

Anti-Corruption Transformation Processes in the Conditions of the Judicial Reform in Ukraine Implementation



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ABSTRACT

This article analyses the anti-corruption transformative processes triggered by Ukraine's judicial reform. The subject of the study is the determination of the critical aspects of the success of anti-corruption transformative measures conditioned by the anti-corruption reform in Ukraine. The objectives of the article are to determine the main anti-corruption challenges facing the Ukrainian judicial system and to characterise the main legislative countermeasures. The authors emphasise that a properly functioning system of courts supports the realisation of many development goals – by protecting human rights, resolving social conflicts, and implementing government policy. However, today the judiciary in Ukraine still needs to meet these principles. One of the crucial aspects of judicial reform in Ukraine is undoubtedly the overcoming of corruption, which significantly distorts the independence of judges and the principle of equality. The article is structured as follows: current challenges of the Ukrainian judiciary: corruption and judicial independence (1); the essence of the primary measures of judicial reform (2); the role of the Constitutional Court of Ukraine in curbing anti-corruption measures of judicial reform (3) and the creation of the Higher Anti-Corruption Court as an anti-

KEYWORDS:

judicial reform;
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corruption component of judicial reform. The authors formulated two critical factors for the success of judicial reform. The first factor is the presence of political will and coordinated cooperation between the President of Ukraine and the Verkhovna Rada of Ukraine. The second factor is the active participation of the public in initiating and controlling the implementation of reform measures.

INTRODUCTION

Courts exist to meet human needs. A person who comes to Court is not a lawyer and should not be one; he does not come for luxury or boredom or an excursion. A person is looking for justice; he wants to restore his violated right with the help of the state judicial mechanism. As an institution that provides judicial services, the judicial system should be simple and accessible to the average citizen, and court procedures should be simple and understandable even for non-lawyers. A properly functioning court system supports implementing many development goals – protecting human rights, resolving social conflicts, and implementing state policy. In addition, substantial academic literature argues that courts are essential in promoting economic growth, primarily by protecting property rights.¹

However, today the judiciary in Ukraine does not meet these principles. In addition, justice is a sphere of state activity and social life in which the idea of the Rule of Law is most vividly embodied. Access to justice involves the legal consolidation and direct functioning of guarantees provided by Law, which allow everyone to freely exercise their right to judicial protection and restoration of the violated right.² A person should receive justice services as quickly, transparently, qualitatively, and efficiently as possible. However, such justice remains only a dream, which reduces the availability of justice as the constitutional and legal basis of the judicial power of Ukraine.³ Because of the factors mentioned above, judicial reform becomes essential for forming an independent, impartial judiciary that ensure the implementation of the principles of the Rule of Law (the Rule of Law, legality, and equality).

1. CURRENT CHALLENGES OF THE UKRAINIAN JUDICIARY: CORRUPTION AND JUDICIAL DEPENDENCY

In judicial reform, special attention should be paid to ensuring the impossibility of corruption, as corruption acts as a destructive factor in building a democratic society.⁴ In general, the problem of corruption in the judicial system is a typical phenomenon in developing countries. For their functioning, such corruption causes more damage than any other factor because even the assumption that the judiciary is corrupt raises broad doubts about the success of anti-corruption activities and the effectiveness of

¹ A. Bedner, *Court reform: law, governance, and development research & policy notes*, 2008.

² T. Brezina, N. Bortnyk, I. Khomyshyn, *Access to Justice: Ukraine and Europe*. *Journal of Advanced Research in Law and Economics* v. 11 n. 4 pp. 1122–1130, (2020).

³ S. Koroed, I. Kresina, S. Prylutsky, *Concept reforming the judiciary of Ukraine*. *Court appeal* 3 pp. 6–34 (2015). (in Ukrainian).

⁴ O. Andriyko, *Judicial reform in Ukraine and the development of administrative justice*. *Constitutional state*. 4, pp. 45–49. (in Ukrainian).

legal protection through judicial means.⁵ Such a situation is unacceptable because, under the conditions of operation of the checks and balances system, judicial power is an essential element in ensuring the protection of human and citizen rights, legality, and the Rule of Law. The “rusting” of the judiciary, caused by corruption, inevitably led to the levelling of the original constitutional prescriptions regarding the essence of our state, namely Art. 1 of the Constitution of Ukraine. According to Art.1, Ukraine is a sovereign and independent, democratic, social, legal state, upholding fundamental human and citizen rights and freedoms. For example, all people are free and equal in their dignity and of the Constitution of Ukraine); citizens have equal constitutional rights and freedoms and are equal before the Law.

Moreover, there can be no privileges or restrictions based on race or skin colour, political or religious beliefs, gender, ethnic and social origin, property status, place of residence, language, or other characteristics (Art. 24 of the Constitution of Ukraine).⁶ It is essential that judges, given their special status, belong to specific subjects of criminal responsibility. Their rights and obligations are determined by a separate Law of Ukraine, “On the Judicial System and the Status of Judges”: only a person who meets the established requirements of the Law is appointed to the position of the judge; most of the measures to ensure criminal proceedings cannot be applied to them, but the provided features are typical for consideration of criminal cases in which judges are suspects. Given the above, corruption in the judicial system has a significant negative impact on the approval and implementation of the constitutional provision on the Rule of Law in Ukraine, generates legal nihilism, violates legality, and destroys the legal system of the state.⁷ If the judiciary is corrupt, it promotes corruption in other government sectors and conveys to the general public that corruption is acceptable.⁸

The analysis of the current situation allows us to identify the main obstacles in combating corruption in the field under study: 1) lack of a general understanding of the current problems of the judiciary, which affect the establishment of fair justice in the country and cause corruption; 2) ambiguity and lack of unified, agreed steps for further judicial reform and solving current problems.⁹

The authors consider it necessary to highlight the study of these obstacles. They are convinced that corruption in the judicial system not only undermines the credibility of courts as fighters against corruption but also destroys confidence in the independence of courts, harming the entire core of judicial functions.¹⁰ The independence of judges as a primary basis for the administration of justice is enshrined in the Basic Principles of the Independence of the Judiciary (Approved by resolutions 40/32 and 40/146 of the

5 L. Moskvych, Corruption determinants in the judicial system of Ukraine. *Bulletin of Luhansk State University of Internal Affairs named after E. A. Didorenko* 3 pp. 153–162. (2015). (in Ukrainian).

