

## Opinion Article

THE RECOVERY OF UKRAINE IN THE FIELD OF JUSTICE:  
CHALLENGES AND PRIORITY GOALS

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**Keywords:** *recovery of Ukraine, national justice system, judicial system, Bar, Public Prosecutor's Office, priority measures, priority goals, reform risks.*

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## ABSTRACT

**Background:** Currently in Ukraine, a significant objective is to promote the construction of a peaceable and open society, ensuring access to justice for all. Such a system must be effective, accountable, and based on the broad participation of institutions at all levels. This article highlights some of the priority steps in the recovery of the justice system in Ukraine. Special attention is given to the priority goals and problematic aspects of the functioning of the institutions of the national justice system, given the declared aim of forming a sustainable justice system. Current challenges in the field of national justice, priority goals and appropriate measures for their achievement have all been analysed.

**Methods:** To achieve the goals of the research, general and special scientific research methods were applied, such as comparative-legal and semantic-structural methods and the method of grouping, analysis, synthesis, and generalisation.

**Results and Conclusions:** It has been established that the first priority goal of ensuring proper functioning of the judiciary is structural modernisation and optimisation of judicial authorities, including a comprehensive audit of the powers of bodies and institutions of the justice system in order to eliminate duplication of functions and ensure procedures for the effective use of resources.

The following were substantiated as risks for achieving such a goal: controversial recognition of the impossibility of the state to be solely responsible for the duration of processes for updating the authorised composition of judicial governance bodies; proposals for the transformation of the system of professional training and professional development of judges; the lack of objective justification for the determination of judicial jurisdiction for the consideration of certain categories of cases; and proposals for recognising the long-term consideration in the parliament of the Draft Law on abolition of the Bar monopoly.

Current trends in the development of functions of advocacy in Ukraine have been highlighted, including selective and inconsistent implementation of bar monopoly on representation of another person in court; restriction of the rights of the Bar self-government bodies in the field of forming judicial corps, extension of the state's control powers advocacy; and the search for an optimal model of governance of the advocacy profession. The key challenges of the prosecutor's office, and priority goals and measures for their achievement, have been highlighted. The possible risks of further reform of this institution due to the disputed constitutionality of its personnel, which were reset as a result of previous priority reform measures, have been emphasised, which may call into question the legitimacy of the new staff of the prosecutor's office and does not allow the assertion of the final completion of these processes.

## 1 INTRODUCTION

The large-scale armed aggression of the Russian Federation against Ukraine exacerbated existing challenges and caused new issues in the field of judiciary. The attempts to resolve such matters have been reflected in the Draft Plan for the Recovery of Ukraine (hereinafter referred to as the Draft Plan)<sup>1</sup>, prepared by the experts of the working group "Justice" of the National Council for the Recovery of Ukraine from the war.

In this document, one of the most important directions of work in the field of judiciary has been defined as bringing the Russian Federation to international legal responsibility for the armed aggression, violation of human rights, and breach of other norms of international

1 Draft Ukraine Recovery Plan <[https://uploads-ssl.webflow.com/625d81ec8313622a52e2f031/62dea471331181b583d43ec5\\_Юстиция.pdf](https://uploads-ssl.webflow.com/625d81ec8313622a52e2f031/62dea471331181b583d43ec5_Юстиция.pdf)> accessed 2 November 2022.

law. This requires the formulation of fundamentally new international agreements and the creation of new institutions with the ability to settle existing jurisdictional problems and ensure the principle of inevitability of punishment for the committed offenses.

At the same time, recovery of the work of the High Council of Justice (hereinafter referred to as the HCJ), the High Qualification Commission of Ukrainian Judges (hereinafter referred to as the HQCUJ), and digitisation of the judiciary have all been singled out as priority areas to overcome the consequences of the war, given that judicial reform is one of the main indicators for assessing Ukraine's readiness for integration with the European Union (hereinafter referred to as the EU). In this context, we should be mindful that the European Council granted candidate status to Ukraine at the Summit in Brussels on 23 June 2022 on the condition that Ukraine must first carry out several important reforms, the second priority among which (after the reform of the Constitutional Court of Ukraine) is the completion of the procedure for formation of a new staff of the HQCUJ and the HCJ.

Continuation of the previously initiated reform of the prosecutor's office as a body, focused on the needs of the state and society, is also recognised as a real challenge in the Draft Plan. Attention is focused on the need to eliminate gaps in normative legal acts in order to improve the implementation of constitutional powers by prosecutors.

In the conditions of the post-war recovery of Ukraine, the legal profession is recognised as one of the important guarantors of both observing and ensuring the rights of the citizens, in particular the victims of the consequences of the armed aggression. The key goals in this area are to bring the organisation and activities of the legal profession to the best standards of the Council of Europe countries and the wider international community; guarantee the institutional independence of the legal profession; create favourable conditions for providing effective and high-quality legal aid to war victims; and ensure full access to justice both in Ukraine and abroad.

At the same time, given the controversy, the defined goals, tasks and stages of their achievement require additional research in order to develop effective components of the justice system in Ukraine with the declared goal of forming a sustainable justice system. Currently, one of these goals is to promote the construction of a peaceable and open society, ensure access to justice for all - and make it effective, accountable, and based on the broad participation of institutions at all levels.

## 2 FAIR, INDEPENDENT AND ACCESSIBLE COURT

### 2.1 Priority Goals of Judicial Reform

Since the beginning of the war in Ukraine, courts, bodies and institutions in the justice system have faced many serious and large-scale challenges to the point that there is no objective possibility for the proper administration of justice. Such a situation requires immediate and effective decisions. In search of a solution to this problem, the scientific legal literature officially mentions the introduction of the idea of a more flexible approach and wider discretion of the judicial powers, which under such conditions contribute to full human rights protection<sup>2</sup>.

