

JUDICIARY IN UKRAINE: EVOLUTION THROUGH THE SYSTEMIC DEFICIENCIES AND EVERLASTING REFORMS¹

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1. Introduction

The idea of this Report arose from my strong belief that the Ukrainian judiciary is capable of being strengthened in the context of the European integration process. The first step towards this is to describe the Ukrainian judiciary transparently, with all its deficiencies, mistakes, weaknesses and strengths, with a view to enabling our European colleagues, partners and decision-makers to understand our real situation and perspectives.

Ukraine is not an isolated island. The country exists within the paradigm of the contemporary world and its economy, geography, history, and security systems. It was labeled for a long time as a post-Soviet state; however, for the past 32 years of independence, the people of Ukraine have demonstrated their ability to be a strong nation.

The deficiencies of the Ukrainian judicial system are not unique within the European legal area. And the capacity and determination to overcome those deficiencies are still there despite the challenges brought by the aggressive war started by Russia.

This Report has more of an introductory and informative character, rather than an analytical one, although it does end with a brief analysis of the recent relevant jurisprudence of the European Court of Human Rights (ECtHR). I intend to develop and extend this Report, as the Ukrainian judiciary takes steps towards enabling and assisting Ukraine's accession to the European Union.

I would like to express my deepest gratitude to my mentor Lord Neuberger, for his kindest peer review of this paper and valuable questions and comments. A special thanks to my colleagues Dr. Sergiy Koziakov and Solvita Harbacevica for their ideas and comments on the draft of this paper.

2. Brief history and basics of the judiciary in Ukraine.

Ukraine's judicial system is a complex structure that has undergone significant reforms in recent years. Since 2010 Ukraine has been pursuing non-stop judicial reforms, which cannot be considered as fully consistent.

Before the Revolution of Dignity in Ukraine (2014) there was a rather low level of public confidence in the judiciary³ and there were some serious structural deficiencies in the procedures of appointment and dismissal of judges mostly as a result of disciplinary proceedings. That marked the beginning of large-scale judicial reform.

³ See, for example, how the former Chair of the the European Commission for the Efficiency of Justice of the Council of Europe (CEPEJ) Georg Stava describing the level of public confidence in the judiciary in his interview "The judiciary reform in Ukraine is progressing at a fast pace. In 5 years people will see the changes", available at: <https://www.pravojustice.eu/post/ekspert-proektu-georg-stava-sudova-reforma-v-ukrayini-vidbuvayetsya-shvidko-cherez-5-rokiv-lyudi-pobachat-rezultat>

In 2015 the President of Ukraine initiated work on a strategy for reform of the judiciary which included both the modernisation of legislation and the adoption of amendments to the Constitution of Ukraine. For this purpose the Constitutional Commission was established. Among the other numerous and substantive changes, the members of the Commission suggested the renaming of the highest court in the system of judiciary from the “Supreme Court of Ukraine” to the “Supreme Court”.

The draft amendments to the Constitution were discussed with the European Commission for Democracy through Law (Venice Commission),⁴ which issued a positive opinion on the proposed amendments to the Constitution regarding the judiciary.

On 2nd of June, 2016, the Ukrainian Parliament adopted amendments to the Constitution and enacted the Judiciary Act 2016 to reorganize and optimize the judicial system. The Judiciary Act 2016 aimed to increase the professional standards of the judiciary, limit judicial immunity to functional levels, and simplify and expedite court proceedings.

The above-mentioned reform was the most comprehensive and led to the transformation of the four-level system of courts to the three-level system. It has been the most substantial judicial reform to date as well. It was primarily directed at making the judiciary more independent, trustworthy, and publicly accountable.

The Ukrainian system of courts consists of three levels. The Supreme Court (as reformed in 2017) is the highest court of general jurisdiction, which includes the Grand Chamber and the four cassation courts: Civil, Criminal, Administrative, and Commercial.

Courts of Appeal are hearing appeals against decisions of lower courts.

District Courts - trial courts of general jurisdiction that hear cases at the first instance.

There are two main judicial governance bodies: the High Council of Justice (HCJ) and the High Qualification Commission of Judges (HQCJ).