6 See note 4.

7 N. Savchyn. Fight against corruption in Ukraine’s judiciary (considering international experience). *The rule of law* 28 pp. 31–38. (2017). (in Ukrainian).

8 TI, Global Corruption Report 2007, p. XVI and XXI. URL: <<https://www.transparency.org/en/publications/global-corruption-report-2007-corruption-and-judicial-systems>> [accessed 05 January 2023].

9 Yu. Lavreniuk, Reforming the Judicial System in the Context of Anti-Corruption. *Efficiency of public administration* 1/2 (46/47), part 1 pp. 85–91. (2016). (in Ukrainian).

10 S. Gloppen, Courts, corruption and judicial independence. URL: <https://www.cmi.no/publications/file/5091-courts-corruption-and-judicial-independence.pdf> [accessed 20 June 2021].

UN General Assembly on November 29 and December 13, 1985). According to these principles, there should be no undue or unauthorised interference with the process of justice, and judicial decisions made by judges are not subject to review. This principle does not preclude due process of law judicial review or commutation of sentences handed down by judicial authorities.¹¹ At the same time, Recommendation CM/Rec (2010) 12 of the Committee of Ministers of the Council of Europe to member states regarding judges: independence, efficiency and duties (adopted by the Committee of Ministers of the Council of Europe on November 17, 2010, at the 1098th meeting of deputy ministers) establish that the independence of judges and the judiciary powers should be guaranteed by the Constitution or fixed at the highest legal level of the member states. More specific norms should be established at the legislative level.¹² Following the Constitution of Ukraine (Art. 129), a judge, while administering justice, is independent and guided by the Rule of Law.¹³ The concept of independence is specified in the relevant Law of Ukraine, “On the Judiciary and the Status of the Judges” (Art.48). It stipulates that a judge in his activities related to the administration of justice is independent of any illegal influence, pressure, or interference.¹⁴

The blatant disregard for the constitutional principle of independence of courts and judges is at the heart of corruption in the judicial system. Additionally, their freedom should be manifested in everything: independence from external influence during the evaluation of evidence, listening to parties, and autonomy in decision-making. At the same time, freedom must be internal, from the side of other judges or the head of the Court as well as being external (from the influence of third parties). It is worth noting that the corrupt impact on the independence of a judge is not only the provision of bribes in the usual “material format” but also a request, offer, promise, service, or any other benefit of an intangible nature. It is worth emphasising that the corruption of the judiciary promotes corruption in different sectors of Government and sends a message to the public that corruption is acceptable.¹⁵

J. Silen emphasises that the need to form an independent court is especially felt in former communist countries, where awareness of the importance of the independence of an individual judge is growing.¹⁶ The legality of the formation of the judicial corps is of particular significance. This specific characteristic comes from the public’s understanding of how the justice system is organised and the absence of assumptions about the possibility of bad faith in evaluating judicial candidates. At the same time, justice system employees must also have specific moral abilities and particular behaviour in addition to legal guarantees of professionalism. The above

11 Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. URL: <<https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.asp>> [accessed 21 June 2021].

12 Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies. URL: <<https://www.icj.org/wp-content/uploads/2014/06/CMRec201012E.pdf>> [accessed 19 June 2021].

13 See note 4, 14.

14 On the Judiciary and the Status of Judges: Law of Ukraine of 2 June 2016 № 1402-VIII. Information of the Verkhovna Rada of Ukraine 31. Art. 545 (2016). (in Ukrainian).

15 See note 8.

16 J. Silen, The concept of ‘internal judicial independence’ in the case law of the European Court of Human Rights. *European Constitution Law Review* Vol. 15, Issue 1. (2019.) DOI: <https://doi.org/10.1017/S1574019619000014>.

demonstrates that the judiciary, independent of corruption, plays a significant role in forming and strengthening democratic regimes.¹⁷

In addition, a negative trend of increasing undue influence on judges is noted, which is presented schematically.

Picture 1. Number of reports of interference with the judge's activities

In 2018, 187 reports of interference in the activities of a judge were registered in the Unified Register of Pretrial Investigations in 2019 – 335 and 2020 – 371.¹⁸ Moreover, violation of a judge's independence is characterised by high latency. Ukrainian courts generally maintain a negative balance of trust-distrust in society: 14% of the population trust the courts, while 75% do not (the ratio is 61%). Simultaneously, compared to 2015, the trust-distrust balance slightly improved positively (equal to 72%). This is evidenced by a survey conducted by the sociological service of the Razumkov Center and the “Democratic Initiatives” Foundation named after Ilka Kucheriva, commissioned by the Center for Political and Legal Reforms.¹⁹

One of the biggest problems of modern Ukraine is the presence of deep-rooted contempt for the Court in the minds of citizens. Public trust or faith in the courts used to be taken for granted. However, the decline of trust in state institutions riddled with corruption, including courts, is a characteristic feature of most democratic societies; Ukraine is no exception.²⁰

To solve this problem, it is essential to take moral and educational measures, reformatting the legal culture of citizens and adopting coercive measures corresponding to the degree of intervention and the importance of justice for the state. Therefore, certain forms of Contempt of Court should be criminalised. Contempt of Court should be recognised as a criminally illegal act, which will be expressed in those actions or inactions that may pose a significant public danger to the Court because they are accompanied by extreme cynicism, leading to systematic non-execution of court decisions and violation of court order.