The primary task at this stage in the Draft Plan is to restore the work of the HCJ, without an authorised composition of which it is impossible to form the HQCUJ. The latter depends

<sup>2</sup> Yu Prytyka, I Izarova, L Maliarchuk, O Terekh 'Legal Challenges for Ukraine under Martial Law: Protection of Civil, Property and Labour Rights, Right to a Fair Trial, and Enforcement of Decisions' 2022 3(15) Access to Justice in Eastern Europe 237.

on the replenishment of the judicial corps with professional and honest personnel, as well as the Disciplinary Inspectors Service, absence of which leads to the accumulation of disciplinary complaints against the actions of judges that require consideration and adoption of appropriate decisions within the terms specified by law.

Based on the identified problem areas, both priority goals and appropriate measures for their achievement have been agreed upon, including:

- recovery of the full-fledged work of the newly formed HCJ and HQCUJ of Ukraine.
- structural modernisation and optimisation of judicial authorities, including conducting a comprehensive audit of the powers of bodies and institutions of the justice system (the HCJ, the HQCUJ of Ukraine, the State Judicial Administration of Ukraine, the Judicial Security Service, the National School of Ukrainian Judges, etc.) in order to eliminate duplication of functions and ensure procedures for efficient use of resources.
- filling full-time vacancies for the positions of judges in the busiest courts of first instance and appeals.
- improvement of the procedures for appointment, dismissal, and disciplinary action of judges.
- optimisation of the existing network of general courts in accordance with the new administrative-territorial system; existing challenges; development and adoption of relevant Draft Laws on liquidation (reorganisation); and formation of local general and specialised courts, in which the number of local general courts is planned to be decreased by a third;
- digitisation of the judicial process, development of remote judicial proceedings, etc.<sup>3</sup>

## 2.2 Risks for Achieving the Set Goals

One of the risks for achieving the defined priority goals for renewing the composition of the HCJ and HQCUJ of Ukraine in the Draft Plan is the inability of the State to be solely responsible for the duration of these processes, taking into account the fact that formation of the authorised composition of these bodies shall be carried out in an equal partnership with independent subjects – International partners and judicial self-government (clause 2.1.4).

In this context, it should be noted that these measures in the field of reforming judicial governance bodies are aimed at eliminating the dysfunction of the judicial system, because due to the shortcomings of the legislation<sup>4</sup> on termination of the powers of the entire composition of the SQJ of Ukraine, selection of candidates for judicial positions and qualification assessment of judges stopped, which made it impossible to fill judicial vacancies in courts. At the same time, the Law of Ukraine of 14 July 2021 No. 1635-IX “On Amendments to Certain Legislative Acts 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” (hereinafter referred to as the “Law

<sup>3</sup> Draft Ukraine Recovery Plan (n1).

<sup>4</sup> Law of Ukraine of 16 October 2019 № 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’ <<https://zakon.rada.gov.ua/laws/show/193-20#Text>> accessed 2 November 2022.

No. 1635-IX”<sup>5</sup> was aimed at improving the procedure for the election (appointment) of members of the HCJ for the practical implementation of the principle of the rule of law; ensuring compliance of the candidates for the position of a member of the HCJ with the criteria of professional ethics and integrity; increasing the institutional capacity of the HCJ; and increasing the level of public trust in bodies of judicial governance in particular, and the judiciary in general. In fact, this Law was at the request of a number of public expert organisations regarding the need in the process of judicial reform to reboot the HCJ by terminating the powers of some its members. This was based on the results of an inspection conducted by public and international experts, as well as the involvement of international experts and public representatives in the procedure for selecting new members of the HCJ<sup>6</sup>.

Therefore, the Ukrainian state consciously and voluntarily chose the format of involving international experts in the specified processes, despite the ambiguous perception of this decision by the legal community, until the Supreme Court appealed to the Constitutional Court of Ukraine (hereinafter referred to as the CCU) with a constitutional submission regarding conformity of some provisions of Law No. 1635-IX<sup>7</sup> with the Constitution of Ukraine. Against this background, the argument that there is a risk of non-achievement of this goal of the reform appears to be, to a certain extent, controversial, and one that is rather aimed at finding an adequate reason for the inability to ensure functioning of the institution of the selection and qualification evaluation of judges for more than three years.

Moreover, such determinants provoke complaints about political populism and fuel public opposition and judgement, which allows for the effective preservation of the hierarchical structure of justice. The reason for which is a recognition of the expert environment of traditional paternalism as being an overly populist simplification of the fundamental foundations of a democratic system. As a consequence, the real substance of the reform is narrowed down to formal content such as regulatory and personnel procedures, and not to systemic changes, which, according to the laws of social psychology, is threatened by the fact that the system traditionally defeats personalities<sup>8</sup>. As a confirmation of this thesis, it resulted in an assessment by expert public organisations of some decisions of the Ethics Council, which was created with the aim of qualitatively updating the HCJ, and caused both surprise and a negative reaction (despite the overwhelming voice of international experts) up to the point of creating a threat to modern reform<sup>1011</sup>.

- 5 Law of Ukraine № 1635-IX of 14 July 2021 ‘On Amendments to Certain Legislative Acts of Ukraine Concerning the Procedure for Election (Appointment) to the Positions of Members of the Supreme Council of Justice and Activities of Disciplinary Inspectors of the Supreme Council of Justice’ <<https://zakon.rada.gov.ua/laws/show/1635-20#Text>> accessed 2 November 2022.
- 6 ‘Real judicial reform is impossible without a qualitative update of the Supreme Council of Justice’ <<https://ti-ukraine.org/news/spravzhnya-sudova-reforma-nemozhlyva-bez-yakisnogo-onovlennya-vyshhoyi-rady-pravosuddya-zayava/>> accessed 2 November 2022.
- 7 Meeting of the Panel of Judges was held to consider the issue of commencement of constitutional proceedings <<https://ccu.gov.ua/novyna/vidbulosya-zasidannya-kolegiyi-suddiv-z-rozglyadu-pytannya-shchodovidkryttya-konstytuciynyh>> accessed 2 November 2022.
- 8 On approval of the Explanations of the High Council of Justice in the case by constitutional submission of the Supreme Court: Decision of the High Council of Justice of Ukraine of 18 January 2022 No. 53/0/15-22 <[https://zakon.rada.gov.ua/rada/show/v53\\_0910-22#Text](https://zakon.rada.gov.ua/rada/show/v53_0910-22#Text)> accessed 2 November 2022.
- 9 ‘Psychology of judicial justice and the resource of open dialogue. Reflection from under the judge’s mantle’ <[https://lb.ua/blog/kostjantyn\\_harakoz/528348\\_psihologiya\\_sudovoi\\_spravedlivosti.html/](https://lb.ua/blog/kostjantyn_harakoz/528348_psihologiya_sudovoi_spravedlivosti.html/)> accessed 3 November 2022.
- 10 ‘Judicial reform on the brink of disaster: the Ethics Council admits dubious candidates to the High Council of Justice, blocks worthy candidates and does not explain its decisions’ <<https://dejure.foundation/tpost/uafsk9opu1-sudova-reforma-na-mezh-katastrofi-etichn>> accessed 3 November 2022.
- 11 ‘One of the demands of the EU is implementation of judicial reform, which Ukraine has not been able to implement for years. What is the problem and is it possible to implement it’ <<https://forbes.ua/inside/odna-z-vimog-es-sudova-reforma-yaku-ukraina-ne-mozhe-vprovaditi-rokami-v-chomu-problema-ichi-realno-tse-zrobiti-27062022-6821>> accessed 3 November 2022.