The HCJ is responsible for ensuring the independence of the judiciary, overseeing the activities of judges, and making decisions related to their discipline and appointment.⁵ The HCJ is a collegial, independent constitutional body of state power and judicial administration, which operates in Ukraine on a permanent basis to ensure the independence of the judiciary, its functioning on the basis of responsibility, accountability to society, the formation of a virtuous and highly professional corps of judges, compliance with the norms of the Constitution and the laws of Ukraine, as well as professional ethics in the activities of judges and prosecutors.

⁴ The Opinion on the proposed amendments to the Constitution of Ukraine regarding the judiciary as approved by the Constitutional Commission on 4 September 2015, no. 803/2015, CDL-AD(2015)027, 23-24 October 2015.

⁵ The official website of the HCJ of Ukraine - <https://hcj.gov.ua/en>

The HCJ consists of twenty-one members, including ten members elected by the congress of judges of Ukraine from among judges or retired judges, two members – appointed by the President of Ukraine, two members – elected by Parliament (the Verkhovna Rada of Ukraine), two members – elected by the congress of lawyers of Ukraine, two members – elected by the all-Ukrainian conference of prosecutors, and two members – elected by the congress of representatives of higher education and research institutions in the area of law. The President of the Supreme Court is an ex officio member of the HCJ.⁶

The HQCJ is responsible for selecting and evaluating judges, as well as proposing candidates for appointment to judicial positions. It is a state collegiate body of judicial self-government that operates on a permanent basis within the system of justice in Ukraine.⁷ The HQCJ consists of sixteen members, eight of whom are appointed from among judges or retired judges. Its operating procedure is determined by the Law of Ukraine On the Judiciary and the Status of Judges.⁸

One should distinguish the above-mentioned governance bodies from the Council of Judges of Ukraine, which is a body of judicial self-governance and acts as the executive body of the Congress of Judges of Ukraine.

Despite the ongoing reforms, Ukraine's judicial system has faced challenges related to corruption, political influence, underfinance, and the need for further improvements in the efficiency and effectiveness of court proceedings.

3. Relevant Constitutional provisions on the Judiciary

By the constitutional principles of separation of powers judicial power in Ukraine is to be exercised by independent and impartial courts created by law (Art. 6, Para 14 Part 1 of Art. 92).

The basic constitutional principles of Justice in Ukraine are set out in Chapter VIII – Justice (articles 124–131).

Judicial power is to be exercised by judges and, in cases determined by law, by jurors through the administration of justice using relevant court procedures.⁹

⁶ Opinion of the European Commission for Democracy Through Law (Venice Commission) No. 999 / 2020. Strasbourg, 10 September 2020. The Law Of Ukraine on the High Council of Justice. Available at:

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2020\)067#:~:text=The%20High%20Council%20of%20Justice%20is%20a%20collegial%2C%20independent%20constitutional,formation%20of%20a%20virtuous%20and](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2020)067#:~:text=The%20High%20Council%20of%20Justice%20is%20a%20collegial%2C%20independent%20constitutional,formation%20of%20a%20virtuous%20and)

⁷ The official website of the HQCJ of Ukraine - <https://vkksu.gov.ua/en>

⁸ The Law of Ukraine On the Judiciary and the Status of Judges (official translation) Available at: <https://zakon.rada.gov.ua/laws/show/en/1402-19#Text>

⁹ Constitution of Ukraine (official translation) Available at: <https://zakon.rada.gov.ua/laws/show/en/254%D0%BA/96-%D0%B2%D1%80#Text>

4. The nature of the Constitutional Court and its place within the system of courts of Ukraine.

The Constitutional Court of Ukraine (CCU) is not part of the general court system of Ukraine; it operates by the provisions of the Constitution of Ukraine (articles 147–153) and the Law on Constitutional Court of Ukraine¹⁰.

According to the Law, the CCU is a body of constitutional jurisdiction that ensures the supremacy of the Constitution of Ukraine, resolves issues of conformity of the Constitution of Ukraine with the laws of Ukraine (and, in the cases provided for by the Constitution of Ukraine, other acts), and is responsible for the official interpretation of the Constitution of Ukraine, as well as having other powers provided for in the Constitution of Ukraine (Art. 1 of the Law of Constitutional Court of Ukraine).