The importance of judiciary independence is so significant that the Ukrainian legislator provides for criminal prosecution for the intervention and activities of judicial authorities (Art. 376 of the Criminal Code of Ukraine). Interference in the activities of judicial bodies is influence on the judge in any form: request, demand, instruction, threat, bribery, violence, criticism of the judge in the media before the decision of the case in connection with its consideration, etc., carried out to prevent the judge from performing his official duties or force him to make an unfair decision.²¹

17 Fiss Owen M. The Limits of Judicial Independence. *The University of Miami Inter-American Law Review*, Vol. 25, No. 1 (Fall, 1993), pp. 57–76 URL: <<https://www.jstor.org/stable/40176330>> [accessed 11 August 2022].

18 See note 10.

19 Judicial reform through the eyes of citizens: what can positively affect the court's credibility? URL: <<https://dif.org.ua/article/sudova-reforma>> [accessed 23 June 2021]. (in Ukrainian).

20 S. Parker, *Courts and the Public*, Australasian Institute of Judicial Administration 1998, pp. 17–18.

21 O. Prudyvus, V. Koshchynets, O. Basaj, N. Nestor, A. Krakovska, The Independence of Judges as a Criterion for Assessing the Efficiency of Court Activities In the Conditions of the Reform of the Judicial System of Ukraine. *Journal of Legal, Ethical and Regulatory Issues* Vol: 23 Issue: 4 (2020). URL: <<https://www.abacademies.org/articles/the-independence-of-judges-as-a-criterion-for-assessing-the-efficiency-of-court-activities-in-the-conditions-of-the-reform-of-the-9464.html>> [accessed 19 June 2021].

Another significant obstacle to corruption overcoming in the judicial system is the incompleteness of judicial reform. The analysis of Transparency International's recommendations for Ukraine shows a negative trend of annual non-fulfilment of one condition – the formation of an independent and professional judiciary. This recommendation, as emphasised by Transparency International experts, is extremely high priority. Besides, there have been no actual changes over the years of judicial reform. Even though people's deputies adopted the first Law of the President in 2019, the Constitutional Court of Ukraine recognised the main provisions of this Law as unconstitutional. The President of Ukraine initiated the next attempt to implement the reform through draft law 3711 on amendments to the Law of Ukraine "On the Judiciary and the Status of the Judges" and some laws of Ukraine regarding the activities of the Supreme Court and judicial governance authorities. However, it has been criticised by the Venice Commission and the expert community and is awaiting a conclusion and a second reading. The virtuous composition of the High Council of Justice, chosen with the participation of the international community and public experts, remains a valid requirement of the International Monetary Fund, a recommendation of the Venice Commission and the public. However, this did not affect the steps to restart this body. The composition of the High Qualification Commission of Judges is also awaiting renewal. Still, it is unknown when such reformatting will finally occur and whether the experience of independent competitive procedures will be considered.²²

In general, the critical problems in the implementation of judicial reform are:

1. low trust in the judiciary mainly due to corruption, dishonest behaviour of many judges, dependence and patronage;
2. ineffectiveness of activity and even boycott of reforms by the Supreme Council of Justice;
3. failure to restart the High Council of Justice and the High Qualification Commission of Judges to clean up and renew the judiciary;
4. chaos in the restructuring of local and appellate courts, filling positions not through competitions but through the transfer of current judges to new courts;
5. poor access to justice due to a shortage of personnel in the courts, a heavy workload on judges and delays in the judicial process;
6. lack of motivation and orientation of judges to satisfy the needs of parties who are users of justice services;
7. weak development of electronic services and digital Court; 8) lack of proper instruction for jurors.²³ The authors propose schematically considering the leading causes of judicial corruption and countermeasures against them.

22 Corruption Perceptions Index 2020 URL: <<http://cpi.ti-ukraine.org/#/>> [accessed 23 June 2021].

23 Successful judicial reform is impossible without the involvement of all stakeholders – politicians and experts URL: <<https://rpr.org.ua/news/uspishna-sudova-reforma-nemozhlyva-bez-zaluchennia-suddiv-polityky-ta-eksperty/>> [accessed 22 June 2021]. (in Ukrainian).

2. THE ESSENCE OF THE MAIN MEASURES OF JUDICIAL REFORM IN THE CONTEXT OF ANTI-CORRUPTION PREVENTION

After the collapse of the Soviet Union, the Ukrainian authorities faced an important task – creating a democratic, legal, and objective judicial branch of Government. The first basic steps towards creating such a judicial power were laid in 1996 with the adoption of the Constitution of Ukraine. After all, according to the Constitution of Ukraine, our country is governed by the rule of Law (Art. 3 of the Constitution of Ukraine), where the principle of the Rule of Law applies (Art. 8 of the Constitution of Ukraine). Justice in Ukraine is administered exclusively by courts. Delegation of court functions and the appropriation of these functions by other bodies or officials are not allowed. The jurisdiction of the courts extends to any legal dispute and criminal prosecution. In cases provided for by Law, courts consider other issues as well. The people directly participate in the administration of justice through the jury (Art. 129 of the Constitution of Ukraine).

In addition, the creation of a qualitatively new judicial system was quite a difficult task, as it required a renewal of the attitude of the judges themselves and the population towards justice. It is important to note that with the fall of communism, judges did not undergo any lustration, which allowed oligarchs and politicians to seize judicial power and use it to their advantage. On the eve of the Revolution of Dignity, the level of trust in the courts in Ukraine was 7%, one of the lowest in the world and the weakest in Europe.²⁴

Judicial reform began in 2016 and has become the largest in the history of independent Ukraine. It included amendments to the Constitution and the establishment of several new institutions. The reform aimed to ensure the judiciary's independence, confidence, and public accountability.

