media, whose experts monitored 18 national online media sources' coverage of the activities of law enforcement agencies and courts during 22–28 February 2021, the coverage of court activities is significantly dominated by negative reports: 41.2% vs 3.4% positive. Such a disproportion is extremely abnormal and can contribute to the formation of significant distrust in the judiciary.³⁴ Therefore, it is not surprising that according to the latest sociological observations,³⁵ citizens consider themselves the least protected in the fields of justice (26% rated it well or satisfactorily) and protection against corruption (12%).

32 2020 Country Reports on Human Rights Practices: Ukraine. United States Department of State. Bureau of Democracy, Human Rights and Labor <<https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/ukraine>> accessed 10 April 2021.

33 O Razumkov's Ukrainian Center for Economic and Political Studies, 'Report on the results of the study "Attitudes of Ukrainian citizens to the judiciary"' (Kyiv, 2020) <<https://rm.coe.int/zvitsud2020/1680a0c2d7>> accessed 10 April 2021.

34 A Bratushchak, 'Someone is snoring. How the media cover the work of the courts' <https://imi.org.ua/monitorings/htos-hrope-yak-media-vysvitlyuyut-robotu-sudiv-i38178?fbclid=IwAR1nQAWFum_AJ4yJLqriVzVmFtaEmX-7CY1ZQND6X0blgBlEjL-1WoFejwA> accessed 10 April 2021.

35 Sociological Group Rating, 'Ukraine in quarantine: Monitoring of public sentiment' (March 26–28, 2021) <http://ratinggroup.ua/research/ukraine/ukraina_na_karantine_poryadok_i_bezopasnost_26-28_marta_2021.html?fbclid=IwAR0yg9dLHEbwZgCP6Au5sTTEYb4sKw8nP4ksyGoufudCDNTrM6NxbFulbz0> accessed 10 April 2021.

7 JURY COURT

Promising means of restoring trust in the domestic judiciary rightly include the expansion of the personal participation of citizens in the administration of justice. For example, the President of the Criminal Court of Cassation of the Supreme Court is convinced that the jury mechanism should be developed and used and that this will help strengthen trust in the judiciary.³⁶

Art. 124 of the Constitution of Ukraine stipulates that the people are directly involved in the administration of justice through juries. However, we can state that the level of implementation of this constitutional provision is extremely low. In particular, criminal proceedings with a jury are possible only in respect of crimes punishable by life imprisonment and provided that at least one of the accused has applied for it (Part 3 of Art. 31 of the CPC of Ukraine). In civil proceedings, a trial with the participation of a jury in accordance with Part 4 of Art. 293 of the CPC of Ukraine is provided only for specific categories of cases of separate proceedings. According to the statistics of the State Judicial Administration of Ukraine, in 2020, the jury considered 44 criminal proceedings and 8,543 civil cases of separate proceedings.³⁷ Given this data, it is difficult to disagree with the conclusions of domestic scientists who say that the jury is still relatively unknown and needs both legislative improvement and an additional awareness campaign on its specifics and possibilities of application in Ukraine.³⁸

Realising the need to address the problems of the jury in Ukraine as a matter of priority, the committees of the Verkhovna Rada of Ukraine held joint hearings on 12 February 2020 on the topic 'Prospects for development, issues of formation and functioning of the jury in Ukraine'. The recommendations adopted as a result of these hearings emphasise that an important component of improving the jury trial is inextricably linked to the introduction of systematic training of candidates involving the judiciary, justice, psychologists, international partners, etc., as well as broad campaigns for a nationwide education campaign on the importance of expanding forms of democracy through the participation of citizens in the administration of justice.³⁹

8 INDEPENDENCE OF JUDGES VS ABUSE OF POWER

Trust in the judiciary obviously cannot be restored without guaranteeing the real independence of judges. Judicial independence is a fundamental element of an effective justice system. However, independence cannot consist of unrestricted freedom and the complete uncontrollability of the judiciary in the administration of justice. Otherwise, it would mean the independence of judges from the people, who are the only source of power

36 The challenges of the digital age were discussed by the participants of the III International Criminal Law Forum <<https://pravo.ua/vyklyky-tsyfrovoi-epokhy-obhovoryly-uchasnyky-iii-mizhnarodnoho-kryminalno-pravovoho-forumu/>> accessed 10 April 2021.

37 State Judicial Administration of Ukraine, 'Report of local general courts on consideration of court cases for 2020' <https://court.gov.ua/inshe/sudova_statystyka/IV_kvartal_20> accessed 10 April 2021.

38 I Myshchak, 'Reforming the jury in Ukraine as an important element in increasing public confidence in the judiciary' (2020) 18-19 (203-204) Public opinion on lawmaking 15-20 <<http://nbuviap.gov.ua/images/dumka/2020/18-19.pdf>> accessed 10 April 2021.