The CCU is composed of eighteen judges.

The President of Ukraine, the Verkhovna Rada of Ukraine, and the Congress of Judges of Ukraine each appoint six judges to the CCU.

Selection of candidates for the office of judge of the CCU is conducted on a competitive basis under a procedure prescribed by the law.

A citizen of Ukraine who (i) has command of the state language, (ii) has attained the age of forty on the day of the appointment, (iii) has a higher legal education and professional experience in the sphere of law for no less than fifteen years, (iv) has high moral values and (v) is a lawyer of recognized competence, maybe a judge of the CCU.

A judge of the CCU is appointed for nine years and cannot be reappointed (Art. 148 of the Constitution of Ukraine).

The role and function of the CCU within the Ukrainian legal system was considered by the Grand Chamber of the Supreme Court in a judgment delivered on 14 March 2018, in a case concerning the dismissal of a judge of the CCU and its former president – Anatoliy Golovin. As a part of its motivation, the Grand Chamber has noted *obiter dictum*:

“According to the [relevant provisions] of the Constitution of Ukraine (as it was worded at the relevant time), the Constitutional Court is composed of eighteen judges. The President of Ukraine, the Verkhovna Rada of Ukraine, and the Congress of Judges of Ukraine each appoint six judges to the Constitutional Court of Ukraine.

This indicates the political nature of the process of formation of that body of constitutional jurisdiction.

Moreover, the Constitutional Court of Ukraine does not examine specific legal disputes between those who are subject to the law but rather has the

¹⁰ The Law on Constitutional Court of Ukraine (official translation) Available at: <https://zakon.rada.gov.ua/laws/show/en/2136-19#Text>

power to declare legislation unconstitutional (therefore acting as a negative legislator) and to provide an official interpretation of the Constitution of Ukraine and, in accordance with the Constitution as it was worded at the relevant time, the laws (therefore acting as a positive legislator).

Such circumstances make the Constitutional Court of Ukraine considerably distinct from the courts of general jurisdiction; those circumstances indicate that it is more of a political body than a judicial one.

*That the Constitutional Court of Ukraine is not a court within the meaning of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 also follows from the judgments of the European Court of Human Rights in *Fischer v. Austria* and *Zumtobel v. Austria*.¹¹*

In such circumstances it is entirely justified to draw the conclusion that the body that appointed a judge of the Constitutional Court of Ukraine has the right to apply measures of political accountability to the judge it has appointed where it establishes that the conduct of the judge in question does not meet the high standards expected by society of a judge of the Constitutional Court of Ukraine.”¹² (Emphasis added).

Several years later, on 13 July 2023, the ECtHR delivered the judgment in relation to this case, finding (among others) a violation of Article 6 § 1 of the Convention as regards the right to a reasoned judgment, and saying this:

*...[I]n its judgment concerning Mr Golovin, the Supreme Court sought to distinguish the applicant’s case from that of Oleksandr Volkov v. Ukraine (no. 21722/11, ECHR 2013) by **characterising the Constitutional Court as a primarily political body** rather than as a court within the meaning of Article 6 of the Convention.*

The Court notes the Supreme Court’s effort to engage with the Court’s relevant case-law. However, it cannot agree with the Supreme Court’s characterisation of the issue. The Supreme Court, while making a general statement about the Constitutional Court being primarily a political body, did not comment on how that applied specifically in the applicant’s case, given that he had been dismissed specifically for breach of his judicial oath.¹³ (Emphasis added).

As the ECtHR neither refuted nor approved the understanding and approach of the Supreme Court to the nature of the CCU, the issue remains open and causes a legal discussion.

¹¹ *Fischer v. Austria*, 26 April 1995, § 29, Series A no. 312; *Zumtobel v. Austria*, 21 September 1993, § 30, Series A no. 268-A.

¹² Case No II/800/120/14. Available at: <https://reyestr.court.gov.ua/Review/73195164>

¹³ *Golovin v. Ukraine*, no. 47052/18, 13 July 2023, Para 24-25.