The main novelties of judicial reform were: the adopted amendments to the Constitution of Ukraine, among other things, provide for the abolition of the institution of “appointment of a judge to a position for the first time” and the provision that judges will hold office indefinitely; raising the age and professional qualifications for candidates for the position of a judge; establishment of a new procedure for the formation of the High Council of Justice, according to which the majority of its members will be judges elected by judges; establishing the process according to which courts will be formed and liquidated by Law; narrowing the limits of the judge's immunity from absolute to functional; laying the groundwork for the renewal of the judiciary, etc.²⁵

Amendments have been made to the Law of Ukraine “on the Judiciary and the Status of Judges”: transition to a three-tier court system: local courts, appellate courts, and the Supreme Court. Establish a new Supreme Court by liquidating the Supreme Court of Ukraine, which will consider cases as a court of cassation, and in cases provided by procedural Law – as a court of first and appellate instance. The Supreme Court will consist of no more than 200 judges. This Court will have the Grand Chamber, the Administrative Court of Cassation, the Commercial Court of Cassation, the Criminal Court of Cassation, and the Civil Court of Cassation. The Supreme Court shall be constituted within six months from the date of entry into force of the Law. It shall begin its work

²⁴ Judicial reform in Ukraine: what has changed in the last three years? <<http://en.dejure.foundation/library/judicial-reform-in-ukraine-what-has-changed-for-the-last-three-years>> [accessed 17 June 2021].

²⁵ Constitution of Ukraine <<https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>> [accessed 18 June 2021] (in Ukrainian).

subject to the appointment of at least sixty-five judges, termination of activity and liquidation of higher specialised courts from the date of the beginning of work of the Supreme Court in a new composition.

The next step is the establishment of new higher specialised courts in the judiciary: the High Court of Intellectual Property and the High Anti-Corruption Court, which will act as courts of the first instance to hear statutory categories of cases, introduce new mechanisms to encourage the fair conduct of judges with the involvement of the public. In particular, to assist the High Qualifications Commission of Judges of Ukraine in establishing the compliance of a judge (candidate for the position of a judge) with the criteria of professional ethics and integrity, a Public Integrity Council is formed; consolidation of the duty of a judge (candidate for the position of a judge) to submit, in particular, a declaration of family ties, a declaration of integrity; introduction of open competitions for the part of judges of appellate, higher specialised courts and the Supreme Court with admission to them of persons who do not have judicial experience; redistribution of powers between the High Qualifications Commission of Judges of Ukraine and the High Council of Justice.²⁶

Unfortunately, *de jure* Law provides for practical measures in Ukraine, while *de facto*, they are either openly ignored or reluctant to be implemented. The achievements in judicial reform include the launch of the Supreme Anti-Corruption Court of Ukraine (since September 2019).²⁷ Another important initiative of the previous Government is that the courts are gradually being taken over by the Judicial Protection Service, a new militarised service in the judiciary (previously, court protection was the responsibility of the Ministry of Internal Affairs of Ukraine).²⁸ The human rights environment welcomes the preliminary approval of amendments to the Constitution of Ukraine regarding waiving the lawyer's monopoly on court representation (introduced gradually in 2017).²⁹ However, this does not mean a final abandonment of it, as the relevant provisions are implemented in the procedural codes. NGOs support the Government's initiatives to introduce a classical jury trial and develop alternative dispute resolution, including mediation and arbitration. There has been progressing in enforcing court decisions by ending corrupt practices blocking enforcement proceedings. Significant changes in legal education can exhibit this: the evaluation of entrants to the master's degree is based on the technology of external independent evaluation, the results of which depend on the training funding. However, a vast state order is still received by specialised educational institutions in the system of militarised executive bodies, which do not provide adequate training for lawyers. Changes in the prosecutor's office are perceived ambiguously.

On the one hand, experts criticise the excessive concentration of executive powers in the hands of the new Prosecutor General. Thus, the Law, from September 19, 2019, to September 2021, suspended the activities of the Qualification and Disciplinary

26 Law of Ukraine «On the judiciary and the status of judges» on June 16 2021 <<https://zakon.rada.gov.ua/laws/show/1402-19#Text>> [accessed 18 June 2021] (in Ukrainian).

27 The Anti-Corruption Court has started working in Ukraine <<https://hromadske.ua/posts/v-ukrayini-pochav-pracyuvati-antikorpucijnij-sud-nazhivo>> [accessed 17 June 2021]. (in Ukrainian).

28 A Judicial Protection Service is being set up in Ukraine <<https://mil.in.ua/uk/news/v-ukrayini-stvoryuyut-sluzhbu-sudovoyi-ohorony/>> [accessed 19 June 2021]. (in Ukrainian).

29 Draft Law on Amendments to the Constitution of Ukraine (concerning the abolition of the lawyer's monopoly) № 1013 of August 29, 2019 <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66242/> [accessed 19 June 2021]. (in Ukrainian).