In the aspect of conducting a comprehensive audit of the powers of bodies and institutions of the justice system, one of the institutions - according to the ideologues of the modern stage of judicial reform - that is not effective in the organisational forms in which they exist today, and that spends large budgetary funds, is called the National School of Judges of Ukraine (hereinafter referred to as the NSJU) and there is a proposal to transform it into an educational centre within the HQCUJ<sup>12</sup>. Such a proposal quite rightly arouses disapproval amongst experts and is characterised as being aimed at depriving the NSJU of its autonomy and budget and turning it into a division of the apparatus of the HQCUJ. This is inconsistent with the Recommendations of the Advisory Council of European Judges, in particular regarding proper training and professional development of judges<sup>13</sup>, the mission of the Judicial Council at the service of society<sup>14</sup>, as well as dominant practice of the organisation of judicial education in EU countries, to which Ukrainian society aspires to become a member<sup>15</sup>.

In the context of the systemic nature of the judicial reform, attention is also drawn to the meticulous attention to the jurisdiction of the High Anti-Corruption Court (hereinafter referred to as the HACC), which was embodied, in particular, in the constitutional submission with regard to conformity of the Constitution of Ukraine (constitutionality) with the Law of Ukraine "On High Anti-Corruption Court" of 7 June 2018<sup>16</sup>. The existence of the grounds for justifying the external specialisation of the HACC is questioned, and attention is also focused on the lack of clarity in determining the jurisdiction of the HACC cases and other courts.

At the same time, the Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine with regard to Increasing of Effectiveness of the Sanctions Related to the Assets of Individuals"<sup>17</sup> of 12 May 2022 added a new type of Law of Ukraine "On Sanctions" (hereinafter referred to as the "Law No. 1644-VII")<sup>18</sup>. This entails seizure into the state revenues of the assets belonging to an individual or legal entity, as well as assets in respect of which such an individual or entity may directly or indirectly (through other individuals or entities) perform actions identical in content to the exercise of the right to dispose of them (clauses 1-1 Part 1, Article 4 of the Law). The purpose of such legislative changes is to prevent the use of economic assets being used to the detriment of the national security of Ukraine, attract assets that are the basis for activities aimed at preparing, inciting and waging an aggressive war (including aggressive propaganda) to strengthen the defence of Ukraine, and provide compensation for damages caused. Taking into account the requirements of Art. 41 of the Basic Law of Ukraine, the judicial procedure for making a decision on the application of this sanction and the procedure for its appeal has been exclusively established. Thus, in the

- 12 'How Ukraine will reboot the judicial system to European standards.' Interview with Deputy Head of the Office of the President Andriy Smirnov <<https://forbes.ua/inside/rule-of-law-klyuchoviy-punkt-dlya-otrimannya-bud-yakoi-dopomogi-yak-kraina-bude-perezavantazhuvati-sudovu-reformu-intervyu-z-zastupnikom-kerivnika-op-andriem-smirnovim-04072022-6960>> accessed 3 November 2022.
- 13 CCEJ Opinion № 4 (2003) on training for judges <<https://rm.coe.int/1680747d37>> accessed 3 November 2022.
- 14 CCEJ Opinion n°10 (2007) on 'Council for the Judiciary in the service of society' <<https://rm.coe.int/168074779b>> accessed 3 November 2022.
- 15 'Why liquidation of the National School of Judges turned out to be a bad idea, especially in wartime' <<https://interfax.com.ua/news/blog/845225.html>> accessed 3 November 2022.
- 16 Constitutional submission with regard to compliance with the Constitution of Ukraine (constitutionality) of the Law of Ukraine "On the High Anti-Corruption Court" of 7 June 2018. No. 2447-VIII < URL: [https://ccu.gov.ua/sites/default/files/3\\_349\\_2020.pdf](https://ccu.gov.ua/sites/default/files/3_349_2020.pdf)> accessed 3 November 2022.
- 17 On Amendments to Some Legislative Acts of Ukraine with regard to Increase of Effectiveness of the Sanctions Related to the Assets of Individuals: Law of Ukraine of 12 May 2022 No. 2257-IX <<https://zakon.rada.gov.ua/laws/show/2257-20/sp:max50:nav7:font2#Text>> accessed 3 November 2022.
- 18 On Sanctions: Law of Ukraine of 14 August 2014 No. 1644-VII <<https://zakon.rada.gov.ua/laws/show/1644-18#Text>> accessed 3 November 2022.



presence of the appropriate grounds and conditions, the central executive authority, which ensures implementation of state policy in the field of seizure of the assets of persons subject to sanctions – currently the Ministry of Justice of Ukraine – applies to the HACC with a statement on application of the sanctions to the relevant individual or legal entity, provided for in clause 1-1h. 1 Art. 4 of Law 1644-VII, in accordance with the procedure specified by the Code of Administrative Procedure of Ukraine (hereinafter referred to as the CAPU).

