



ANALYSIS OF THE NATIONAL LEGISLATION OF UKRAINE PROVIDING FOR SOCIAL BENEFITS IN THE CONTEXT OF THE EXECUTION OF THE EUROPEAN COURT OF HUMAN RIGHTS JUDGEMENTS IN THE BURMYCH AND OTHERS V. UKRAINE GROUP OF CASES, OTHER ECtHR JUDGEMENTS ON THE NON-ENFORCEMENT OF DECISIONS OF THE UKRAINIAN NATIONAL COURTS ON SOCIAL ISSUES

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“PROMOTING SOCIAL HUMAN RIGHTS AS A KEY FACTOR OF SUSTAINABLE DEMOCRACY IN UKRAINE”

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INTRODUCTION

Appropriate enforcement of national court decisions is one of the key requirements set out by Article 6 of the European Convention on Human Rights (ECHR), which enshrines the right to a fair trial. Shortly after Ukraine had ratified the ECHR, the European Court of Human Rights (ECtHR), beginning from the case of *Kaysin v. Ukraine*, started to deliver judgements against Ukraine related to the non-enforcement or protracted non-enforcement of national judicial decisions². Back in 2004, the Ministry of Justice, while analysing applications to the ECtHR³, pointed out that non-enforcement or protracted non-enforcement of judicial decisions became the most recurring problem and the most common subject of applications to the ECtHR against Ukraine, reaching 90% of all applications. This analysis pointed out the need to amend the national legislation, in particular, in terms of enforcement and bankruptcy proceedings and moratoria on enforcements against property, and emphasised the existence of an urgent need to enhance legal guarantees to protect human rights in terms of ensuring the right of individuals to receive funds awarded to them under court decisions within a reasonable time. The situation further aggravated year by year, and this was demonstrated by the pilot judgement in the case of *Yuriy Nikolayevich Ivanov v. Ukraine* (2009) and the judgment in the case of *Burmych and Others v. Ukraine* (2017). Therefore, non-enforcement of national court decisions is a rather chronic problem, so that new strategies and approaches are necessary to resolve it.

A significant number of documents have been adopted to address the issue of non-enforcement of national court decisions, among them, the Concept of addressing problematic issues related to the emergence of the arrears in payments by the state awarded by court decision, the National Action Plan on ensuring appropriate enforcement of court decisions, the Laws of Ukraine “On state guarantees for the enforcement of court decisions”, “On authorities and individuals enforcing court decisions and decisions of other authorities”, amendments to the Law of Ukraine “On enforcement proceedings”, Resolutions of the Cabinet of Ministers of Ukraine “On approval of the procedures for the settlement of arrears in payments awarded by court decisions and guaranteed by the state” and “The issues related to the settlement of arrears in pensions awarded by courts”, and the National Strategy of the implementation of general measures to execute the ECtHR pilot judgement in the case of *Yuriy Nikolayevich Ivanov v. Ukraine* and the Grand Chamber judgement in the case of *Burmych and Others v. Ukraine*, etc. However, it has not yet led to any positive results, that is, the reduction of the amount of outstanding debt or the number of new judgements. Since the ECtHR judgement in the *Burmych and Others* case, new judgements of the European Court of Human Rights appeared in the cases of *Kruchko and Others v. Ukraine*⁴ of 4 October 2018 and *Dmytrenko and Bezdorozhnyi v. Ukraine*⁵ of 2 July 2020, which the ECtHR declared, in terms of claims related to non-enforcement of national judicial judgements, the follow-up of its judgement in the *Burmych* case, stroke out and transmitted them to the Committee of Ministers of the Council of Europe to be dealt within the framework of the general measures to execute the *Ivanov* pilot judgment.

² ECtHR, *Kaysin and Others v. Ukraine*, application No. 46144/99. This case was related to the non-execution of the national judgment that established the right to a disability pension and due sums to be paid; the case has resulted in a friendly settlement

³ V. Lutkovska, I. Koval. *The analysis of applications to the European Court of Human Rights. The Ministry of Justice of Ukraine.* / URL: <https://minjust.gov.ua/m/str/4485>

⁴ The ECtHR judgment in the case of *Kruchko and Others v. Ukraine* of 4 October 2018 / URL: https://zakon.rada.gov.ua/laws/show/974_e09#Text

⁵ The ECtHR judgment in the case of *Dmytrenko and Bezdorozhnyi v. Ukraine* of 2 July 2020 / URL: http://search.ligazakon.ua/l_doc2.nsf/link1/SOO01278.html

The non-enforced decisions are directly related to awarded payments and recoveries from the State in favour of plaintiffs in the several groups of issues of which social issues group is the largest. Professionals argue that billions of hryvnias are needed to secure the execution of all court decisions in force; however, nobody knows the exact amount of the outstanding judgment debt. According to the expert data, almost 2.2 billion UAH⁶ were needed in 2019 to execute all decisions on social benefits and, according to the data provided by the Government Agent before the ECHR, the total national judgment debt, of which the state was liable, amounted to 31 billion UAH in 2018⁷. In 2020, experts mentioned various estimates of the total arrears in state payments awarded by all court decisions, including even the figure of up to 500 billion UAH. All these estimates do not almost certainly include possible compensations for non-pecuniary damages, which individuals, suffered from the non-enforcement of judgments delivered in their favour, are entitled to, as demonstrated by the Resolution of the Administrative Cassation Court within the Supreme Court of 24 March 2020 on awarding compensation for the prolonged non-enforcement of a judicial decision⁸. In general, such a situation is unacceptable and may only be remedied by the establishment of a relevant unified register. As the level of arrears is not identified, it is difficult to foresee the overall funding necessary to execute all decisions where the state is the respondent and possible terms of their payment. In the Government's opinion, the situation is different with regard to the execution of the ECtHR judgments. Responding to the request by S. A. Leshchenko, people's deputy of Ukraine, of 19 January 2018, the Ministry of Justice claimed the absence of any outstanding debts under the ECtHR judgments delivered against Ukraine and that almost 61.4 million UAH had been paid.⁹ The Ministry's response made no mention whatsoever of the need to execute the judgment in the case of Burmych and Others, as well as under other 12,143 applications, and this fact may be illustrative of the understatement by the Government of this large-scale problem.