Commission of Prosecutors.³⁰ Many issues previously determined by Law have been submitted to the Prosecutor General of Ukraine for regulation. The functions of selection, certification and disciplinary powers have been transferred to the personnel commissions set up by the Prosecutor General of Ukraine (in practice, they consist equally of prosecutors and civil society). On the other hand, the Law gave an impetus to clean the prosecutor's office of dishonest staff, which, unlike the courts, has positive trends (for example, only 45% of employees of the General Prosecutor's Office of Ukraine and 68% of regional prosecutors passed certification).³¹ This gives hope for modernising the prosecutor's office in the next one or two years, although this body's lack of institutional capacity to remain independent remains.³²

In our opinion, most of the judicial reform measures are fragmentary, inconsistent, and sometimes even contradictory. A perennial problem of Ukrainian legislation is a "well-written" material law that does not have a procedural order or deadlines for implementation, responsible authorities or persons, and means of control. Undoubtedly, the judicial reform in Ukraine has indeed brought specific positive changes; at the same time, we are convinced that they are not of severe systemic nature and have not significantly affected the reduction of corruption in Ukraine. In analysing anti-corruption measures during the implementation of judicial reform, we would like to focus particular attention on how these anti-corruption novelties are implemented by individual judicial bodies, namely the Constitutional Court of Ukraine and the High Anti-Corruption Court.

3. THE ROLE OF THE CONSTITUTIONAL COURT OF UKRAINE IN INHIBITING ANTI-CORRUPTION MEASURES OF JUDICIAL REFORM AS DISCREDITING THE INDEPENDENCE OF THE JUDICIARY

State power in states governed by the Rule of Law is exercised based on its division into legislative, executive, and judicial (Art. 6 of the Constitution of Ukraine). All branches of Government are equal and exist side by side to provide checks and balances to one another. The cooperation of all departments of Government is crucial to ensure the proper level of functioning of all state institutions, the implementation of legal reforms and the implementation of Ukraine's chosen pro-European course. An imbalance in the equality of the branches of power can lead to its usurpation of power as a whole and the implementation of various types of illegal actions. Among judicial bodies, the Constitutional Court of Ukraine itself should be the last line of defence to protect our rights and ensure the functioning of our democracy. Very often, it is done the other way around.³³ The Constitutional Court of Ukraine is the flagship that must defend the legal principles of independence and the Rule of Law; besides, this body proved to be

30 Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning Priority Measures to Reform the Prosecutor's Office" of September 19, 2019. № 113-IX <<https://zakon.rada.gov.ua/laws/show/113-20#n53>> [accessed 19 June 2021]. (in Ukrainian).

31 Office of the Prosecutor General <https://www.gp.gov.ua/ua/news?_m=publications&c=view&t=rec&id=266446> [accessed 19 June 2021]. (in Ukrainian).

32 R. Kuybida, Judicial reform. *Industrial brief "Judicial reform"*. 1 pp. 1-4 (2020). (in Ukrainian).

33 A. Bannon, Z. Laub, Court Reform Gets New Attention. <<https://www.brennancenter.org/our-work/research-reports/court-reform-gets-new-attention>> [accessed 22 June 2021].

the first to nullify the stated regulations due to the desire to hide its corrupt actions (1); openly making decisions in conditions of conflict of interests (2); defiantly ignores the requirements of anti-corruption legislation in Ukraine.

As discussed earlier, an influential ascetic of building an independent judiciary is the need for a transparent anti-corruption declaration by judges of their income and expenses. This system operates in many countries. It is worth noting that in Ukraine, the demonstrative declaration of income and costs by officials was introduced, as well as the implementation of a natural mechanism for the publicity of such declarations. Their verification by the National Agency for the Prevention of Corruption, the prosecution of those guilty of failure to submit a declaration by a person authorised to execute functions of the state and local self-government, and the introduction of knowingly false information into this declaration (Art. 366-1 of the Criminal Code of Ukraine). At the same time, all successes regarding introducing transparency of officials' fortunes were overturned on October 27, 2020, by the Constitutional Court of Ukraine, which recognised the rule on declaring inaccurate information as unconstitutional.

Although the mechanism of the electronic declaration was enshrined in the anti-corruption Law back in 2014, due to the reluctance of deputies to implement a means of accurate, effective control over their assets constantly postponed its entry into force, the Law did not officially enter into force until September 1, 2016. The electronic declaration discloses their income, property, securities, assets, corporate rights, financial obligations, expenses, transactions, etc.³⁴

The grounds for criminalising the declaration of unreliable information were unfavourable dynamics of this type of action; the historical development of a new group of social relations based on social, political, and economic changes in the state; the need for a criminal law guarantee for the protection of constitutional rights and freedoms and the existence of international legal obligations of Ukraine to combat corruption offences.³⁵

The primary purpose of submitting the declaration of a person authorised to perform state and local self-government functions is to create conditions for transparency of persons authorised to act in the roles of state or local self-government and identify and prevent conflicts interest.

The main difference between the existing paper and electronic declaration forms is data recording because the data is electronic. In addition, the electronic form of the declaration has several significant positive features that distinguish it from the paper. The authors believe that these traits can be grouped into three categories – the first of these is the positive features for the declaration subjects: simplification of data entry by the issue of declaration; providing a secure authentication protocol for logging in to the electronic declaration system; preventing errors on the part of the declarant during data entry.³⁶

³⁴ A. Steblyanko, O. Reznik Electronic declaration as a form of control over the activities of law enforcement officers. *Scientific Bulletin of Uzhhorod National University. Series: Law Issue.* 44 (2) pp. 160–164 (2017). (in Ukrainian).

³⁵ K. Polkin, On the validity of criminalization of declaring unreliable information. *Bulletin of the Luhansk National University of Internal Affairs named after EO Didorenko* 1. pp. 142–155 (2016). (in Ukrainian).

³⁶ Unified state register of declarations of persons authorized to perform the functions of the state or local self-government. URL: <<https://public.nazk.gov.ua/>> [accessed 18 June 2021].

The second group combines positive features for controlling entities, the possibility of using cross-checking information using databases of other government agencies, providing access to the electronic declaration system to other state databases, optimisation of procedures for processing property declarations by the staff of the National Agency for the Prevention of Corruption and creating an effective process for verifying assertions.

