



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

Report

**Of the regional expert discussions of the 2019 Annual report of the High Council
of Justice “On ensuring the independence of judiciary in Ukraine” and its
compliance with the provided Council of Europe recommendations**

(July-October 2020)

Introduction

Following the consultations with High Council of Justice, the Council of Europe Project "Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights" (Project), which is funded by the Human Rights Trust Fund and implemented by the Justice and Legal Cooperation Department of the Council of Europe, organised a number of events aimed at discussing the 2019 Annual report of the High Council of Justice "On ensuring the independence of the judiciary in Ukraine" and its compliance with the provided Council of Europe recommendations. The project requested Mr Oleksandr Drozdov, the associate professor and president of the Ukrainian Advocates' Association, to participate in these discussions and prepare a report on their results.

The report provides the main conclusions of the regional expert discussions and offers the recommendations on the issues that should be addressed in the next annual reports of the High Council of Justice in order to strengthen the independence of the judiciary.

The regional events aimed at presenting and discussing the 2019 Annual Report of the High Council of Justice on ensuring the independence of the judiciary in Ukraine, a sole strategic document of the Ukrainian judiciary, which reflects the current situation of the judicial independence in the country. Furthermore, these events provided an opportunity for participants to exchange views with regard to strengthening the independence and impartiality of the judiciary in Ukraine in the context of the standards and recommendation of the Council of Europe and the execution by Ukraine of judgments of the European Court of Human Rights in the Volkov group of cases related to the independence and impartiality of the judiciary, the system of judicial discipline and the careers.

The regional expert discussions took place online on 15, 29 July and 26 October 2020. The following participants attended them: representatives of the Supreme Court, the High Council of Justice, the State Judicial Administration of Ukraine, the Judicial Protection Service and their territorial offices, the National School of Judges of Ukraine and its regional branches, judges of local courts of first and appellate instances, civil society and international organisations, as well as representatives and experts of the Council of Europe.

Discussed topics:

- the status of ensuring the independence of the judiciary in Ukraine in 2019 and the measures taken by the High Council of Justice in this respect, including proposals on the legislative changes on the judiciary and the status of judges, the conclusion of the Venice Commission on the legislative acts regulating the status of the Supreme Court and judicial bodies, the decisions of the Constitutional Court of Ukraine № 2-r / 2020, № 4-r / 2020 and № 7-r / 2020 (regarding the constitutionality of Article 375 of the Criminal Code of Ukraine);
- compliance of the 2019 Annual Report of the High Council of Justice "On ensuring the independence of the judiciary in Ukraine" with the standards and provided recommendations of the Council of Europe;
- issues related to the status of and requirements for the execution by Ukraine of the judgments of the European Court of Human Rights in the Volkov group of cases, including the decision of the Committee of Ministers of the Council of Europe adopted at 1383 meetings on September 29 - October 1, 2020;
- further steps and measures to be taken to enhance the protection of the independence of the Judiciary in Ukraine.

Achieved outcomes:

- Participants discussed problematic aspects pertaining to ensuring the independence of the judiciary in Ukraine in 2019 and the measures taken by the High Council of Justice, as well as the inadmissibility of arbitrary dismissal of judges and insufficient financial support of the judiciary.
- Participants shared their views on interfering in the activities of judges:
 - on the administration of justice by law enforcement agencies (in terms of quantitative and qualitative characteristics of judges' notifications of interference and response to judges' notifications by the High Council of Justice, criminal proceedings / number of criminal proceedings sent to court with an indictment against judges);
 - during the administration of justice by people's deputies of Ukraine, deputies of local councils, other representatives of state authorities and local self-government;
 - by citizens and their associations, mass media;
 - on the administration of justice by lawyers.
- Participants discussed the compliance of the 2019 Annual report of the High Council of Justice "On ensuring the independence of the judiciary in Ukraine" with the standards and recommendations of the Council of Europe, as well as exchanged their opinions on the content and format of the next Annual report.
- Participants reviewed the status of and requirements for the execution by Ukraine of the judgments of the European Court of Human Rights in the Volkov group of cases of Oleksandr Volkov, paying a special attention to the cases of "Kulykov and Others v. Ukraine" and "Denisov v. Ukraine", which address issues of structural independence of the judiciary.
- Participants also discussed issues such as the dissemination of false information about judges, abuse of procedural rights, recording of court sessions, filing judicial conduct complaints, etc. The High Council of Justice noted that these issues should not be addressed with measures aimed at protecting judicial independence.
- Participants discussed measures to be taken to enhance the protection of the independence of the judiciary in Ukraine and formulated relevant recommendations.