The laws of Ukraine on annual state budgets allocated different funds to execute court decisions where the state was the respondent: 600 million UAH was allocated to take actions to execute court decisions guaranteed by the state in 2019, and 1,797,000 UAH in 2020. However, on 13 April 2020 the Law of Ukraine "On the State budget of Ukraine for 2020" was amended to suspend incontestable recovery of funds from the state and local budgets on the basis of judicial decisions until 1 January 2021, and the impact of this decision on addressing the non-execution problem is far from being positive. Anyway, even provided that political will is in place, proposed amendments are promptly approved, and the Ukrainian economy and finances are growing, the execution of court decisions in Ukraine will be a rather protracted process.

⁶ Expert Report following a series of expert discussions on enforcement of national judgments in Ukraine in the context of the execution of judgments of the European Court of Human Rights *Yuriy Nikolayevich Ivanov v. Ukraine and Burmych and others v. Ukraine* / Supporting Ukraine in the execution of judgments of the European Court of Human Rights. 2018. P. 4 /

<https://rm.coe.int/expert-report-following-a-series-of-expert-discussions-ukr/16808f2559>

⁷ The Ministry of Justice of Ukraine. The Government Agent before the ECtHR. 1 March 2018 / Response to the request made by Mr Melnyk, people's deputy of Ukraine of 7 February 2018

⁸ The Supreme Court ruling issued 24 March 2020 by the panel of judges of the Administrative Cassation Court in a case regarding the compulsory execution of judicial decisions and decisions of other bodies /

URL: <http://www.revestr.court.gov.ua/Review/88385320>

⁹ They at the Ministry of Justice suggest that the beneficiary to whom 1.5 billion should be paid under the European Court judgment be looked for with no outside help / *Ekonomichna Pravda*

URL: <https://www.epravda.com.ua/news/2018/02/3/633710/>

The main recommendations delivered by the experts were and still are related to the execution of the already adopted decisions, identification of the level of arrears and the procedures for their payment. However, the growth in the number of court decisions is unstoppable. In this situation of non-enforcement of judgments on social issues, experts and professionals increasingly stress the necessity to address the root causes of such applications to courts of which the financial failure of the state to comply with its obligations is a primary one, further generating more positive court decisions and their non-execution. Also, the ECtHR pointed out in its judgement in the case of *Burmych v. Ukraine* that preventive measures are more effective than compensations for the non-enforcement of court decisions.

Thereby resolving by Ukraine of the issue of non-enforcement of national court decisions and proper execution of the European Court of Human Rights judgment in the case *Burmych and Others v. Ukraine* requires that besides tackling as such the enforcement of the already issued national judgments and the execution of the European Court of Human Rights judgments, several different large-scale sets of issues are to be considered and addressed:

1. The development and implementation of an effective mechanism for the enforcement of the national courts' decisions which provide for recoveries from the state in favour of claimants (with regard to social and labour disputes related to wage arrears, payments of social security benefits, pension payments, compensations, allowances, supplements, etc., payments awarded by court decisions where respondents are state-owned enterprises, enterprises with 25% of shares belonging to the state and other companies subject to moratoria in force). Addressing this issue requires not only the execution of the ECtHR judgements where relevant ECHR violations have been established or those stricken out and transmitted directly to the Committee of Ministers of the Council of Europe but the execution of a substantially larger group of other national court decisions, where claimants did not apply to the ECtHR;

2. The development and adoption of legislative amendments aimed at eliminating deficiencies forcing Ukrainian citizens to apply to courts to be able to receive benefits from the social security system provided by the national legislation in force, which should result in the decrease of national court decisions on recoveries from the state budget in favour of claimants. Addressing this issue would require a far-reaching and large-scale review of the social benefits system, including pensions, the introduction of temporary limits due to acute financial crisis, the review of the methodology used for the subsistence minimum level calculation and other changes, and the reform of the social security system;

¹⁰ Карташева А. ВР ухвалила законопроект про виділення з бюджету коштів для "Південмашу"/КІІВ. 14 липня. УНН. /
URL: <https://www.unn.com.ua/uk/news/1880456-vr-ukhvalila-zakonoproekt-pro-vidilennya-z-byudzhetu-koshtiv-dlya-pivdenmashu>

¹¹ Держстат України, Сума заборгованості з виплати заробітної плати по регіонах у 2020 році./
URL: http://www.ukrstat.gov.ua/operativ/operativ2020/gdn/zvz/zvz_20_u.htm

3. The development and adoption of legislative amendments to address the reasons for labour disputes over state outstanding payments before employees (public sector, state-owned enterprises, etc.). The major issues are related to wage arrears, final payments due to dismissals, failures to pay average salaries due to forced absenteeism, compensation for military uniforms and accessories or for unobtained military uniforms, etc.

The amendments to the state budget for 2020, adopted on 14 July 2020 and related to the additional measures to provide for financial rehabilitation of the state enterprise “The Industrial Association Pivdennyi Machine Factory named after O.M. Makarov”, provided for the allocation of funds (210 million of UAH) to this enterprise to pay arrears in wages accumulated for over six months¹⁰. The total governmental arrears in wages amounted to 3,142.8 million UAH, as of June 2020. Such level of debt remains practically unchanged during the year, as 3,034.4 million UAH of debt was recorded in January and 2,964.2 million UAH in April¹¹, of which, notably, almost 40 % was accumulated at the state enterprises. At the same time, these statistics do not reflect whether such percentage includes arrears in wages at the partly state-owned enterprises (25 % of shares and more), which are subject to the moratorium on enforcement against their properties, in force already for a long period of time.