At the same time, the CAPU was supplemented with the provisions that a) it is the HACC that decides administrative cases regarding the application of the sanction provided for in clause 1-1, Part 1 of Article 4 of the Law of Ukraine “On Sanctions” as a court of first instance (Part 5 of Article 22 of the CAPU), and b) the Appellate Chamber of the HACC reviews the decisions of the HACC in an appeal procedure as a court of appeal (Part 4 of Article 23 of the CAPU). In the end, the CAPU was supplemented by Art. 283-1, which defines the specifics of proceedings in the cases involving application of the sanctions.

Incidentally, it should be noted that in the first edition of the Law of Ukraine “On High Anti-Corruption Court”, CAPU’s task was defined as administration of justice in accordance with the principles and procedures of judicial proceedings defined by law with the aim of protecting individuals, society and the state from corruption and related crimes; judicial control over pre-trial investigation of these crimes; and observance of the rights, freedoms and interests of persons in criminal proceedings. With the changes introduced by the Law of Ukraine dated 31 October 2019 No. 263-IX “On Amendments to Certain Legislative Acts of Ukraine with regard to Seizure of Illegal Assets of the Persons Authorised to Perform the Functions of the State or Local Self-Government and Punishment for Acquiring Such Assets”<sup>19</sup>, its task was supplemented by a decision on the issue of recognition of the assets as unsubstantiated and their seizure into state revenues in cases provided for by the law, in civil proceedings.

In the end, the changes introduced by the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine on Improving the Effectiveness of Sanctions Related to the Assets of Individuals” assigned to HACC the task of administration of justice in cases involving application of the sanction in connection with seizure of the assets belonging to in individual or legal entity, as well as assets in respect of which such an individual or legal entity may directly or indirectly (through other individuals or legal entities) perform the actions identical in content to the exercise of the right to dispose of them, in the order of administrative proceedings. The Explanatory Note to the corresponding Draft Law does not clearly state the arguments for assigning this category of cases to the jurisdiction of the HACC rather than the existing network of administrative courts. In this context, with some probability, it can be argued that by analogy with the argumentation of referring to the jurisdiction of the HACC consideration of the cases of recognition of assets as unfounded and their seizure into state revenues under the expected guarantees of impartial consideration of such cases<sup>20</sup>, the same argumentation is embedded in the decision to refer to the jurisdiction of the HACC of administrative cases regarding application of the sanction provided for in clause 1-1 part 1 of Article 4 of Law No. 1644-VII.

In the expert environment, taking into account the specialisation that is embodied in the name of this court, it is noted that the tasks of the HACC do not relate to implementation

19 On Amendments to some Legislative Acts of Ukraine with regard to Seizure of Illegal Assets of the Persons Authorised to Perform the Functions of the State or Local Self-Government, and Punishment for Acquiring Such Assets: Law of Ukraine of 31 October 2019 No. 263-IX <<https://zakon.rada.gov.ua/laws/show/263-20/sp:max50:nav7:font2#n247>> accessed 3 November 2022.

20 Explanatory note to the Draft Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine with regard to Seizure of Illegal Assets of the Persons Authorised to Perform Functions of the State or Local Self-Government and Punishment for Acquisition thereof” <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_2?pf3516=1031&skl=10](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=1031&skl=10)> accessed 3 November 2022.

of the policy and purpose of applying the sanctions, but to the administration of justice in order to protect the individual, society and the state from corruption and related criminal offenses. Highly appreciating the independence and professionalism of the HACC, experts recognise the undeniable fact that the HACC judges do not have a well-formed practice for assessing threats to national security, which may negatively affect the quality of the decisions made. At the same time, they proposed establishing the authority to consider applications for sanctions in the form of seizure of assets by the Supreme Court. As the highest court in the judicial system of Ukraine, the Supreme Court will be able to ensure stability and unity of judicial practice, which is critically important when applying such an exclusive and completely new mechanism for the Ukrainian legal system<sup>21</sup>.

Against this background, *assignment of new categories of cases to the jurisdiction of the HACC requires a more in-depth justification and an expectation of guarantees of impartial consideration of such cases. The lack of substantive justification for assigning this category of cases to the jurisdiction of the HACC, to a certain extent undermines trust in other courts, as an objective and impartial consideration of this category of cases is considered unattainable.* In search of a concept to justify the criterion by which judicial jurisdiction could be determined, it should be noted that consideration of this category of cases could be referred to the jurisdiction of administrative courts, which, as in some other categories of cases, actually authorise the right of the subject of power to exercise the powers defined by the law.

### 3 BAR

#### 3.1 Key Challenges: Controversial Approaches

The modern development of the legal profession in Ukraine may with some probability be characterised as not fully consistent and systematic, despite complex scientific studies devoted to the problems of the organisation of the legal profession and advocates' activity, and taking into account the relevant legislative initiatives. Indicative of this is the very recent introduction of a truncated bar monopoly on representation of another person in court, and already now there is a strongly marked tendency to abolish it. In addition to being an important institution of the justice system in Ukraine, the Bar is empowered in the field of forming judicial and prosecutorial bodies governance, and therefore authorised to participate in the processes of formation of professional staff of state functionaries of this system. The latter however, are not endowed with such a privilege in the processes of formation of the advocate corps of the justice system. The issue of effectiveness of the current governance model of the legal profession is also debatable. As a result, one of the main problems that determines the need for further improvement of administration of justice, at the current stage of reforming the system in Ukraine, is the functional imperfection of the legal system<sup>22</sup>. Moreover, in the Draft Plan, in the conditions of post-war reconstruction, the legal profession is recognised as one of the important guarantees of ensuring the rights of the citizens who suffered from the consequences of the armed aggression. One of the current goals of the system of sustainable justice in Ukraine is to promote the building of a peaceable and open society, ensure access to justice for all and create effective, accountable

21 Analysis of the Ukrainian model of application of the sanctions in the form of seizure of assets under Draft Law No. 7194: Advantages, Risks, Controversial Points <[https://izi.institute/wp-content/uploads/2022/05/analiz\\_7194\\_izi-2.pdf](https://izi.institute/wp-content/uploads/2022/05/analiz_7194_izi-2.pdf)> accessed 3 November 2022.