The third group includes positive features for third parties (public activists, journalists, citizens, etc.) who wish to read the declarations of persons authorised to perform the functions of state or local government: providing open online access and searchable open data contained in words, and the ability to download them; creation of an available programming interface for developers to provide secure access to open data from the property declaration and their download in various formats.³⁷

Undoubtedly, along with the positive features, the electronic declaration also had shortcomings. They first protected restricted information in words from disclosure and all other data from unauthorised external interference. Secondly, the system is overloaded because most declaration subjects fill it almost simultaneously, given the deadlines for submission of declarations. Third, errors in representations are caused by malfunctions of the electronic declaration system, particularly the country of nationality of the declaration's subject or family members. Fourth, there are multiple technical shortcomings, such as the inability to print the declaration, the failure to save a partially completed declaration, the attachment of the electronic declaration system to a specific computer, and the need to complete the declaration immediately.

At the same time, despite all the above shortcomings, introducing the institution of the anti-corruption electronic declaration was generally a positive and vital step in overcoming corruption. Concerning criminal prosecution for declaring inaccurate information, during the investigation of this issue, the authors analysed 50 court verdicts passed since the criminalisation of this act and to date. Thus, considering the alternative type of sanction of the researched article, the courts applied the following types of punishment: community service – 62% of cases (1); fine – 18% of cases (2); imprisonment for a definite term with subsequent release from serving a probation sentence – 20% of cases (3). Moreover, in the case of convictions, the courts imposed additional mandatory punishment on the perpetrators depriving the right to hold certain positions or engage in certain activities. In 24% of cases, amnesty was applied. The authors want to pay special attention to the fact that, in other instances, indictments under Art. 366-1 of the Criminal code of Ukraine, courts passed decisions on the release of persons from criminal liability based on Art. 45 of the Criminal Code of Ukraine (in connection with effective repentance) or based on Art. 48 of the Criminal code of Ukraine (in association with change of a situation), on condition of submission of the corresponding declarations already at a stage of judicial consideration.³⁸

The possibility of release from criminal liability was because of this act following the note to Art. 45 of the Criminal Code of Ukraine did not belong to criminal corruption offences. Consequently, the commission of this criminal offence could be released from criminal liability in connection with effective repentance, reconciliation of the perpetrator with the victim, transfer of the person on bail, change of circumstances, etc. The authors are convinced that such a legislative approach was just a bypass of the Law.

³⁷ See note 32.

³⁸ A. Andrieshin, Criminal law qualification of declaring unreliable information (Article 366-1 of the Criminal Code of Ukraine). Bulletin of the Association of Criminal Law of Ukraine 2 (11) pp. 127–137 (2018). (in Ukrainian).

However, suppose we are used to the gaps and detours of the Law caused by the legislator's actions: in that case, no one could expect the Constitutional Court of Ukraine to openly ignore the Constitution of Ukraine, domestic legislation, and international obligations (taken by Ukraine in the Visa Liberalization Action Plan). The first attempt by the Court to oppose these anti-corruption reforms occurred during the recognition of the norm on illicit enrichment as unconstitutional (Article 368-2 of the Criminal Code of Ukraine). However, if, at that time, the criminal law norm did have certain shortcomings, then explain from the point of view of the right the decision of the Constitutional Court of Ukraine № 13-r/2020 in the case of the constitutional petition of 47 deputies of Ukraine on compliance with specific provisions of the Law of Ukraine "On Prevention of Corruption", the Criminal Code of Ukraine seems impossible.³⁹

According to Art. 1 of the Law of Ukraine "On the Constitutional Court of Ukraine", the Constitutional Court of Ukraine is a body of constitutional jurisdiction that ensures the supremacy of the Constitution of Ukraine, decides on compliance of the Constitution of Ukraine with laws of Ukraine and other acts provided by the Constitution of Ukraine following the Constitution of Ukraine. The principles of this Court of Art. 2 of the relevant Law call for the Rule of Law, independence, collegiality, transparency, openness, complete and comprehensive consideration of cases, and the validity and binding nature of its decisions and conclusions.⁴⁰ At the same time, in the context of the analysis of the above decision, the issue of independence in decision-making by judges of the Constitutional Court of Ukraine first arises. After all, three judges have a personal interest that may conflict with their duty to act impartially. The National Anti-Corruption Bureau of Ukraine registered a criminal case in the village, vol. 366-1 of the Criminal Code of Ukraine. In addition, the National Agency for the Prevention of Corruption found that Judge-Rapporteur I. Slidenko had failed to report significant changes in his property. This fact was established after the beginning of verifying judges' declarations. Such actions indicate a corruption-related offence (Article 172-6 of the Code of Ukraine on Administrative Offenses). Another Constitutional court judge, V. Moysyk, also did not report significant changes in property status, as required by Law.⁴¹

It is important to note that the recognition of the norm of declaring unreliable information unconstitutional creates a dissonance with the presence of administrative liability for the submission of knowingly unreliable information in the declaration of a person authorised to perform state or local government functions (Part 4 of Article 172-6 of the Code of Administrative Offenses). After all, if the declaring subject indicates false information in the declaration of the person authorised to perform the state and local self-government functions in the amount of 100 to 250 subsistence minimums for non-disabled persons, he will be subject to administrative liability. Alternatively, if false information about the property exceeds the statutory limit, there will be no liability at all. The above decision of the Constitutional Court of Ukraine has created a

39 Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of 47 people's deputies of Ukraine on compliance with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine "On Prevention of Corruption", Criminal Code of Ukraine № 13-r/2020 of October 27, 2020 URL: <http://www.ccu.gov.ua/sites/default/files/docs/13_p_2020.pd> [accessed 22 June 2021]. (in Ukrainian).