In March 2020, The Committee on Social Policy and Protection of Veterans’ Rights of the Verkhovna Rada of Ukraine held its meeting dedicated to the state of wage arrears payment. In particular, its participants pointed out the need for Ukraine to accept Article 25 of the European Social Charter (Revised) which provides that a guarantee institution or any other effective form of protection should be established to pay wage arrears to employees in the event of the bankruptcy or insolvency of their employer. It was stressed that the Association Agreement between Ukraine and the European Union also provides for the alignment of the Ukrainian legislation with the Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer, which also requires the functioning of guarantee institutions. However, the appropriateness of introducing additional burdens on employers and/or the state budget in times of crisis is a controversial issue. Apart from the establishment of guarantee institutions, the cancellation of the moratorium on enforcements against properties of enterprises and protection of enterprises in certain spheres of the economy, and increasing the liability of employers should impact the payment of wage arrears owed to employees. In general, the problem of arrears in wages and other payments to employees generates another flow of claims to national courts and applications to the ECtHR, which is the second largest after the flow of claims on social issues. The payment of wage arrears and other arrears owed to employees is closely related to the social aspect of general measures in the case of *Burmych and Others v. Ukraine* and the previous group of cases and may constitute a part of such measures under the broad understanding of social security.

¹⁰ A. Kartasheva. *The Verkhovna Rada adopted the draft law on the budget funds allocated for Pivdenmash / KYIV*. 14 July. UNN. /

URL:<https://www.unn.com.ua/uk/news/1880456-vr-ukhvalila-zakonoproekt-pro-vidilennya-z-byudzhetu-koshitiv-d-ya-pivdenmashu>

¹¹ *The State Statistics Service of Ukraine. Arrears in wages, by regions, in 2020.* / URL:http://www.ukrstat.gov.ua/operativ/operativ2020/gdn/zvz/zvz_20_u.htm

However, addressing the problem of arrears to the employees should be a subject of a separate special analysis in the context of the reform of the Ukrainian labour laws, the adoption of a new Labour Code, prevention of labour disputes over arrears payments, the need to strengthen the employers' liability for non-payment of wages, in conjunction with the amendments to Article 175 of the Criminal Code providing for the liability for the non-payment of salaries, scholarships, pensions or other payments established by law;

4. A separate group of issues is related to the review/cancellation of the moratorium on enforcements against the property of state enterprises and economic entities where the state possesses at least 25 % of the share capital, which might relate to the protection of labour rights of employees and many other issues.

The presented research focuses on addressing only one group of issues, and these are the root causes of the non-enforcement of judgments on social issues.

During all the time of the establishment and development of the legal framework in independent Ukraine, the social security system, notwithstanding substantial changes, was not fundamentally reformed, no radical break from the paternalist system happened, the transition to targeted social benefits and social aid has not been completed in many sectors, and there was no reform of labour laws. At the same time, new social payments were introduced, and the old ones were raised in disregard of the real financial capabilities of Ukraine, and the instances were not rare when laws were adopted providing for some aid or social benefits without a legal framework for their reception, which precluded relevant groups from exercising their rights provided for in such laws¹². When the number of social benefits, types of aid and subsidies, lacking any financial rationale or an assessment of the state capabilities, the precise number of beneficiaries and other factors, grows each year then the state arrears in such payments increase as increase also the number of national court decisions in favour of claimants and the number of applications to the ECtHR.

The Ukrainian social security system is based on several dozens of comprehensive laws and hundreds of regulatory acts. Many regulatory acts lack harmonisation with budget expenditures; some acts are outdated, do not correspond to present-day realities in social security and are discordant inter se. The system of social benefits, subsidies and types of aid is rather extensive and confusing; there is no precise official data on the number of existing types of different payments, benefits, allowances and supplements.

¹² See, in particular, the ECtHR judgment in the case of *Budchenko v. Ukraine* of 14 April 2014.

The main types of them include:

state assistance provided to families with children

- assistance in maternity,
- assistance at birth,
- assistance in adoptions,
- assistance for children under guardianship or custody,
- assistance for single mothers,
- assistance in caring for a sick child,
- "Baby packages"
- reimbursement of childcare services for children under three years of age ("municipal babysitters"),
- assistance for children with severe perinatal injuries,

state social assistance to persons with congenital disabilities and children with disabilities

- assistance to persons with congenital Group I disabilities,
- assistance to persons with congenital Group II disabilities,
- assistance to persons with congenital Group III disabilities,
- assistance to children with disabilities under 18,
- attendance allowance to persons caring for persons with congenital Sub-Group AI disabilities,
- attendance allowance to persons caring for persons with congenital Sub-Group BI disabilities,
- disability allowance to single persons with congenital Group II and III disabilities in need of permanent external care on the basis of findings of medical and social care expert commissions of medical institutions,
- attendance allowance to persons caring for children with disabilities under 6 years,
- attendance allowance to persons caring for children with disabilities between 6 and 18 years,

state social assistance to persons not entitled to pensions and persons with disabilities

- assistance to persons with Group I disability,
- assistance to persons with Group II disability,
- assistance to persons with Group III disability,
- assistance to clergy and junior churchmen,
- assistance to persons who reached the age entitling them to receive benefits,
- assistance to children of deceased income earners,
- attendance allowance to single low-income persons in need of permanent external care on the basis of findings of medical and social care expert commissions of medical institutions (except for the persons with Group I disability),
- attendance allowance to low-income persons with Sub-Group AI disabilities,
- attendance allowance to low-income persons with Sub-Group BI disabilities,

