



**Further support for the execution by Ukraine of judgments in respect of Article 6 of the  
European Convention on Human Rights**

**Overview**  
**of the 2019 Annual Report of the High Council of Justice**  
**“On Ensuring the Independence of the Judiciary in Ukraine”**

*Executive summary*

August 2020

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This overview is based on the draft Annual Report of 2019 submitted by the High Council of Justice (HCJ) of Ukraine to identify problematic issues and provide an assessment of possible steps to take to resolve them. The Annual Report is the only official comprehensive document that should reflect the state of independence of judges in Ukraine. It is used to form public policy, plan necessary steps, and form a legal position by experts and organisations, including international organisations.

The report, which has been analysed, is the third comprehensive document developed by the HCJ in accordance with the provisions of clause 7 of part 1 of Article 73 of the Law of Ukraine “On the High Council of Justice”. It consists of an introduction, conclusions, and two main parts with a review of important events, actions, and issues that influenced the state of judicial independence.

The expert’s proposals were formulated by considering the current challenges for the judicial system, current legislation, and the content of the submitted draft report. The expert analysed the content of the report in the context of recent legislative changes and the information contained in it regarding:

- staffing of courts;
- safeguarding the work of newly formed courts;
- qualification assessment of judges;
- provision of resources as a factor in judiciary independence;
- execution of the judgements of the European Court of Human Rights regarding issues related to the independence and disinterestedness of the judiciary;
- cases of interference in the activities of a judge or court.

## **General issues**

1. Given the status and importance of the report for the formation of state policy in the field of safeguarding the independence of the judiciary, it is evident that the process of its formation should constitute a platform for discussion, particularly regarding the state of affairs on relevant issues involving judicial self-government bodies, bodies and institutions of the justice system, and non-governmental organisations. The analysis of the Annual Report of 2019 indicates that it primarily reflects the vision of the HCJ on the state of independence of judges and actions taken by the HCJ. Accordingly, the expert draws attention to the need to involve in the formulation of the report all relevant entities that play a part in ensuring the independence of judges whose position is important for a comprehensive reflection of the state of affairs.

The expert also noted that the report of 2019 took into account the previous proposals made by the experts, in particular, a separate section is provided on Ukraine’s implementation of the judgements of the European Court of Human Rights regarding issues of independence and disinterestedness of the judiciary. This is a positive development in the formation of the report.

2. To ensure discussion of the report at the highest political levels, it is essential that the Annual Report is presented to the Parliament. Based on the results of the hearings, the Parliament should decide on actions that must be taken to resolve problematic issues. Accordingly, it seems equally necessary to amend the Law of Ukraine “On the High Council of Justice” and the Regulations of the Verkhovna Rada of Ukraine. Prior to making the amendments, it is also recommended that all necessary steps are taken to ensure that relevant issues are addressed to the Parliament by initiating the HCJ parliamentary hearings or discussions at the meeting of the relevant parliamentary committee.

### **On legislative changes**

3. It is noted that the Annual Report justifiably pays much attention to the relevant legislative amendments that were adopted, in particular, by Law of Ukraine No. 193 and provides evidence of their unconstitutionality and non-compliance with international standards. However, since the Judgement of the Constitutional Court of Ukraine No. 4-p/2020 was adopted at the beginning of the year regarding these changes, it would be advisable to include information on it in the report. Given the state of the legislation and the actual lack of dialogue between the HCJ and Parliament, attention is drawn to the need to effectively use the possibilities of appealing controversial provisions of laws containing risks to the state of independence of judges in the Constitutional Court of Ukraine. For example:
  - to appeal the disputed provisions of Laws No. 193, 263 and 117;
  - to consider the introduction of an interpretation of the provisions of the Constitution, namely clause 7 of part 1 of Article 131 of the Constitutional Court of Ukraine in the context of whether this provision can be construed as imposing a duty on Parliament to take into account the advisory proceedings of the HCJ regarding draft laws on the independence of judges, and whether violations of this obligation by the Parliament may be considered a violation of the procedure for the consideration and adoption of the draft law, which may lead to its recognition as unconstitutional;
  - it is advisable to consider the possibility of applying to the Constitutional Court of Ukraine with a constitutional claim on the unconstitutionality of the provisions of the Law of Ukraine "On the State Budget of Ukraine for 2020", given the inadequate critical funding of the judiciary. The urgent consideration of such a claim by the Constitutional Court may have a significant impact on the formation of interaction with Parliament, both in the budget for 2020 and in relation to future budgets.
4. Analysis of the report indicates a lack of proper dialogue between the HCJ and the Parliament. It seems that this situation is part of the general problem of a lack of trust in the court and the judicial system as a whole. In order to overcome this issue, it is advisable to form a common strategy for all judicial authorities to increase confidence in the court and to take steps for its implementation. The development of such a strategy per se by the judicial authorities that identifies problems and highlights actions to solve them will be a positive signal for the population, and will also become a guide for judges and court employees regarding the steps that should be taken in their daily work. In addition, it is recommended that consideration is given to involving representatives of civil society, whose professional activities are related to the independence of judges, in the discussion of problematic issues. In view of this, it would be highly advisable to explore the possibility of establishing a non-profit or scientific advisory board at the HCJ.
5. Given the mass media's powerful impact on the formation of public opinion, it would be beneficial to develop a common communication strategy between the judiciary and mass media in order to strengthen confidence in the authorities. To monitor the state of affairs regarding trust in the court and identify shortfalls that have a negative effect, it would also be practical to carry out monitoring campaigns as widely as possible with the support of international organisations, and with minimal use of HCJ resources.