40 Law of Ukraine On the Constitutional Court of Ukraine of July 13 2017 № 2136-VIII *Information of the Verkhovna Rada of Ukraine* 35. Art. 376 (2017). (in Ukrainian).

41 Constitutional Court of Ukraine judges have a personal interest in considering cases of abolition of liability for misappropriation of officials and public access to declarations. <nazk.gov.ua/uk/novyny/suddi-ksu-mayut-osobystyj-interes-rozglyadayuchy-spravu/> [accessed 22 June 2021]. (in Ukrainian).

paradoxical situation when there is a declarative obligation to file a declaration but no authority to verify it and the ability to prosecute for false information.

Lack of validity of the decision of the Constitutional Court of Ukraine № 13-r/2020 in the case of the constitutional petition of 47 people's deputies of Ukraine on the constitutionality of specific provisions of the Law of Ukraine "On Prevention of Corruption", the Criminal Code of Ukraine is confirmed in a separate opinion of the Constitutional Court Judge V. Lemak, who emphasises that the decisions of the Constitutional Court resolve "complex cases" when examining not just the facts and norms of laws, but the analysis of the peculiarities of the legal standard and its measurement on the scale of constitutional norms and regulations and their argumentation using constitutional arguments, which in this case was made in appropriate way.⁴² A similar position is expressed in the dissenting opinion of judge S. Holovaty, who states that the thesis of "control of the executive branch over the judiciary" has no legal basis.⁴³

This situation raises the question: is the Constitutional Court of Ukraine defending the Constitution of Ukraine and the interests of the Ukrainian people? After all, the decision of the Constitutional Court of Ukraine will also result in the closure of all criminal proceedings opened under Art. 366-1 of the Criminal code of Ukraine, particularly against the mayor of Odesa G. Trukhanov and the ex-director of "Ukroboronprom" P. Bukin. As of October 27, 2020, the National Anti-Corruption Bureau of Ukraine was investigating 180 cases of false declaration. Seven people, including three former deputies, have been reported as suspects.⁴⁴ In the authors' opinion, the closure of all proceedings was simply a bonus; the primary goal of the judges of the Constitutional Court of Ukraine was purely corrupt, namely: to relieve oneself of the need to submit electronic anti-corruption declarations, which means removing all obstacles to illegal enrichment.

The analysed decision of the Constitutional Court of Ukraine caused a public response. It prompted the President of Ukraine to urgently submit a draft Law on Restoration of Public Confidence in Constitutional Proceedings, which proposes the Decision of the Constitutional Court of Ukraine of October 27, 2020, № 13-r/2020 in case № 1-24/2020 (393/20) to be declared null and void (as not creating legal consequences) as such, which was accepted by the judges of the Constitutional Court of Ukraine in the conditions of an actual conflict of interests. In addition, the President proposes to restore the wording of the Law of Ukraine, "On Prevention of Corruption", and the Criminal Code of Ukraine, which was in force before the issuance of this illegal decision.⁴⁵

⁴² Dissenting opinion of a judge of the Constitutional Court of Ukraine V. Lemak in the case on the constitutional petition of 47 people's deputies of Ukraine on the compliance of the Constitution of Ukraine (constitutionality) with certain provisions of the Law of Ukraine "On Prevention of Corruption", the Criminal Code of Ukraine № 13-r/2020 of 27 October 2020 URL: <http://www.ccu.gov.ua/sites/default/files/docs/13_p_2020_2.pdf> [accessed 22 June 2021]. (in Ukrainian).

⁴³ Dissenting opinion of a judge of the Constitutional Court of Ukraine S. Holovaty in the case on the constitutional petition of 47 people's deputies of Ukraine on compliance with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine "On Prevention of Corruption", the Criminal Code of Ukraine № 13-r/2020 of October 27, 2020 <http://www.ccu.gov.ua/sites/default/files/docs/13_p_2020_1.pdf> [accessed 22 June 2021]. (in Ukrainian).

⁴⁴ Constitutional Court vs National Agency for the Prevention of Corruption. What are the consequences of the "destruction" of electronic declaration. URL: <<https://suspiľne.media/75202-konstitucijnij-sud-nazk-aki-naslidki-matime-znisenna-elektronnogo-deklaruvanna>> [accessed 23 June 2021]. (in Ukrainian).

⁴⁵ Draft Law on Restoration of Public Confidence in the Constitutional Judiciary. URL: <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70282> [accessed 23 June 2021]. (in Ukrainian).

To eliminate the consequences of the above decision of the Constitutional Court of Ukraine, the people's representative had to circumvent the Law, as it had previously happened with the resumption of criminal liability for illicit enrichment. Thus, on December 4, 2020, the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning Establishment of Liability for Declaring Inaccurate Information and Failure of a Declaration Subject to Declare a Person Authorised to Perform State or Local Self-Government Functions" was adopted. Ukraine was supplemented by two new articles, which provided for criminal liability for declaring inaccurate information (Article 366-2 of the Criminal Code of Ukraine) and failure of the subject to report a declaration of a person authorised to perform state or local government functions (Article 366-3 of the Criminal Code of Ukraine).

The authors should note the resumption of criminal liability for false information in the anti-corruption declaration or in general for its non-submission by authorised entities; however, these articles were not included in the list of corrupt criminal offenses, i.e., there was a tendency to avoid liability for blatant corruption. We are convinced that the legislator urgently needs to make Art. 366-2 and 366-3 of the Criminal Code of Ukraine to the list of criminal corruption offenses outlined in the note to Art. 45 of the Criminal Code of Ukraine.

