




MAIN CHALLENGES TO THE JUDICIAL INDEPENDENCE IN UKRAINE

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Reform of the Judiciary in Ukraine: Setting the Context

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- ❑ **2014-2018: comprehensive judicial reform,** focused on the process of the selection of judges and the new composition of the SC
 - ❑ The reform of the process of the selection of judges and the new composition of the Supreme Court, which began its work in January 2018, has been a marked improvement over the system that existed before.
 - ❑ **2019 a new vision of the judicial reform in Ukraine.**
 - A highly criticised Law No. 193 was adopted in the context of a new political situation, after the presidential elections
 - ❑ **2020: the reform is not completed**

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- relevant to the topical and current issues;
- covers a significant number of topics, related to the independence of the judiciary;
- presents an objective overview of the situation based on assessment of the independence;
- indicates both positive developments and constraints;
- emphasises on the negative impact of some reforms on the independence of judges
- is a useful tool in the context of the HCJ obligation to protect the independence of the judiciary and the individual judges

2019 Annual report of HCJ

- ❑ Indicates disturbing conclusions about the infringed independence of the judges and the judiciary in Ukraine in 2019:
 - Too many changes in a short time;
 - no account of the opinion of the judiciary (the HCJ and the SC) in the course of the elaboration of the legislation on judiciary;
 - unprecedented pressure on judges;
 - undue interference in the work of judges;
 - excessive criticism towards judges;
 - low public trust.



Independence of the judiciary in Ukraine: Points of reference

- ❑ **Opinion CDL-AD(2019)027 of the Venice Commission**
- ❑ **Opinion CDL-AD (2020)999 of the Venice commission**
 - 2020 Fast track legislation to settle urgent matters
 - VC opinion and the CoE standards could be used as reference points for proposed legislative amendments needed to replace the unconstitutional texts.

- ❑ **Two decisions of the Constitutional court of Ukraine: CCU No 2-p/2020 and CCU No 4-p/2020**
 - CCU decisions found a contradiction between the Constitution of Ukraine and a number of provisions of Law No. 193. Consequently, the envisaged judicial reform is hampered until the adoption of new legal provisions, which should be in compliance with the Constitution.



Main Challenges to the Independence of Judges in Ukraine

❑ Unjustified legal amendments

❑ Unjustified amendments provided for in the Law of Ukraine No. 193, adopted without due regard to the majority of remarks from the justice authorities.

❑ **CoE standard:** The right balance should be found between the need to further improve the performance of the judiciary and the necessity to protect its independence from the negative influence of too many reforms which come in a short time.

❑ **Venice commission, Opinion (2020)999**

“In the absence of a holistic approach, various pieces of legislations were adopted that did not have the character of a comprehensive reform”.

❑ Too many changes within a short time

❑ **CCJE Opinion No 18:**

- too many changes within a short period of time should be avoided if possible, at the very least in the area of the administration of justice
- the right balance should be found between the need to further improve the performance of the judiciary and the necessity to protect its independence from the negative influence of too many reforms which come in a short time.
- **Venice commission**
- the principle of stability and consistency of laws is essential for the foreseeability of laws for individuals, including judges and others serving in the affected institutions.
- Frequent changes in the rules, concerning judicial institutions and appointments, can lead to various interpretations, including even alleging *mala fide* intentions behind these changes.



❑ No account of the opinion of the judiciary in the course of the elaboration of the legislation on judiciary

- Disturbing practice of the national institutions and in particular of the Verkhovna Rada of Ukraine to leave without consideration the Advisory opinions of the HCJ while adopting laws on the judiciary and the status of judges although these opinions are made public and are duly submitted to it.
- The new Law No 193-X which proposed significant changes to the status of the judiciary without taking its opinion.

❑ CoE standards:

- ❑ **CCJE Opinion No. 18** – the importance of judges participating in debates on national judicial policies;
- ❑ **CCJE Opinion 3** - judges should be consulted and play an active role;
- ❑ **Magna Charta of judges:** judiciary involved in all decisions which affect the practice of judicial functions
- ❑ **ECtHR case *Baka v. Hungary*, para. 168 and para. 125.**
 - **Infringement of art. 10 ECHR**
 - the judiciary has the right and the obligation to express its opinion on legislative changes that concern its status and functions, and any attempts to neglect this infringe its freedom of expression and its independence.
 - Issues concerning the functioning of the justice system constitute questions of public interest, the debate of which enjoys protection.

❑ **Decrease in the number of Supreme court judges**

- ❑ The unmotivated and abrupt decrease in the number of SC judges:
 - ✓ infringes Art. 6 ECHR;
 - ✓ leads to the inability of the remaining judges to deal with the huge amount of cases within reasonable timeframes.
- ❑ The retroactive application of access filters to the current huge backlog raised serious concerns;
- ❑ The lack of an impact assessment, the lack of criteria or procedure for selection leads to arbitrariness;
- ❑ Infringement of the security of tenure and irremovability.