payments to persons affected by the Chornobyl disaster

- one-time compensation to Chornobyl liquidators who became persons with disabilities due to the Chornobyl disaster,
- one-time compensation to children with disabilities due to the Chornobyl disaster,
- one-time compensation to families who lost an income earner from among Chornobyl liquidators whose death is related to the Chernobyl disaster,
- annual rehabilitation benefits,
- reimbursement of the cost of independent therapeutic resort treatment,
- reimbursement of travel once a year to anywhere in Ukraine and back by car, or air, or rail, or water transport to persons classified in categories 1 and 2,
- compensation of 50 (25) per cent of the cost of food in accordance with medical (physiological) norms established by the Ministry of Health of Ukraine, to citizens of categories 1 and 2,
- monetary compensation for children who are not fed in schools located in areas of radioactive contamination, and for children with disabilities due to the Chernobyl disaster who are not fed in schools, as well as for all days when they did not attend schools,
- monthly assistance for a child affected by the Chornobyl disaster,
- temporary incapacity allowance to persons affected by the Chornobyl disaster,
- servicing bank loans (including compensation for loan interests) extended on favourable terms to individuals affected by the Chornobyl disaster before 1999,
- lost property evaluation services to persons affected by the Chornobyl disaster,
- compensation for the lost property if individuals were resettled or independently relocated from areas of radioactive contamination and for the expenditures related to relocation,
- assistance in the case of dismissals related to liquidation, restructuring or re-conversion of an enterprise, institution or organisation, downsizing of staff or in posts, compensation for the lost income due to health impairment, compensation for health impairment to Chornobyl liquidators, liquidators of other nuclear incidents, participants to nuclear tests, military exercises with the use of nuclear weapons, families who lost income earners, parents of deceased persons, annual rehabilitation benefits

and other types of assistance

- state social benefits to low-income families,
- temporary state benefits to children,
- assistance to orphaned children and children deprived of parental care, cash benefits to caregivers and foster parents,
- attendance allowance (monthly attendance allowance cash benefit to persons forming part of a household with persons with Group I or II disabilities which emerged as a result of mental disorders, who are in need of permanent external care on the basis of findings of medical expert commissions of medical institutions),

- compensation to individuals providing social services,
- compensation to persons caring for persons with Group I disabilities or persons of age over 80,
- cash benefits compensating therapeutic resort treatment vouchers,
- reimbursement of the cost of independent therapeutic resort treatment,
- solid fuel allowance,
- liquefied gas allowance,
- one-off remuneration to women who have been awarded the Mother Heroine honorary title;
- one-off material support to persons affected by human trafficking,
- an annual one-off benefit to war veterans,
- burial allowance,
- temporary public social assistance to individuals outside the labour force who reached the general pensionable age but are not entitled to pension benefits,
- child allowance for large families,
- monthly targeted allowance to internally displaced persons to cover living expenses, including housing and utility services,
- etc.

Ukraine failed to assume responsibility under Article 12 of the ESC for the right to social security despite many established social benefits and the right to social security enshrined in the Constitution, which includes the right to financial security in cases of complete, partial, or temporary disability, loss of the principal wage-earner, unemployment due to circumstances beyond their control, old age, and in other cases determined by law (Article 46). After Ukraine acceded in 2017 to two paragraphs of this article, the obligations to establish or maintain a system of social security and to maintain the social security system at a satisfactory level remained disregarded. Such selectivity on Ukraine's part is related to the ECSR requirements as the latter thoroughly examines minimal requirements to the types of social security and focuses not so much on the number of introduced social benefits as on their capacity to safeguard decent human living standards and meet all basic needs. That is exactly why the research focuses on the need to review the subsistence level as it is the starting point for the whole social security system in Ukraine.

Consequently, this analysis aims at producing a general review of the national legislation in the field of social rights, identifying main problems affecting recourse to the court by individuals seeking protection of their social rights provided for in the current legislation and suggesting proposals as to the reform of the national social legislation and practices in Ukraine to eliminate the main reasons for taking legal actions to protect social rights, with due consideration of the case-law of the European Court of Human Rights and the practice of the European Committee of Social Rights.

Key recommendations are related to the systematisation of all types of social benefits, the transfer to targeted benefits, the consideration of possible limitation of benefits, the introduction of the linkage between wages paid from the state budget or wages in the state-owned enterprises and the relevant subsistence wage multiplied several times, and the review of the methodology to calculate subsistence level and its content.

Certain progress and positive changes may be asserted in the activities of the Ministry of Social Policy of Ukraine as observed in the period when the research was being prepared, and discussions were held of the introduction of comprehensive social protection measures to execute the ECtHR judgment in the case of *Burmych and Others v. Ukraine* within the Council of Europe Project “Promoting social human rights as a key factor of sustainable democracy in Ukraine” and other Council of Europe Projects. In particular, new information platforms are planned to be launched, the new National social service was developed, and the Register of providers of social services was launched in a trial mode. The Verkhovna Rada Committee on Social Policy and Protection of Veterans’ Rights emphasises the need to review and change the methodology for the calculation subsistence minimum level and that it should correspond to the actual value of goods and their list should be enlarged. In July 2020, the Committee considered the draft law 3515 on the regulation of the calculation of the subsistence minimum level and enabling its increase and recommended Verkhovna Rada to approve it in principle. On 26 August, the Cabinet of Ministers of Ukraine approved the Concept of implementation of state policies of social security and protection of the children’s rights.

However, by the end of August, the Committee of Ministers neither published nor presented the results of the verification of all social benefits calculated on the basis of subsistence level, to identify the levels of budgetary expenditures to fund them, separately under each type of social benefits and each category of their beneficiaries, which should have been presented to the Verkhovna Rada before 3 August 2020 in accordance with the Verkhovna Rada Resolution “On the recommendations of the parliamentary hearing “Problems of calculation of the subsistence level in Ukraine” No. 620-IX of 19 May 2020. Such delay proves the relevance and apparenity of this research and the need to reform the social benefits system in order to simplify and modernise it and to make it more transparent.

ACRONYMS

ECHR	European Court of Human Rights
ECtHR	European Social Charter
ESC	European Committee of Social Rights
ECSR	the Committee of Ministers of the Council of Europe
CM	The Cabinet of Ministers of Ukraine
CMU	The Verkhovna Rada of Ukraine
VRU	The Constitutional Court of Ukraine
CCU	The Supreme Court
SC	The Supreme Court
WHO	World Health Organisation
ILO	International Labour Organisation

MAIN PROBLEMATIC ISSUES RELATED TO NON-ENFORCEMENT OF NATIONAL COURT DECISIONS ON SOCIAL ISSUES AND SOLUTIONS TO ADDRESS THEM

According to the ECtHR well-established case-law, the State has full discretion in establishing the system of social care and decides of its own accord what benefits should be paid from the social care system and what are the sources of such payments¹³ (state budget, local budgets, funds, etc.). The right to pensions and other benefits from the social security system cannot be interpreted, according to Article 1 of Protocol No. 1 to ECHR, as entitling a person to a pension of a particular amount, as was confirmed in the judgment in the case *Kjartan Ásmundsson v. Iceland*. However, the ECtHR has also considered under different ECHR articles, the issues related to ensuring a decent standard of living,¹⁴ although for the time being it declared inadmissible the majority of such applications.