### **Regarding court staffing**

6. The situation with the competition for vacant judges' positions in 2019 as described in the report demonstrates the lack of coordinated work by the judiciary resulting in the non-appointment of 467 candidates for the position of judge. Given the above, it is obvious that the relevant authorities need to co-operate more closely and, in case of disputes, the court must resolve them without delay.

### **Regarding the execution of the judgements of the European Court of Human Rights**

7. In terms of the execution of the judgements of the European Court of Human Rights, it seems necessary to draw attention to the fact that the situation with the implementation of this judgement requires maximum attention with regard to the risks to new appeals by the applicants, as in the case of *"Kulykov and Others v. Ukraine"*, in the event of prolonged failure to take individual steps to execute this judgement. In addition, it is important to start monitoring the new claims that judges send to the European Court of Human Rights regarding communication with the Government of Ukraine in order to identify potential new problems and possibly take measures to prevent them.

#### **Regarding cases of interference in the activities of a judge or court**

8. The report indicates a problem with the lack of efficiency of the submission institution of HCJ in responding to submissions reporting cases of interference in the activities of a judge or court. After analysis of the legislation and the information presented in the report and taking into account the dynamics of the changes compared to last year, the following is advised:
  - Introduce monitoring of the efficiency and effectiveness of the response to the submission of HCJ by the relevant entities;
  - Take steps to draw up an administrative offence report on the failure to provide a response on the HCJ's submission in accordance with Articles 188-32 of the Code of Ukraine on Administrative Offences. In addition, it is recommended that such an administrative offence be seen as failure to comply with the legal requirement specified in the HCJ submission on the identification and prosecution of persons who have performed actions or failed to act, thus violating the independence of judges or undermining the authority of justice. At the same time, it is advisable to allow authorised employees of the HCJ to draw up reports;
  - Strengthen the functional ability of the HCJ to respond effectively to cases of interference in the activities of a judge by allowing the HCJ to impose fines on officials whose actions constitute interference or contact the Supreme Court to verify the fact of interference and then penalise such actions.
9. In order to strengthen control over the activities of law enforcement agencies based on the complaints of judges about interference in their duties, it is recommended that the HCJ constantly monitors and controls the actions taken by law enforcement agencies in criminal proceedings with reference to complaints by judges. It is important to consider developing a mandatory special training course for prosecutors with the support of the General Prosecutor's Office of Ukraine to reveal problematic issues concerning the action (inaction) of prosecution authorities that negatively affect the independence of the court (judges) and focus on actions that are unacceptable and are considered to be interference in judicial activities.
10. In order to solve the issue of the lack of meaningful steps to combat the influence on officials of public authorities (public persons, journalists) who deliberately allow public statements that undermine the credibility of the court and make groundless attacks on the judiciary, it is advisable to consider the possibility of amending the Code of Ukraine on Administrative Offences regarding the prediction of an administrative offence in the form of public disrespect towards the court on the part of government officials and the provision of the right to HCJ employees to draw up administrative offence reports in case of the committing of this offence.
11. To improve the quality of information coverage by journalists, it would be useful for the HCJ to cooperate with educational institutions where journalists are trained as part of special training courses for journalists on media coverage of the work of judges and the court.
12. The report needs to be supplemented in terms of outlining the specific steps the HCJ must take in the event of establishing interference in a judge's activity and court outcomes.
13. The large-scale HCJ practice on ensuring the independence of judges requires collation that will improve its accessibility to interested parties. To prevent cases of submission of unreasonable claims by judges, as well as failure to submit appropriate claims, it is advisable to generalise the practice according to the relevant claims of the judges and develop recommendations for judges

on what kinds of behaviour do constitute interference and those that don't to form appropriate criteria; and to carry out an information campaign aimed at judges to promote the reporting of interference and compliance with the duty of notification. It is also advisable to consider the possibility of creating short explanations (using technical tools) for judges and distributing them amongst judges or uploading these explanations as videos to the HCJ website, or to include these issues in the list of compulsory topics that are covered by the National School of Judges during training for judges.

14. Besides, given that the HCJ has already formed a certain system of work and has delegated much of this work to employees within the body, it would be advisable to consider the possibility of carrying out an internal institutional audit of the efficiency of the implementation of the assigned tasks. The objective of this audit is to analyse the level of performance of tasks taking into account the number of employees, the distribution of the workload between structural units, and the number and nature of tasks in order to provide recommendations on technical or organisational steps that could influence the improvement of overall performance.