❑ **Disciplinary procedures**

- ❑ The shortened deadlines in disciplinary procedures can seriously infringe the independence of judges
- ❑ Disciplinary procedures held *in absentia* and procedures initiated anonymously contradict to the right to a fair trial under ECHR Art. 6
- ❑ The regulations of disciplinary procedures should be in line with the important ECtHR judgements, relevant for Ukraine (such as Oleksandr Volkov v. Ukraine and Kulykov and Others v. Ukraine etc.)
- ❑ This approach contributes to the efficient implementation of the ECtHR judgments and for compliance with the legislation with the CoE standards.

❑ Excessive criticism towards judges

- the judiciary must accept criticism as a part of the dialogue between the three branches of power of the state and with the society as a whole;
- criticisms by one branch of the state power of the other branches of the state power should be undertaken in a climate of mutual respect;
- there is a clear division line between freedom of expression and legitimate criticism on the one hand, and disrespect and undue pressure against the judiciary on the other;
- The latter undermines public trust and confidence in the judiciary and could, in an extreme case, amount to an attack on the constitutional balance of a democratic state
- The role of the HCJ in such cases could be crucial to assist judges in such situations

❑ **Low public trust in the judiciary**

- Low public trust can negatively affect the independence of judges by decreasing the public support for their work but also by allowing disrespect and contempt towards judicial decisions;
- it leads to unacceptable public pressure over the work of judges and consequently to an infringement of their independence;
- Judges, who are part of the society they serve, cannot effectively administer justice without public trust.
- They should be aware of society's legitimate expectations and complaints about the functioning of the judiciary. Permanent mechanisms to obtain such feedback set up by councils for the judiciary or other independent authorities, could be considered

❑ **Low public trust in the judiciary (2)**

- Judiciary must also earn trust and confidence by being accountable to the society and the other branches of state power;
- Need for judicial transparency;
- A dialogue with the public, directly or through the media, is of crucial importance in improving the knowledge of citizens about the law and increasing their confidence in the judiciary.

❑ **Undue pressure on judges and judiciary and the unfettered freedom of judges**

- important issue raised in the 2019 Annual report are the findings about unprecedented pressure on the judiciary in 2019.
- interference with judges administering justice by law enforcement agencies, lawyers, prosecutors, people's deputies of Ukraine, deputies of local councils, other representatives of state and local self-government authorities;
- The register of notifications of interference in the work of judges indicates a high number of complaints from judges which raises serious concerns about the independence of judges;
- CCJE Opinion No 1 judges should be able to have recourse to a council for the judiciary when their independence is violated or put to the test.

❑ **Undue pressure on judges and judiciary**

- ❑ The revision of Art. 375: it not lead to undue interference in judicial independence.
- ❑ CoE standards: judges should not be personally accountable where their decision is overruled or modified on appeal;
- ❑ judges should have unfettered freedom to decide cases impartially, in accordance with the law and their interpretation of the facts (CM Recommendation (2010) 12);
- ❑ judges are accountable through the appeal process and decisions of judges should not be subject to any revision other than appellate or re-opening proceedings, as provided for by law;
- ❑ a situation in which the law does not provide appropriate guarantees against abuse and misuse of disciplinary measures to the detriment of judicial independence is problematic (ECtHR).

❑ Undue pressure on judges and judiciary (2)

- ❑ A situation in which the law does not provide appropriate guarantees against abuse and misuse of disciplinary measures to the detriment of judicial independence is problematic (ECtHR).
- ❑ Opinion No. 18: disciplinary measures and criminal liability are acceptable only for deliberate acts or omissions;
- ❑ judges should adjudicate cases without any undue influence by the prosecution or defence or by any other source (Opinion No.12);
- ❑ public prosecutors must strictly respect the independence and the impartiality of judges: in particular, they shall neither cast doubts on judicial decisions nor hinder their execution, save where exercising their rights of appeal or invoking some other declaratory procedure;
- ❑ fear of sanction: a “chilling effect” on judges, case *Baka v. Hungary*.

❑ **Undue interference with judicial independence through legislative changes in 2019**

- The dismissal of the HQCJU members prior to the end of their mandates and without a transitional period is problematic.
- The new selection procedure of the HQCJU members deviates from the CoE standards according to which half of its members are judges elected by their peers and limits the role of the HCJ.
- The EIC and the SB have no constitutional grounds and infringe the independence of judges

LESSONS LEARNED

The judicial reform could continue only if:

- ❑ it does not contradict the Constitution;
- ❑ takes into account the leading European standards in the field;
- ❑ takes into account the opinion of judiciary and civil society.

LESSONS LEARNED

- ❑ The Annual reports of the HCJ and the work of the HCJ could be an important tool for:
 - ✓ raising pertinent issues and
 - ✓ safeguarding the independence of the judges and the judiciary.

- ❑ Hints for Improvements:
 - ✓ **Involvement of stakeholders & consultations.**
 - ✓ **Gain more public and media support.**
 - ✓ **Comprehensive list of specific recommendations.**