22 On the Strategy for Development of the Justice System and Constitutional Judiciary for 2021-2023: Decree of the President of Ukraine of 11 June 2021 No. 231/202 <<https://zakon.rada.gov.ua/laws/show/231/2021#Text>> accessed 2 November 2022.



and participatory institutions at all levels<sup>23</sup>. However, there is insufficient effectiveness of state policy in the field of bar and advocacy. In particular, the legislation regulating the specifics of organisation and activity of the advocacy has a significant negative impact on the advocacy's performance of its special social role in society and therefore requires additional research in order to strengthen the system of sustainable justice.

Among the main problems of the notion of the Bar in Ukraine that need to be solved, the Draft Plan outlines the following:

- incomplete compliance of the principles of the Bar in Ukraine with the basic principles of the EU bar profession, which will in the long run lead to abolition of the Bar monopoly on provision of professional legal aid
- strengthening of qualification requirements for the persons who intend to gain access to the profession of an advocate; the introduction of a transparent procedure for conducting a qualification exam; and improvement of the internship institute, which will prospectively provide for the regulation of admission of advocates of foreign states and advocates of aggressor countries (the Russian Federation, Republic of Belarus) to legal practice in Ukraine
- the need to expand the professional rights of advocates and guarantees of advocates' activity, which in the future will involve ensuring a) implementation of the principle of competition in the judiciary; b) equality of procedural rights of the parties, in particular, providing advocates with identified access to state registers; c) an increase in the level of protection of attorney-client privilege; d) provision of access to the work of advocate's assistant for the persons who have acquired a higher legal education at the "Bachelor" level or above; and e) regulation of the issue of success fees in certain categories of cases, in particular to facilitate access to legal aid for the persons who have suffered damages as a result of war
- the imperfection of self-government of the Bar, which in the future will involve decentralisation of the Bar self-government; a change in the status of the Ukrainian National Bar Association (hereinafter referred to as the "UNBA"); creation of alternative professional organisations of advocates; ensuring the right to participate in the Bar self-government for all advocates; bringing the terms of tenure in the self-governing bodies of advocates in line with the practice of the EU countries; and recovery of the activities of the self-government bodies of advocates in the temporarily occupied regions in the territories controlled by Ukraine
- the imperfection of bringing an advocate to disciplinary responsibility, which will in the long term involve introduction of a transparent procedure for such by increasing the statute of limitations for bringing to disciplinary responsibility; determining the requirements for the form and content of a statement (complaint) regarding the improper behaviour of the advocate; the content of a decision in a disciplinary case; and creation of a single resource for collection, storage, protection, accounting and search of disciplinary practice
- non-compliance of individual provisions of the rules of advocate ethics with international standards of advocate deontology, which will prospectively foresee

23 *About the Sustainable Development Goals of Ukraine for the period until 2030: Decree of the President of Ukraine of 30 September 2019 No. 722/2019* <<https://zakon.rada.gov.ua/laws/show/722/2019#Text>> accessed 2 November 2022.

an update in accordance with international standards of professional deontology and ensure uniform practice in their application<sup>24</sup>

The Bar Council of Ukraine characterised the changes proposed in the Draft Plan as a risk for European integration in the field of the Bar. In general, the reform plan of the “Justice” Working Group, in its opinion, leads to a complete imbalance of a single independent professional self-governing, self-regulated organisation of advocates, since instead it proposes the creation of separate small professional regional bar associations that are unable to ensure the uniform rules of the profession and its self-government. As a result, implementation of the proposals of the Working Group will lead to the destruction of the self-governance and self-regulation of advocates according to the uniform rules of the profession<sup>25</sup>. Current scientific legal literature also emphasises that the Bar of Ukraine in wartime showed internal consolidation, as well as external ability to act side-by-side with civil society institutions and public authorities to achieve the joint task of countering the armed aggression against Ukraine. At the same time, it is emphasised that the principles of its organisation and activity must be observed as a condition for the proper implementation of the Bar’s activity, ensuring independence, autonomy and professionalism of this unique human rights institution<sup>26</sup>.

Given the certain controversy of the highlighted views on improvement of the notion of the Bar in Ukraine, the modern trends in development of this institution require a legal analysis, primarily in the functional aspect, in attempts to identify its most promising direction.

### 3.2 Modern Trends in Development of Bar in Ukraine: Functional Aspect

Based on the legal analysis of the provisions of the Law of Ukraine “On Bar and Advocate’s Activity”, as well as doctrinal developments in this area, professional legal aid, which is implemented in the types of advocate’s activity as defined by the law, claims to be recognised as the domain that determines the priority direction of the development of advocacy during system reform justice.

Moreover, taking into account constitutional provisions, this area of competence and responsibility within the justice system may in all likelihood be further narrowed exclusively to defense against criminal charges and representation of another person in court. This has even become a reason for the emergence of a legal category that is new for the national legal system - a “bar monopoly” for the provision of these types of legal aid. Regarding the latter however, it is possible to assert with some probability the attitude of the state regarding the presence of defects in this function due to a clear legislative tendency to abolish the Bar monopoly on representation of another person in court. At the same time, it is possible to state certain doubts regarding such an attitude, given the fact that for a long period of time there has been no further active consideration of the corresponding Draft Law (regarding the abolition of the attorney monopoly), despite it being recognised as urgent as far back as 2019. This state of affairs suggests that the flaw may not lie in the function of the Bar itself, but in a certain unfortunate phenomenon where law is mostly a service tool of politics, rather than its guiding and driving force.

Therefore, at the constitutional level, the right of everyone to professional legal aid is currently enshrined in systematic connection with Art. 131-2 of the Basic Law of Ukraine.

24 Draft Ukraine Recovery Plan (n1).

25 On appeal of the Bar Council of Ukraine to international and Ukrainian institutions on the issues of reforming the Bar of Ukraine: Decision of the Bar Council of Ukraine of 01.08.2022 No. 49 <[https://unba.org.ua/assets/uploads/legislation/rishennya/2022-08-01-r-shennya-rau-49\\_62fcf79a9d7e7.pdf](https://unba.org.ua/assets/uploads/legislation/rishennya/2022-08-01-r-shennya-rau-49_62fcf79a9d7e7.pdf)> accessed 2 November 2022.