The European Committee of Social Rights considers these aspects more in detail while interpreting the relevant provisions of the European Social Charter and the European Social Charter (revised), in particular, its Article 12 (1) which places an obligation on the Member States to establish a system of social security or maintain its functioning. The ECSR interprets the essence of the right to social security not only and not so much in terms of the existence and the number of types of payments or benefits established by national law, but through the lens of their sufficiency to satisfy basic needs and provide a decent and adequate standard of living. The European Code of Social Security which Member States have to ratify in order to accede to Article 12(2), addresses the types and volumes of social payments and benefits, as does, in general, the ILO Convention No. 102. As of July 2020, Ukraine has not acceded to paragraphs 1 and 2 of Article 12 of the Charter, although it ratified the ILO Convention No. 102.

At the same time, the ECtHR stressed more than once in its judgements that the lack of money in a budget was not a sufficient argument to justify non-compliance of a State with its obligations.

The ECtHR recalled in paragraph 23 of the *Suk v. Ukraine* judgement that *“it is within the State’s discretion to determine what benefits are to be paid to its employees out of the State budget. The State can introduce, suspend or terminate the payment of such benefits by making the appropriate legislative changes. However, once a legal provision is in force which provides for the payment of certain benefits and any conditions stipulated have been met, the authorities cannot deliberately refuse their payment while the legal provision remains in force”*.

The ECtHR reiterated in its judgement in the *Pichkur v. Ukraine* case that if a Member State has legislation in force providing for the payment of a welfare benefit as of right, whether conditional or not on the prior payment of contributions, that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for those satisfying its requirements.

¹³ See ECtHR judgments in the cases of *Suk v. Ukraine* of 10 March 2011 and *Sukhanov and Ilchenko v. Ukraine* of 26 June 2014 and the inadmissibility decision in the case of *Fakas v. Ukraine* of 3 July 2014.

¹⁴ See: *Pronina v. Ukraine* judgement of 18 July 2006, *Bogatova v. Ukraine*, of 7 October 2010, *Petrychenko v. Ukraine*, of 12 July 2016, *Pancenکو v. Latvia*, of 28 October 1999; *Larioshina v. Russia*, of 23 April 2002, *Nencheva and Others v. Bulgaria*, of 18 June 2013

As of today, the ECtHR has a clear-cut position that the lack of adequate budget resources in no way affects the obligations that have already been assumed. The ECtHR admits that a situation may arise when arrears accumulate in a certain year; however, they should be dealt with in the state budget for the next year.

Therefore, the only available solutions to prevent new claims to national courts regarding non-provision of social benefits set out in the legislation in force due to lack of adequate funding are the detailed study, systematisation and review of all social payments, benefits, supplements, compensations, allowances etc., paid from the state budget; the reduction in number and types of financial and other benefits provided from the state budget and allocation of funds to address the most vulnerable categories of people.

Such analysis and systematisation prove the relevance of this proposal, despite its unpopularity. A prime example of this could be benefits to victims of the Chernobyl disaster, which were significantly reduced in recent ten years, while the number of sub-statutory regulatory acts introducing and regulating relevant benefits continues to multiply. For example, the Resolution of the Cabinet of Ministers of Ukraine No. 562 dated 12 July 2005 as amended in 2020 "On annual rehabilitation benefits to citizens suffered following the Chernobyl disaster" is still in force and provides for the sums of payments between 75 and 120 UAH. The amount of payments has not been changed since 2005. A question arises as to the expediency of the allocation and servicing of annual rehabilitation benefits amounting to two or four euros a year. The question of whether such benefits could really satisfy or even help to satisfy a person's need in rehabilitation needs not to be answered.

The legislation also provides for medical care benefits (including prosthetics) for individuals suffered from the Chernobyl disaster. However, according to the funds budgeted for 2020, about 136 UAH is provided per person.

At mid-year of 2020, there were 1,790,836 persons in Ukraine, who suffered from the disaster (all categories included).¹⁵ In general, in addition to pensions, supplements to pensions and supplemental pensions covering health damage to those suffering from the Chernobyl disaster, more than ten other payments and supplements are provided, and each of them is as a rule regulated by a separate sub-statutory regulatory act. Among them are:

one-time compensation to Chernobyl liquidators who became persons with disabilities due to the Chernobyl disaster, one-time compensation to children with disabilities due to the Chernobyl disaster, one-time compensation to families who lost an income earner from among Chernobyl liquidators whose death is related to the Chernobyl disaster, annual rehabilitation benefits, reimbursement of the cost of independent therapeutic resort treatment, reimbursement of travel once a year to anywhere in Ukraine and back by car, or air, or rail, or water transport to persons classified in categories 1 and 2, compensation of 50 (25) percent of the cost of food

¹⁵ The Ministry of Social Policy of Ukraine. The number of individuals having the status of persons affected by the Chernobyl disaster and persons entitled to benefits provided for in the Law of Ukraine "On the status and social protection of persons affected by the Chernobyl disaster" / URL: <https://www.msp.gov.ua/news/17980.html>

in accordance with medical (physiological) norms established by the Ministry of Health of Ukraine, to citizens of categories 1 and 2, monetary compensation for children who are not fed in schools located in areas of radioactive contamination, and for children with disabilities due to the Chernobyl disaster who are not fed in schools, as well as for all days when they did not attend schools, etc.