39 Recommendations of joint committee hearings in the Verkhovna Rada of Ukraine committees on law enforcement and legal policy on the topic 'Prospects for development, issues of formation and functioning of the jury in Ukraine', approved by the decision of the Verkhovna Rada Committee on Law Enforcement (protocol No 37 of 1 July 2020) <<http://komzakonpr.rada.gov.ua/uploads/documents/32665.pdf>> accessed 10 April 2021.

in Ukraine. After all, judges, as well as other officials of public authorities, are obliged to act only on a certain basis, within the powers and in the manner prescribed by the Constitution and Laws of Ukraine. In this aspect, the decision of the Constitutional Court of Ukraine No 13-p/2020, based on an absolute (unlimited) interpretation of the independence of the judiciary, was subjected to well-founded public criticism. In particular, it is difficult to agree with the Court's conclusion that any forms and methods of control in the form of inspections, monitoring, etc. of the functioning and activities of courts and judges should be implemented only by the judiciary and exclude the establishment of such bodies in the executive and legislature powers.⁴⁰

Guarantees of judges' independence should not be used to avoid legal liability. The ECtHR, which guards human rights and fundamental freedoms, also does not support the reference to guarantees of the independence of judges as a means of protection against legitimate restrictions. Thus, rejecting the complaint on compliance with the principle of 'an independent and impartial tribunal established by law' in *t Xhoxhaj v. Albania*, the Court stated

The Court must take account of the extraordinary nature of the vetting process of judges and prosecutors in Albania. This process was introduced in response to the urgent need, as assessed by the national legislature, to combat widespread levels of corruption in the justice system. It consists of the assessment of three criteria and precisely targets all serving judges and prosecutors. It is for this reason that the vetting process of judges and prosecutors in Albania is sui generis and must be distinguished from any ordinary disciplinary proceedings against judges or prosecutors. In the Court's view, the fact that members of the IQC did not come from amongst serving professional judges was consistent with the spirit and goal of the vetting process, namely to avoid any individual conflicts of interest and ensure public trust in the process.⁴¹

Based on the approaches used in this decision, it can be concluded that a more meticulous review of integrity and enhanced public control over the lifestyle of judges in countries with high levels of corruption is legitimate. The limits of interference with the privacy of public figures, including judges, to assess their integrity are somewhat broader due to the urgent need to restore public trust in the judiciary and the public interest in the purification of the judiciary over the private interests of the individual. Given the slight progress of Ukraine in the world ranking of perceptions of corruption (ranking 117th among 180 countries in 2020), this conclusion is more than relevant for our country.

9 REFORM STRATEGY

The constitutional status of the judiciary and enshrining the principles of justice, the guarantees of judges in the Basic Law of Ukraine, require special care in the development and implementation of reforms and consistent, mutually agreed measures to overcome problems in this area. Until recently, Ukraine had a Strategy for the Reform of the Judiciary and Related Legal Institutions for 2015-2020.⁴² However, its long implementation period, as we see, did not provide significant progress in the implementation of the right to a fair trial.

40 Decision of the Constitutional Court of Ukraine of 27 October 2020 No 13-p/2020 in case No 1-24/2020(393/20) <<https://zakon.rada.gov.ua/rada/show/v013p710-20>> accessed 10 April 2021.

41 *Xhoxhaj v Albania* App no 15227/19 (ECtHR, 9 February 2021) paras 299-300 <<http://hudoc.echr.coe.int/eng?i=001-208053>> accessed 10 April 2021.

42 Strategy for reforming the judiciary, the jurisdiction and related legal institutions for 2015-2020: Approved by the Decree of the President of Ukraine of 20 May 2015 No 276/2015 <<https://zakon.rada.gov.ua/laws/show/276/2015>> accessed 10 April 2021.

Therefore, taking into account the experience gained, and in accordance with the current challenges facing the judiciary, it is necessary to create a new strategic plan to restore public confidence in judges.

On 1 March 2021, at the All-Ukrainian Forum 'Ukraine-30. Development of Justice', the Strategy for the Development of Justice and Constitutional Judiciary for the next three years was presented. The purpose of the Strategy is to establish the main directions of policy and priorities for further improvement of Ukrainian legislation on the judiciary, the status of judges, and the judiciary in cooperation with other institutions of justice for the practical establishment of the rule of law, efficient and fair justice, strengthening the functional basis of the organisation of the judiciary in accordance with the standards of protection of human rights and values defined by the Constitution of Ukraine, the obligations of Ukraine as a member of the Council of Europe, and bilateral agreements with the European Union. To achieve this goal, the Strategy provides for appropriate measures in such areas as improving access to justice, strengthening judicial independence and accountability to society, judicial careers and the accountability of judges, the system of prosecutors, and improving the bar.

10 CONCLUSIONS

We can state that the true attitude of the citizens of Ukraine towards the judicial system cannot be simply analysed or presented in the form of only one statistical indicator. Such an assessment should be based on an integrated approach, which also takes into account the national characteristics of the judiciary, the degree of involvement of citizens in this area, and the background of negative information against which domestic courts operate and which facilitates the rejection of the judiciary by the majority. According to international professional organisations and in accordance with the case-law of the ECtHR, domestic justice is characterised by the presence of systemic problems that need to be addressed immediately. In this regard, Ukraine is in an active phase of judicial reform, the main objectives of which are to implement the best international standards in the field of justice, increase personal participation in the administration of justice, ensure the rule of law and effective protection of human rights, establishing public trust in judges and court decisions. A new comprehensive strategy for such a reform must be approved as soon as possible.

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