26 O Khotynska-Nor, N Bakaianova, ‘Transformation of Bar in Wartime in Ukraine: on the Way to Sustainable Development of Justice (On the Example of Odesa Region)’ 2022 3 (15) Access to Justice in Eastern Europe 154.

This includes, among other things, the obligations assumed by the state to guarantee to everyone representation of his/her interests in court as a type of legal aid, which acquires the characteristics of professional legal aid in the case of being provided by an advocate.

In view of the enshrined constitutional guarantee of the right to professional legal representation of another person in court, the provisions of the Law of Ukraine dated 18.12.2019 No. 390-IX “On Amendments to Certain Legislative Acts of Ukraine on Extending Opportunities for Self-Representation in Court by State Authorities, Bodies of the Autonomous Republic of Crimea, local self-government bodies, other legal entities, regardless of the procedure of their creation”<sup>27</sup>, (given that any attempts to circumvent the state’s fulfilment of its obligation to ensure everyone’s right to professional legal aid, in particular by extending the range of persons who can carry out self-representation of a legal entity) can be considered as limiting such a right, and are due to the need to regulate relations of representation differently than in the Constitution, and without making changes to it. Moreover, in all likelihood, such legal regulation gives grounds to assert a violation of the constitutional principle of equality before the law, which is a logical continuation of the principle of justice, and therefore needs revision.

Under such circumstances, one of the current tendencies in the development of the functions of the legal profession in Ukraine may be defined as *the selective and inconsistent introduction of the Bar monopoly on representation of another person in court, which contains the potential danger of turning the constitutional guarantees of everyone’s right to professional legal aid into a component of the political situation*. In this context, a unified solution to this problem is seen as promising. This is that the state should regulate the right to access to court, taking into account the requirements of the principles of equality and justice, in order to influence the cost of representation services, not only in the interests of the court, but also taking into account the needs and resources of individuals. In this regard, one of the stages of the reform of the legal profession in the Draft Plan perceives abolition of the Bar monopoly on provision of professional legal aid by the end of 2025 (with a note on the long-term consideration of the relevant Draft Law in the Parliament) as a possible risk of achieving this goal. However, it is worth questioning the reasonableness of the specified deadline and formulation of the risk given the fact that the Draft Law was previously approved by the majority of the constitutional composition of the Verkhovna Rada of Ukraine on 14 January 2020 No. 434-IX, and the Committee on Legal Issues that politicians recommended to the Verkhovna Rada of Ukraine submitted by the President of Ukraine as an urgent draft of the Law on Amendments to the Constitution of Ukraine (Regarding Abolition of the Bar Monopoly), reg. No. 1013 of 29 August 2019<sup>28</sup>. On the other hand, in the scientific legal literature it is noted that returning to an unregulated representation will be a step backwards, reflecting on the quality of the trial, the length of the case, the state of justice, and more<sup>29</sup>.

Carrying out a legal analysis of the functional load of the Bar under the current legislation of Ukraine, legal professionals also draw attention to the endowment of this institution with the functions that are not inherent to it, which is observed in relation to the provisions of the country’s Law “On Prevention and Counteraction to Legalization (Laundering) of Proceeds from Crime, Financing of Terrorism and Financing of Proliferation of Weapons of Mass

27 On appeal of the Bar Council of Ukraine to international and Ukrainian institutions on the issues of reforming the Bar of Ukraine: Decision of the Bar Council of Ukraine of 01.08.2022 No. 49 <[https://unba.org.ua/assets/uploads/legislation/rishennya/2022-08-01-r-shennya-rau-49\\_62fcf79a9d7e7.pdf](https://unba.org.ua/assets/uploads/legislation/rishennya/2022-08-01-r-shennya-rau-49_62fcf79a9d7e7.pdf)> accessed 2 November 2022.

28 Conclusion of the Committee of the Verkhovna Rada of Ukraine on Legal Policy of 02.05.2020. <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=66242](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66242)> accessed 2 November 2022.

29 Bakaianova N, Svyda, O, Demenchuk, M, Dzhaburiya, O, & Fomina, ‘Advocacy of Ukraine under constitutional reform’ 2019 8(22) Amazonia Investiga 576.

Destruction”<sup>30</sup>, whereby advocates received the legal status of being the subjects of primary financial monitoring of the suspicious transactions (activities) of their clients. Extension of the advocate’s activity, in particular in fiduciary activities and mediation, was also reflected in a number of draft laws<sup>31 32</sup> regarding development of the notion of the Bar. These were accompanied by an active expert discussion, which only emphasises the relevance of the issue of the functional workload of the Bar at various stages of reforming the justice system. The above makes it possible to single out another trend in development of the functions of the Bar in Ukraine – *the extension of the powers of the state regarding advocacy in view of the potential of advocacy as a profession, which could create a risk of conflict with both the tasks and essence of advocacy*. In this aspect, it is considered promising to avoid such a conflict by determining the priority of the principle of confidentiality of advocacy.

One of the modern trends in development of the functions of the legal profession in Ukraine, related to the formation of prosecutorial and judicial governance bodies, is *limitation of the rights of the legal self-government bodies in the formation of the judicial corps due to changes in the legislative approach to formation of judicial governance bodies, according to which the powers of the legal profession in this field lose the symbol of immediacy and become subjectively mediated*. At the same time, despite the fact that the legal profession, as one of the defining elements of the justice system, is authorised to participate in the processes of forming the professional staff of state functionaries of this system (prosecutors directly and judges indirectly), it does not, however, have such privilege in the formation of the advocate corps of the same justice system, which appears to be somewhat unsystematic.

In this context, it is also worth paying attention to the research of the experts of the “New Justice” Justice Sector Reform Program, who in 2017 (after the amendments to the Constitution of Ukraine regarding justice) published a report entitled “Best Practices in Governance of the Legal Profession”. The report singled out so-called “best practices”, despite recognition of the fact that, internationally, the choice of a model of regulation of the legal profession depends on the specific system of justice (of which such a legal profession is a constituent part) and that justice is one of the few phenomena to which it is impossible to apply a single international standard because it depends on many factors in local communities. The ‘best practices’ outline in the report are as follows: the functions of regulation of the legal profession and its representation must be clearly demarcated - the Bar association serves advocates, and the regulatory body must serve the interests of the society; independence of the persons responsible for qualification assessment and admission to the profession from representatives of the legal profession and the government is absolutely necessary; qualification assessment and disciplinary systems should not be part of a professional association; and systems of qualification assessment and disciplinary responsibility must be provided with sufficient funding and staffed by professional employees<sup>33</sup>.