2.3 billion UAH was allocated in general in the state budget in 2019 for the social security of people suffered from the Chornobyl disaster, and 1.3 billion UAH in 2020, about 700 UAH per person. Over 6 billion UAH was needed in 2011 to secure payment of all benefits provided by the legislation for the victims of the Chornobyl disaster. Failure to finance all benefits led to outstanding debts and amendments to the legislation which allowed the Government to apply relevant laws and set payment rates in accordance with the available financial resources in the state budget of Ukraine, the budget of the Pension Fund of Ukraine and other funds for a relevant year. The Constitutional Court of Ukraine declared constitutional such amendments and such management of payment rates in its decision of 26 December 2011.¹⁶ The ECtHR held in the *Kjartan Ásmundsson v. Iceland* case that the right to a pension paid from the social security system cannot be interpreted as entitling a person to a pension of a particular amount. On the other hand, such approach, which may be subject to changes each year or deprive Chornobyl victims, persons born in the time of war and other categories of vulnerable people of any relevant benefits, results in their vulnerability while there is a whole array of different regulations securing their social benefits. Moreover, their levels will depend on resources from both the state budget and the Pension fund of Ukraine. The state budget financing of the latter increases year by year: it amounted to 167.5 billion UAH in 2019 and over 170 billion UAH in 2020, equalling almost one-fifth of all state budget revenues.

It is deemed necessary in this situation to repeal the majority of regulations providing for multiple benefits for Chornobyl disaster victims and other categories of individuals and to consider in parallel the increase of the main benefit rate, which should be of a targeted nature.

Moreover, the formation of the structure of budget expenditures should be changed to secure transparency and clear awareness of the volume of social transfers from the state budget. However, the emphasis should be made on the explicit alignment of budget allocations for each benefit provided by law with the number of beneficiaries and the established benefit payment rates. Whenever adequate resources are not allocated in the draft budget, an obligatory review and amendment of the relevant legislation in force should be provided to reduce the benefit rate in question, cancel or suspend it, and appropriate clarification should be made for the public. The ECtHR case-law demonstrates that such measures could be introduced in a non-discriminatory manner¹⁷; however, the ECSR imposes stricter requirements as to possible cancellation or reduction of benefits. The CCU

¹⁶ The decision of the Constitutional Court of Ukraine of 26 December 2011, No. 20-rp/2011 in the case under the constitutional petitions by 49 people's deputies of Ukraine, 53 people's deputies of Ukraine and 56 people's deputies of Ukraine on the conformity with the Constitution of Ukraine (constitutionality) of Item 4 of Section VII "Final Provisions" of the Law of Ukraine "On the State Budget of Ukraine for 2011 / URL: <https://zakon.rada.gov.ua/laws/show/v020p710-11#Text>

¹⁷ See, for instance, the ECtHR judgements in the cases of *Khoniakina v. Georgia*, *Fábián v. Hungary*, *Koufaki and ADEDY v. Greece*, *Da Conceição Mateus v. Portugal*, *Santos Januário v. Portugal*, *Cichopek and others v. Poland*, *Markovics and Others v. Hungary*, *Aleksí Bakradze v. Georgia*, *Mockienė v. Lithuania*, *Aielli and Others* and *Arboit and Others v. Italy*

practice concerning the reduction and cancellation of social payments, allowances and benefits is rather contradictory and contentious.

Social expenditures provided for in the state budget should be protected from reducing in any circumstances, as it could be the question of life and death for a given person. Such a provision should be clearly prescribed by law, as different politicians and statesmen have different levels of legal culture and different understanding of a welfare state. Recently, on 14 July 2020, the Verkhovna Rada adopted the amendments to the Law of Ukraine "On the state budget of Ukraine for 2020" with regard to additional measures for the financial rehabilitation of the state enterprise "The Industrial Association Pivdennyi Machine Factory named after O.M. Makarov". The Budget Committee of the Verkhovna Rada considered the draft and pointed out that the increase in the share capital would lead to insufficient financing of social expenditures. This example testifies to the insecurity of the most vulnerable categories of people, even when the allocation of certain funds for various social benefits is protected. Therefore, taking into consideration the level of poverty in the country, the budget lines for social expenditures should be fully protected, and their reduction should not be permitted.

Social benefits for Chernobyl disaster victims as well as for all other categories of beneficiaries should be of targeted nature to the fullest possible extent to provide for the most efficient disbursement of funds available for each current period. A good example of a general approach could be the introduction, since 1 September 2018, of the so-called "baby packages", which are an irrevocable social benefit for each newborn baby and which value amounted to 5,000 UAH in 2020.¹⁸ All citizens of Ukraine, foreign nationals and stateless persons residing in Ukraine on legal grounds, persons recognised as refugees or those in need of additional protection, who bore a live-born child, are entitled to a "baby package" (paragraph 4).¹⁹

286,777 babies were born in 2019. Accordingly, the government had to spend or spent²⁰ 1,4 billion UAH. Already in 2020, it is planned to purchase such packages for 331,000 babies. This benefit is provided for each newborn child irrespective of family/mother's income, including children born by foreigners residing in Ukraine on legal grounds, which hardly corresponds to current financial capabilities of Ukraine. Such benefits undoubtedly should encourage the support for young parents; however, they should be targeted and be provided in certain circumstances for certain categories of children/parents who are in need of them. If the state financial capabilities increase, this should result in an increase in social benefits and in the number of beneficiaries.

Moreover, funds to purchase "baby packages" or compensate for them are allocated in 2020 within the budget programme "Payment of certain types of benefits, compensations, cash benefits and services compensations for certain

¹⁸ The Cabinet of Ministers of Ukraine. The Resolution "Some issues related to the implementation of the pilot project dedicated to social protection of families with children and support to the development of responsible parenthood" of 30 May 2018, No. 427

¹⁹ The Cabinet of Ministers of Ukraine. The procedures for the provision of newborn babies with the one-time payments-in-kind in the form of "baby packages" funded by the state budget. Approved by the Resolution of the Cabinet of Ministers of Ukraine No. 172 dated 3 March 2020

²⁰ The Resolution of the Cabinet of Ministers of Ukraine No. 172 dated 3 March 2020 "Certain issues related to the provision of newborn children with the one-time payments-in-kind in the form of "baby packages" provides that packages will be distributed only after payments-in-kind for 2019 will have been provided to certain categories (outlined in the Resolution). Such provision in the Resolution confirms that as of March 2020 this social obligation has not been timely met with regard to 2019 and in relation to a certain number of persons.

categories of people” amounting to 61.5 billion UAH. This budget programme and the comments to it do not clarify the exact types of benefits or cash benefits or the categories of persons intended to be their beneficiaries. At the same time, there are no allocations at all with regard to some state budget expenditure lines, in particular, for cash compensations to victims whose houses have been destroyed due to wartime emergencies caused by the military aggression of the Russian Federation.