Main conclusions and recommendations

Following the discussions, it was suggested that the following measures be taken:

1. As many stakeholders as possible, in particular those mentioned in the Law of Ukraine "On the High Council of Justice", should be involved in the consultation process for the preparation of the annual report, such as judicial and judicial self-government bodies, other institutions and judicial bodies, as well as non-governmental organisations, and representatives of the bar. This approach will facilitate the implementation of the recommendations contained in relevant international instruments as well as, for example, the development of dialogue and the exchange of experience between judges and lawyers on their relationship at an institutional level (both national and international), taking into account the Code of Ethics and Opinion No. 16 (2013) On the relationship between judges and lawyers adopted at the 14th plenary session of the CCJE (Strasbourg, 13-15 November 2013).

2. The High Council of Justice should take into account the annual reports of the UN General Assembly Special Rapporteur on the Independence of Judges and Lawyers when preparing annual reports. It is also advisable to prepare an official summary of each annual report (up to 30 pages), prepared by the High Council of Justice and translated into English.

3. The High Council of Justice should make efforts to gain broad public support, as well as more media attention, to promote the recommendations of the annual report and to hold public debates on problematic issues.

4. The dissemination of the annual report should be as wide as possible. In addition to publishing the report on the website of the High Council of Justice and submitting it to the Verkhovna Rada of Ukraine, the official summary of the annual report can be sent to other stakeholders and international partners.

5. Consolidate at the legislative level the effective influence of the judiciary in decision-making regarding any changes to the legislation on the judiciary and the status of judges, through, *inter alia*, advisory opinions. Currently, this primarily concerns issues of underfunding of the judiciary (even in a pandemic), shortage of judges and cases of interference in the activities of the court / judges. In this regard, it is advisable to include special procedures in the Rules of Procedure of the Verkhovna Rada advisory opinions, reports, and annual reports of the High Council of Justice.

6. Following the presentation of the annual report of the High Council of Justice for the respective year, press conferences are to be held at national and regional levels, as well as a series of speeches by media representatives. In addition, the High Council of Justice should organise public discussions during seminars and conferences, inviting a wide range of participants.

7. At the legislative and law enforcement levels, ensure compliance with convention requirements when disqualifying judges, the legality of their appointment and the independence of lawyers involved in trials, taking into account, *inter alia*, the case law of the European Court of Human Rights in *Angelika Simaitiene v. Lithuania*, *Bagirov v. Azerbaijan*, and *Gudmundur Andri Astradson v. Iceland*.

8. In its annual reports, the High Council of Justice must clearly indicate the issues and reasons why they have remained unresolved since its previous annual report. In addition, the annual report should contain an exhaustive list of specific recommendations at the end of the document.

9. It is proposed that the High Council of Justice makes more effective use of the possibility to appeal the disputed provisions of laws that contain risks to the state of independence of judges to the Constitutional Court of Ukraine.

10. Establish a scientific advisory council at the High Council of Justice with the involvement of civil society representatives, whose professional activities are related to the independence of judges.

11. In terms of implementation of the decisions of the European Court of Human Rights:

11.1. It is fitting to take appropriate law-making and law-enforcement measures to ensure guarantees against arbitrary dismissal or protection against wrongful prosecution of judges, taking into account the provisions contained in the opinion of the Advisory Council of European Judges № 18 (2015) "Judiciary and its relations with other branches of state power in a modern democracy", reports by the Venice Commission, in particular those concerning the analysis of draft laws and laws on the judiciary and the status of judges, numerous decisions of the European Court of Human Rights (*Sovtransavto-Holding v. Ukraine*, *Salov v. Ukraine*, *Miller v. Ukraine*, *Zubko and others v. Ukraine*, *Baka v. Hungary*).