Under such circumstances, one can single out another modern trend in the development of the functions of the legal profession - *the search for an optimal model of governance of the legal profession, which is due to the need to modernise the governing bodies of the legal*

30 On Preventing and Counteracting to Legalization (Laundering) of the Proceeds from Crime, Financing of Terrorism and Financing of Proliferation of Weapons of Mass Destruction: Law of Ukraine of 6 December 2019 No. 361-IX <<https://zakon.rada.gov.ua/laws/show/361-20#n831>> accessed 2 November 2022.

31 Draft Law of Ukraine “On Amendments to the Law of Ukraine “On Bar and Advocate’s Activity” and some other legislative acts of Ukraine (with regard to the status and guarantees of advocacy, formation and work of self-governing bodies of advocates)” No. 1794-1 of 4 February 2015. <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=53817](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53817)> accessed 2 November 2022.

32 Draft Law of Ukraine “On Bar and Advocate’s Activity” No. 9095 of 6 September 2018. <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=64557](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64557)> accessed 2 November 2022.

33 Best practices in governance of the legal profession <[https://newjustice.org.ua/wp-content/uploads/2017/09/New-Justice\\_Report\\_Bar\\_Hawley\\_Feb\\_2017\\_UKR.pdf](https://newjustice.org.ua/wp-content/uploads/2017/09/New-Justice_Report_Bar_Hawley_Feb_2017_UKR.pdf)> accessed 2 November 2022.

*profession, in which the possibility of participation of state representatives in the formation of the legal corps is proposed.*

#### **4 KEY CHALLENGES OF THE NOTION OF PUBLIC PROSECUTOR'S OFFICE, PRIORITY GOALS, MEASURES AND RISKS OF THEIR ACHIEVEMENT**

In the Draft Plan, the key challenges of the notion of the Public prosecutor's Office are summarised in three main areas: improving implementation of the constitutional powers by prosecutors; introduction of the system tools for formation of criminal policy; and ensuring a transparent and objective consideration of a complaint about a prosecutor committing a disciplinary offense and the inevitability and proportionality of the prosecutor's disciplinary responsibility.

Based on the identified problem areas, priority goals and appropriate measures for their achievement have been agreed upon, including:

- bringing the Law of Ukraine “On Public Prosecutor's Office”, the Criminal Procedure Code of Ukraine (hereinafter referred to as the CPCU), and other legislative acts into compliance with the Constitution of Ukraine in terms of ensuring implementation of the functions of the prosecutor's office in relation to organisation and procedural management of pre-trial investigations and maintenance of public prosecution
- introducing amendments to the Law of Ukraine “On Public Prosecutor's Office” and the CPCU aimed at regulating the procedural content of the function of the Public Prosecutor's Office regarding organisation of pre-trial investigation
- determination of the priority areas of formation and implementation of criminal policy; formation of the policies regarding prioritization of criminal proceedings; and granting the relevant powers to the prosecutor regarding their application
- establishment of clear objective criteria for distribution of the workload between prosecutors, including the criterion of specialisation; and implementation of restorative justice mechanisms at the pre-trial stage of criminal proceedings
- further development of the mechanism of transparent and competitive (on the basis of objective criteria) selection and appointment of prosecutors
- digitalisation of disciplinary procedures; raising the level of awareness and external communications; and implementation of the annual evaluation system of the prosecutor's work quality<sup>34</sup>

In demand for a long time, the identified priority goals and measures deserve support in order to bring the provisions of Ukrainian legislation in this area into compliance with the principle of legal certainty. In this regard, we should recall the comments on the Draft Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine Regarding Priority Measures for the Reform of the Public Prosecutor's Offices” of the Main Legal Department of the Verkhovna Rada of Ukraine. The title of this Draft Law did not fully correspond to its content, since the so-called priority measures defined in it were primarily related to personnel reloading of the Public Prosecutor's Office through certification of current prosecutors<sup>35</sup>. These remarks are relevant even now as the provisions of the Law of Ukraine

<sup>34</sup> Draft Ukraine Recovery Plan (n1).

<sup>35</sup> Comments to the Draft Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine Concerning Priority Measures to Reform the Prosecutor's Office” <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=66266](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66266)> accessed 3 November 2022.

“On Prosecutor’s Office” have not yet been brought into line with the amendments to the Constitution of Ukraine regarding justice adopted on 2 June 2016, and therefore remain one of the primary and necessary legislative steps to improve the organisation and activities of the Public Prosecutor’s Office.

Among the current challenges of reforming the Public Prosecutor’s Office, we should also be reminded of the long-awaited and requested Decision of the CCU on the constitutionality of the reform of the Public Prosecutor’s Office in 2019 - a case that has been under consideration by the Grand Chamber of the CCU for a long time. Thus, the board of judges of the CCU commenced constitutional proceedings in case No. 3/116(20), which was considered by the Grand Chamber of the CCU from 24.12.2020<sup>36</sup>. It is noteworthy that the representatives of this body of constitutional jurisdiction highlight the potential of the decision in this case. The court of the constitutional jurisdiction has the opportunity to form legal positions regarding the role and place of the Public Prosecutor’s Office in the system of state authorities and the justice system<sup>37</sup>, which deserves support.

At the same time, in the absence of a legal position of the CCU in this case, the problematic aspects of personnel overloading of the Public Prosecutor’s Office are resolved in both the legal positions of the Supreme Court and the Decisions of the CCU on constitutional complaints regarding the conformity with the Constitution of certain provisions of the Law of Ukraine of 19 September 2019 No. 113-IX “On Amendments to Certain Legislative Acts of Ukraine Regarding Priority Measures for Reforming Public Prosecutor’s Offices” (hereinafter referred to as the “Law No. 113-IX”)<sup>38</sup>. The complainants base their claims on violation of the constitutional guarantees against illegal dismissal, significant interference in their private and professional life, lack of reasonable (proportional) means of interference with their rights, and failure to take into account the requirements of constitutional prescriptions regarding the content and direction of state activity. All of which are determined by human rights, freedoms and their guarantees. The main duty of the state is to assert and ensure human rights and freedoms, and create conditions for citizens to fully exercise their right to work.