Another example of a wide number of social aid beneficiaries is free of charge urban public transport use, including for all students of general education schools. Local budgets allocate corresponding funding which is calculated depending on the number of students and not the number of those really in need of such aid. It is provided that such compensations and benefits should be targeted, but the Cabinet of Ministers prolongs the transition to targeted transport use benefits without any significant changes.

It was not rare in Ukraine that new benefits or allowances were introduced without any mechanism for their implementation and the responsibility for the latter was being placed, as a rule, on the Cabinet of Ministers. The delays in the development of relevant legal frameworks blocked, in fact, any opportunities for people to enjoy the allowances and benefits provided for, resulting in claims to national courts which later became subjects of applications to the ECtHR. A telling example of this can be the ECtHR judgment in the case of *Budchenko v. Ukraine*²¹ where the Court dealt with the issue of the applicant’s right to compensation for the cost of electricity and natural gas to be refunded by mining companies if individuals entitled to free of charge coal for heating live in the houses with central heating. The national courts refused to order the compensation because no relevant mechanism was introduced, and the procedure for the transfer of funds from companies to local budgets was lacking. The ECtHR paid its attention to the fact that notwithstanding the 4-month period, established by the law for developing such a mechanism. It took the Government more than 10 years to do so. The ECtHR held that there had been a violation of Article 1 of Protocol No. 1 to the ECHR by Ukraine and awarded the applicant the compensation of gas and electricity costs as substantiated by the bills. Therefore, the absence of real mechanisms and procedures for the implementation of payments and benefits provided for in the social laws does not disqualify their beneficiaries for such benefits, and so mechanisms for the implementation of the national legislation in the field of social security, elaborated during the development and adoption of it, should be effective and accessible to relevant beneficiaries.

The basic issue regarding the start of reforming and reviewing the social security system is the number of population and the clear awareness of the number of people experiencing difficult living conditions, unable for objective reasons to satisfy their basic needs and requiring aid from the government. To sum up, the number of people of certain categories should be a basic prerequisite for the

²¹ ECtHR judgment in the case of *Budchenko v. Ukraine* of 24 April 2014.

precise calculation of social expenditures, the development of effective social programmes and the reform of social protection, pension, health care and other systems. The last population census in Ukraine was conducted in 2001, a total of almost 48.5 million people lived in Ukraine according to its results²². According to official data provided by the State Statistics Service of Ukraine, the population of Ukraine was 42,153,201 as of the beginning of 2019 and ²³ the average permanent population of Ukraine was 41,636,584 as of May 2020.²⁴ Accordingly, the budget and its expenditures are planned by certain indicators calculated on the basis of the population. At the same time, in January 2020 the Government announced that the real population of Ukraine was 37.3 million.²⁵ And the population census planned for the end of 2020 has been postponed.

In Ukraine, thereby, precise information about the population in general and its number in terms of different groups and certain specific needs is necessary to reform the social protection system. The provision of reliable information will help to identify the real needs of those living under difficult conditions and in need of social aid.

The establishment of the real subsistence level is of no less value in reforming the social protection system to stop the flow of applications on social matters to national courts, where the state which fails to meet its social obligations is the respondent. Discussions about the need to undertake a major review of the methodology for calculating the subsistence level, which is, in the expert opinion, significantly undervalued, protract for years.

On 19 May 2020, the Verkhovna Rada adopted its Resolution on Recommendations of the parliamentary hearing “Problems of calculation of the subsistence level in Ukraine”. The Recommendations state that “... by ratifying the European Social Charter (Revised) (in part), the International Labour Organisation Social Policy (Basic Aims and Standards) Convention (No. 117) and Social Security (Minimum Standards) Convention (No. 102) and by signing the Association Agreement with the European Union, Ukraine undertook obligations to guarantee the standard of living for its people according to the international standards and guaranteed the social security level for each of its citizens of no less than the subsistence level provided for by the law, as well as protection from poverty and social exclusion ...”. Thus, the provision of funds equalling the subsistence level should protect individuals from poverty and social exclusion.

The Constitutional Court also pointed out the need to secure in practice decent living standards through the subsistence wage in its decision of 22 May 2018 No. 5-r/2018.²⁶ The Constitutional Court refers to the European Social Charter, which sets out that, with a view to ensuring the effective exercise of the right to social security, the Contracting Parties undertake to endeavour to raise the system of social security progressively to a higher level (Author’s note: Ukraine ratified Article

²² State Statistics Committee of Ukraine. All-Ukrainian census. / URL: <http://2001.ukrcensus.gov.ua/>

²³ State Statistics Service of Ukraine, Demographical Yearbook “The Population of Ukraine in 2018” / URL: http://database.ukrcensus.gov.ua/PXWEB2007/ukr/publ_new1/2019/zb_ukr_2018.pdf

²⁴ State Statistics Service of Ukraine, The population of Ukraine (estimate) as of 1 July 2020 and the average population in January-June 2020 / URL: http://database.ukrcensus.gov.ua/PXWEB2007/ukr/news/op_popul.asp

²⁵ V. Pyrih. The Government published data on the real population of Ukraine /

URL: https://zaxid.net/chiselnist_naselennya_ukrayini_na_gruden_2019_skilki_lyudey_v_ukrayini_n1496489

²⁶ The decision of the Constitutional Court of Ukraine of 22 May 2018, No. 5-r/2018 in the case under the constitutional petition by 49 people’s deputies of Ukraine on the conformity with the Constitution of Ukraine (constitutionality) of Section I(12) of the Law of Ukraine “On amending and declaring invalid some legislative acts of Ukraine” dated December 28, 2014 No. 76-VIII

12(3) in 2017); with a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake: to take measures within the framework of an overall and coordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance; to review these measures with a view to their adaptation if necessary (Author's note: Article 30 is ratified by Ukraine). At the same time, the Constitutional Court reiterates in its decision mentioned above that, proceeding from available financial resources of the state and in order to maintain the fair balance between the interests of individuals and those of the society, Verkhovna Rada may introduce, amend, cancel or renew such benefits as they are of no fundamental nature and therefore cannot be considered as constitutional rights, freedoms or their guarantees, and the state may reallocate its expenditures in a relevant manner to secure a fair balance between the interests of individuals and those of the society, and this position is, in general, in line with the ECtHR case-law, as it was already mentioned above.