11.2. With regard to freedom of expression, judges in law enforcement should take into account the relevant case law of the Strasbourg Court, namely in the aspect of the judge's ability to comment freely on political developments, including judicial reform (see Article 10 of the

Convention for the Protection of Human Rights), fundamental freedoms and, for example, the judgment of the European Court of Human Rights in *Kudeshkin v. Russia*). The ethical aspects of Articles 6 and 10 of the Convention should also be discussed in this context, as the coverage of trials by a lawyer, journalist, blogger should remain within the framework of moral and ethical principles and professionalism, should be based on a certain fact, and also should be based on legal explanation as well as the content of the decision.

12. In the context of ensuring adequate and timely payment of remuneration, national judges should pay due attention to the provisions reflected in the decision of the European Court of Human Rights in the case of *Zubko and Others v. Ukraine* in law-making and law enforcement activities.

13. In cases of interference in the activities of a judge or court, the following is recommended:

13.1. Introduce systematic monitoring of the effectiveness or efficiency of the response to the submission of the High Council of Justice by the relevant entities.

13.2. Take measures to draw up protocols on administrative liability for failure to respond to the submission of the High Council of Justice in accordance with Articles 188-32 of the Code of Ukraine on Administrative Offences.

13.3. Provide for such an administrative offence as non-compliance with the legal requirement specified in the submission of the High Council of Justice to identify and prosecute persons who have committed acts or omissions that violate the guarantees of independence of judges or undermine the authority of justice. At the same time, the right to draw up protocols should be granted to authorised employees of the High Council of Justice.

13.4. Strengthen the functional capacity of the High Council of Justice to respond effectively to cases of interference in the activities of a judge and empower the High Council of Justice to impose penalties on officials whose actions are perceived as such interference, or to apply to the Supreme Court to verify interference and imposition of a fine for inappropriate actions.

14. In order to strengthen control over the activities of law enforcement agencies with regard to judges' complaints about interference in their activities, the following is recommended:

14.1. Introduce a system of constant monitoring and control by the High Council of Justice regarding the measures taken by law enforcement agencies in criminal proceedings on complaints by judges.

14.2. In cooperation with the Office of the Prosecutor General, develop a mandatory special training course for prosecutors, which will reveal the problematic issues of actions (inaction) taken by prosecutors that negatively affect the independence of the court (judges) and focus on actions that are unacceptable and considered interference.

15. Initiate amendments to the Code of Ukraine on Administrative Offences to provide for an administrative offence in the form of public contempt of court by public officials and the right of employees of the High Council of Justice to draw up protocols on administrative liability in case of this offence.

16. In order to improve the quality of information coverage by journalists, introduce cooperation of the High Council of Justice with educational institutions where journalists study, within the framework of special training courses for journalists on media coverage of judges and courts.

17. In order to prevent cases of unfounded notifications by judges, as well as failure to submit proper notifications, it is advisable to generalise the practice of relevant requests of judges and develop recommendations for judges on what behaviour should not be considered interference and what behaviour is considered to form response criteria. Carry out an information campaign

amongst judges to encourage notification of interference and compliance with the obligation of such notification.

18. It is advisable to consider creating brief explanations (using technical tools) for judges and disseminating them amongst judges or posting them on video on the website of the High Council of Justice or including these issues in the list of mandatory issues covered by the National School of Judges.

19. Given that the High Council of Justice has already formed a certain system of work, the distribution of the burden being on employees within the body, it would be appropriate to consider the possibility of conducting an internal institutional audit of the effectiveness of the tasks. The purpose of such an audit is to analyse the level of efficiency of these tasks, taking into account the number of employees, the distribution of work between departments, the scope and nature of tasks to provide recommendations for technological or organisational measures that could improve efficiency.