Such arguments were given by the court of constitutional jurisdiction in one of the Decisions on the constitutional appeal, concluding that the provisions of Clause 8 of Chapter XI “Final and Transitional Provisions” of the Law of Ukraine “On National Police” of 2 July 2015 No. 580-VIII are unconstitutional. It noted that the Verkhovna Rada of Ukraine cannot notify individual employees or certain categories of employees about their possible future dismissal by passing laws (which are normative acts)<sup>39</sup>. This gives reason to expect a similar legal position of the CCU in cases of constitutional complaints<sup>40</sup> regarding recognition of unconstitutional provisions of Section 6 of Section II “Final and Transitional Provisions”

36 Constitutional submissions < <https://ccu.gov.ua/novyna/konstytuciyni-podannya>> accessed 3 November 2022.

37 Separate opinion of Judge of the Constitutional Court of Ukraine O.O. Pervomayskyi in case No. 1-223/2018(2840/18) on constitutional submission of 50 People’s Deputies of Ukraine with regard to compliance with the Constitution of Ukraine (constitutionality) of a separate provision of Clause 26 of Chapter VI “Final and Transitional Provisions” of the Budget Code of Ukraine” < <https://zakon.rada.gov.ua/laws/card/na06d710-20>> accessed 3 November 2022.

38 Law of Ukraine of 19 September 2019 № 113-IX ‘On Amendments to Certain Legislative Acts of Ukraine Regarding Priority Measures for Reforming Public Prosecutor’s Office’ <<https://zakon.rada.gov.ua/laws/show/113-20#Text>> accessed 3 November 2022.

39 In the case under the constitutional complaint of Bohdan Viacheslavovych Bivalkevych with regard to compliance with the Constitution of Ukraine (constitutionality) of Clause 8 of Chapter XI “Final and Transitional Provisions” of the Law of Ukraine “On the National Police”: Decision of the Second Senate of the Constitutional Court of Ukraine on 21 July 2021 No. 4-p(II)/2021. Case No. 3-107/2020(221/20) <<https://zakon.rada.gov.ua/laws/show/v004p710-21/conv#Text>> accessed 3 November 2022.

40 Constitutional complaints <<https://ccu.gov.ua/novyna/konstytuciyni-skargy>> accessed 3 November 2022.



of Law No. 113-IX, according to which all prosecutors were warned of a possible future dismissal from office.

Thus, one of the risks of achieving the priority goals of further reform of the Public Prosecutor's Office is the controversial constitutionality of the personnel reset according to Law No. 113-IX. This will certainly present the CCU the task of finding a balance between the socially significant interests in support of the legitimacy of the new personnel of the Public Prosecutor's Office and the private interests of the subjects of the right to a constitutional complaint. In any case, before the final formation of court positions in cases regarding constitutionality of this reform, the statement proposed in the Draft Plan that "before the war, a complete staffing of the Public Prosecutor's Office was carried out by persons who *did not meet the requirements of integrity and professionalism*"<sup>41</sup> deserves revision in search of a more correct wording.

## 5 CONCLUSIONS

One of the primary steps in recovery of Ukraine in the field of judiciary is to overcome the problematic aspects of the functioning of the institutions of the national justice system, as they are key elements of the national human rights mechanism.

In order to ensure proper functioning of the judiciary, there are plans to carry out the structural modernisation and optimisation of the judicial authorities; restore the full-fledged work of judicial governance bodies; and conduct a comprehensive audit of the powers of the bodies and institutions of the justice system in order to eliminate duplication of the functions and ensure the procedures for the effective use of resources.

In order to restore the full-fledged work of the bodies of judicial governance, the Ukrainian state consciously and voluntarily chose the format of involving international experts, which gives the grounds for recognising as controversial the identification of risk for achieving this goal, and the impossibility of the State being solely responsible for the duration of these processes, taking into account the fact that formation of the authorised composition of these bodies is carried out in equal partnership with such subjects.

On the issue of carrying out a comprehensive audit of the powers of bodies and institutions of the justice system and the system of judicial reform, the proposals regarding the transformation of the system of professional training and professional development of judges (without taking into account the guidelines of the relevant European standards), as well as the demonstrative recognition of certain subjects of the justice system as guarantors of the impartial consideration of certain categories of cases, appear to be controversial, which is a clear substantive justification for the determination of court jurisdiction.

One of the main problems that determines the need for further improvement of the administration of justice is the functional imperfection of the Bar system, as well as the insufficient effectiveness of state policy in the field of the Bar and advocacy. As a result, new trends in the development of the legal profession in Ukraine have appeared. These include the selective and inconsistent introduction of the Bar monopoly on representation of another person in court, restriction of the rights of self-governing bodies of advocates in the forming of the judicial corps, extension of the state's control powers over the legal profession, and a search for an optimal governance model of the legal profession.

Currently, the key challenges of the Public Prosecutor's Office are the need to improve implementation of constitutional powers by prosecutors; the introduction of the system tools for formation of criminal policy; and ensuring a transparent and objective consideration

41 Draft Ukraine Recovery Plan (n1).

of a disciplinary complaint about a prosecutor committing a disciplinary offense and the inevitability and proportionality of the prosecutor's disciplinary responsibility. One of the risks for achieving priority goals in the field of further reform of the Public Prosecutor's Office is the questionable constitutionality of the personnel reset of the Public Prosecutor's Office, as a result of previous priority reform measures, which may call the legitimacy of the new personnel into question and does not provide an opportunity to assert the final completion of these processes. Therefore, recovery of Ukraine in the field of judiciary is mainly determined by the reform of the justice system, which currently requires systemic changes rather than formal regulatory and personnel procedures. This should determine the prospective directions of further scientific research.

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