4. THE ROLE OF THE HIGH ANTI-CORRUPTION COURT IN THE IMPLEMENTATION OF JUDICIAL REFORM

Judicial reform in Ukraine is closely related to establishing an anti-corruption outlook, objectivity, and independence of judges. At the same time, another critical aspect was forming a specialised court to consider corruption, even though this is not a foreign idea, regarding creating an anti-corruption court in Ukraine. Thanks to this idea, the design of specialised anti-corruption courts has been implemented worldwide for many years. Thus, technical judicial bodies for the review of corruption cases (whether individual courts, specialised courts, or chambers of courts) are established in at least 17 jurisdictions (if, in some instances, such judicial bodies should be empowered to hear other categories of cases in addition to corruption): Philippines, Pakistan, Croatia, Bulgaria, Mexico, Slovakia, and others.⁴⁶ Regarding the Ukrainian background, establishing specialised anti-corruption courts or individual judges in Ukraine was one of the Organization for Economic Cooperation and Development (OECD) recommendations in analysing anti-corruption reforms in the country. In addition, establishing a specialised anti-corruption court through a transparent and fair selection process, which should involve experts with international experience, is one of the prerequisites for providing Ukraine with the next tranche of financial support from the International Monetary Fund.

Regarding the normative basis for the establishment of such a court, it became the Sustainable Development Strategy "Ukraine – 2020," which provides for the implementation of anti-corruption reform, the primary purpose of which is to significantly reduce corruption in Ukraine, reduce state budget, and economic losses due to corruption and improve Ukraine's position, international rankings that assess the degree of sin, which will primarily contribute to the creation of an effective institutional

⁴⁶ Anti-corruption court in Ukraine: prerequisites for formation and guarantees of effectiveness URL:<<https://ti-ukraine.org/news/2175/>> [accessed 21 June 2021]. (in Ukrainian).

system for combating corruption.⁴⁷ Then, as already noted, the establishment of the Supreme Anti-Corruption Court was provided by the Law of Ukraine “On the Judiciary and the Status of Judges”. Based on these documents, on June 7, 2018, the Law of Ukraine, “On the Supreme Anti-Corruption Court”, entered into force. Given that the organisational, functional, and other features of this Court were enshrined in a separate piece of legislation, in our opinion, this is evidence of the priority of the High Anti-Corruption Court over the High Court of Intellectual Property. After all, the peculiarities of the latter’s activity are contained only in the relevant Law of Ukraine, “On the Judiciary and the Status of Courts”.

The Supreme Anti-Corruption Court is a permanent higher specialised court in the judicial system of Ukraine, acting as a legal entity with a seal with the image of the State Emblem of Ukraine and its name. The Supreme Anti-Corruption Court manages state-owned property belonging to its sphere of management. The task of the High Anti-Corruption Court is to administer justice following the principles and procedures of justice provided by Law to protect individuals, society, and the state from corruption and related criminal offences and judicial control over the pre-trial investigation of these criminal offences in criminal proceedings, as well as resolving the issue of recognising unfounded assets and their recovery in state revenue in cases provided by Law, in civil proceedings.⁴⁸ The anti-corruption Court should be the last link in the chain of newly created anti-corruption bodies that will ensure the inevitable punishment of corrupt officials. Only the certainty of punishment and appropriate sanctions for violating criminal Law will reduce corruption in Ukraine, resulting in a reduction of corruption in the public sector, which, in turn, will lead to the growth of the real sector of the economy.⁴⁹

CONCLUSIONS

Summing up the above, we emphasise that implementing real, not declarative, judicial reform is essential for Ukraine. Ukraine’s desire to become a genuinely democratic and legal state requires decisive institutional, organisational, qualification and personnel changes. The powerful component of judicial reform is the fight against corruption and, therefore, the building of an independent judiciary. It should be noted that both judicial and anti-corruption reforms are separate institutional processes that take place in parallel. And if the anti-corruption reform concerns many aspects, and has many forms and manifestations, then the reform of the judiciary is aimed at transforming judicial institutions. These transformations relate to the process of selection, the appointment of judges, distribution of court cases, material support of courts and court staff, the process of rendering and appealing decisions, and the process of bringing judges to disciplinary responsibility, judicial self-government, etc. Additionally, combating corruption in courts is only one aspect of judicial reform. It is a separate but essential step. The importance of combating corruption for ensuring

⁴⁷ O. Kosytsia, Organizational and legal grounds for the establishment of an anti-corruption court in Ukraine. *Judicial and investigative practice in Ukraine* Vol. 4. pp. 6–10. (2017). (in Ukrainian).

⁴⁸ Law of Ukraine On the Supreme Anti-Corruption Court № 2447-VIII of June 7, 2018 *Official Gazette of Ukraine* 48 16. Art. 1656 (2018). (in Ukrainian).

⁴⁹ Why are anti-corruption courts important? URL: <https://biz.nv.ua/ukr/experts/kostetsky_m/chomu-ekonomichno-vazhlyvo-mati-antikoruptionsjini-sudi-2008723.html> [accessed 19 June 2021].

an independent and objective judicial system is enormous. However, anti-corruption measures should be implemented in symbiosis with other transformational steps.

The current state of implementing these measures is quite broad and not systematised enough. Some have become successful, and some are just beginning to be implemented. However, the most critical task is to permanently change the attitude of the entire population towards the judiciary, the judicial process and the judges themselves. At the same time, such a task has two forms: the first of them is the formation of the desire of judges to make decisions based on the Law, ignoring private interests, which can be found in both personal relationships (conflict of interests) and the second – outright corrupt influence (bribery, advantages, benefits of services, both material and immaterial character).

We are convinced that the measures determined by the judicial reform will be able to be fully implemented only if two factors are present: the first factor is the presence of political will and coordinated cooperation between the President of Ukraine and the Verkhovna Rada of Ukraine, and the second factor is the active participation of the public in initiating and monitoring the implementation of reform measures (as was the case with protests against the arbitrariness of the Constitutional Court of Ukraine).

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