As of today, it is observed in Ukraine that the function of the subsistence level as the fundamental instrument of social policy is reduced. Indeed, the Law of Ukraine "On the subsistence level" provides for the basic elements of the subsistence level, including housing and utility charges, in particular, the cost of water supply (drainage), heat supply, gas consumption and electricity. The housing costs were 0.22 UAH per square meter before 2017, and 2.25 UAH in 2020, that is, at least two times less than the real costs. The numbers and volumes established for some categories of consumer goods do not correspond to WHO minimal standards. Many elements are significantly undervalued. The fact that the subsistence level does not cover even housing costs is vividly demonstrated by the allocation of billions of hryvnias of subsidies and subventions to local budgets. In 2020, it is planned to allocate 47.5 billion UAH for benefits and housing subsidies designated to compensate for housing costs and the purchase of different heating fuels. Therefore, the calculation of a real subsistence level will provide for allocating the government funding to support the most vulnerable categories of people and those living under difficult conditions, as well as for reducing other expenditures.

The Recommendations of the parliamentary hearing on the problems of calculation of the subsistence level in Ukraine proposed to amend the Law of Ukraine "On the subsistence level" to provide for authorising the Government to verify all social benefits calculated on the basis of the subsistence level, as approved by the Law of Ukraine "On the state budget for 2020", to identify the amounts of budgetary expenditures to fund them, separately under each type of social benefits and each category of their beneficiaries, and to inform the Verkhovna Rada of its results not later than 3 August 2020. As can be seen from the above, the Government has no information or consolidated data on all the social benefits, their volumes and beneficiaries. Such a situation is disastrous and will block any far-reaching and specific proposals to reform and review benefits paid from the state social security system.

RECOMMENDATIONS

- ✦ Immediately after the quarantine limitations are cancelled, a methodology should be developed to evaluate the needs of different categories of people and the population census should be conducted in Ukraine.
- ✦ A new methodology should be developed with the broad participation of experts and civil society to calculate the subsistence levels, which would enable people to satisfy their basic needs and provide for their decent living standards, with due consideration to the Recommendations of the parliamentary hearing “Problems of calculation of the subsistence level in Ukraine” of 19 May 2020. The subsistence level should be re-calculated on the basis of a new methodology and the financial ability of the state to guarantee it should be analysed.
- ✦ All benefits and types of assistance funded from the state budget, directly or through subventions to regions, should be analysed and systematised, the rate of each benefit and assistance should be identified, and the implementation of mechanisms and procedures relevant to them should be verified.
- ✦ Sub-statutory norms and regulations which provide for multiple benefits to certain categories of people should be reviewed and cancelled in the framework of the analysis of all payments from the social security system, and the opportunity for an increase in the rates of the main benefits should be considered.
- ✦ The social benefits system should be revised to provide for its targeted nature. With regard to benefits or allowances which the Government converts or plans to convert into targeted ones, precise obligations should be assumed with regard to terms of termination of such transition periods.
- ✦ Amendments should be considered to the structure of the state budget expenditures to secure transparency of all social transfers and their beneficiaries.
- ✦ Explicit alignment of budget allocations for each benefit provided by law with the number of beneficiaries and the established benefit payment rates should be provided within each annual state budget. Whenever adequate resources are not allocated in the draft state budget, obligatory review and amendment of the relevant legislation in force should be provided to reduce benefit rates, cancel or suspend benefits in a non-discriminatory manner, and an appropriate clarification should be provided to the public.
- ✦ A prohibition should be considered of establishing supplementary payments, compensations, allowances or any other social benefits to be paid from the state budget, which are not provided by the legislation in force, as well as of increasing extrabudgetary funds reprogrammed into a state budget for a current year by decrees of the President and resolutions of the Cabinet of Ministers.

- ✦ The right of the Cabinet of Ministers, enshrined in many social laws due to amendments made since 2011, to establish at its discretion the rates for supplementary payments and benefits for certain categories of people exclusively within resources provided by the state budget and the Pension Fund should be revised to secure that such discretion is applied only to such categories of vulnerable individuals who are already provided with the minimum living wage.
- ✦ The opportunity for the Cabinet of Ministers, stipulated in many social laws, to establish, at its discretion, the rates of allowances or benefits to certain categories in view of resources available for a current year in the framework of resources provided for in the state budget or the Pension Fund should be reviewed so that such discretion be applied under exceptional circumstances only.
- ✦ The appropriateness of reducing or cancelling current social benefits and supplementary payments to certain categories of persons, as well as reducing pension supplements, including those already accrued, should be considered with due regard to the ECtHR case-law with regard to pension and social legislation reform and the austerity measures already introduced by various countries due to financial crisis.
- ✦ The ratification of Article 12(1) of the European Social Charter (revised) which provides for establishing a system of social security or maintaining its functioning, should be promoted.
- ✦ A co-financing and a search for donor funding to support the most vulnerable categories of people should be provided.
- ✦ The need for limiting the maximum level of salaries of civil servants, judges, top managers of state enterprises and all categories of employees receiving salaries from the state budget should be considered, with the adjustment of the maximum level of salaries to a certain number of minimum living wages.
- ✦ The necessity of the development and introduction of a training course on social human rights, intended for civil servants, local administrations, judges, social workers, higher education students and other categories, should be analysed.