Because the CCU's decisions cannot be reversed or appealed, and there is no external oversight to assess the judges' work and enforce their impartiality it is an object of high political pressure and has frequently been an epicenter of political scandals.¹⁴

It is significant that The European Commission, recommends that Ukraine be granted candidate status, on the understanding that one of the steps taken must be to enact and implement legislation on a selection procedure for judges of the CCU, including a pre-selection process based on the evaluation of their integrity and professional skills, in line with Venice Commission recommendations.¹⁵

5. What is the interaction between the Constitutional Court of Ukraine and the Supreme Court?

According to Para 5 Part 2 of the Article 36 of the Law on the Judiciary and the Status of Judges the Supreme Court can request the CCU to provide an opinion on the constitutionality of laws, other legal acts, as well as the official interpretation of the Constitution of Ukraine.¹⁶ The procedure is prescribed by Para 5 Part 2 of the Article 46, which empowers the Plenum of the Supreme Court to request the CCU to provide an opinion on the constitutionality of laws and other legal acts, as well as the official interpretation of the Constitution of Ukraine.

This tool allows the maintenance of a dialogue between the court system and the CCU, as the courts of first and second instances may refer issues to the Plenum of the Supreme Court with a suggestion that it requests the CCU to provide an opinion.

Since the newly formed Supreme Court has been functioning¹⁷ it has referred requests to the CCU five times. Among those five petitions, only one has been considered so far.¹⁸ That case concerned the voluntary violation of

¹⁴ For example, see the article explaining the crises of the CC as of 2020. Available at:

<https://huri.harvard.edu/ukraine-constitutional-court-crisis-explained#:~:text=The%20Constitutional%20Court%20is%20the,work%20and%20enforce%20their%20impartiality.>

¹⁵ European Commission, "Commission Opinion on Ukraine's application for membership of the European Union" (June 17, 2022), pp. 20-21 Available at:

<https://data.consilium.europa.eu/doc/document/ST-10321-2022-INIT/en/pdf>

¹⁶ The Law of Ukraine On the Judiciary and the Status of Judges (official translation) Available at: <https://zakon.rada.gov.ua/laws/show/en/1402-19#Text>

¹⁷ From December, 2017.

¹⁸ A judgment in the case No. 4-r/2020, delivered on 11th of March 11, 2020. The constitutional petition of the Supreme Court concerned the constitutionality of certain provisions of the laws of Ukraine "On the Judiciary and the Status of Judges" of June 2, 2016 No.1402–VIII, "On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and Some Laws of Ukraine on the Activity of Judicial Governance Bodies" of October 16, 2019 No.193– IX, "On the High Council of Justice" of December 21, 2016 No.1798–VIII.

independence of judiciary. The new legislative changes, adopted by the Parliament proposed the reduction of the number of judges of the Supreme Court from two hundred to one hundred without any adjustment to the Supreme Court's functions, or any change in the amount of a Supreme Court judge's remuneration, or any other changes.¹⁹

Confirming the previous legal positions, the CCU once again concluded that the legislator cannot arbitrarily set or change the amount of a judge's remuneration, as it would thereby be using its powers as an instrument of influencing the judiciary.

Among the other conclusions the Constitutional Court of Ukraine stressed that the implementation of the principle of the rule of law, the right of everyone to judicial protection is possible only with the actual observance of constitutional requirements for the independence of judges, which contain legal guarantees aimed at preventing any influence on judges and the judiciary.

The other pending cases concerned:

– the official interpretation of the provision of Article 105.1 of the Constitution of Ukraine. According to the petitioner, the need for official interpretation arose due to the fact that “in the Constitution of Ukraine, the immunity of the Head of the Ukrainian State is defined without specific parameters, only by a short formula; the Basic Law does not specify what the immunity of the President of Ukraine is. At the same time, there are no norms in the legislation of Ukraine that would detail the immunity of the Head of State and specify the grounds and procedural mechanism for bringing the President of Ukraine to liability for committing administrative offenses.”

– the conformity of paragraph 3 of Section III “Final and Transitional Provisions” of the Law of Ukraine “On Recognising the Law of Ukraine “On the List of Objects of State Property Rights Not Subject to Privatisation” as invalid” with the Constitution of Ukraine (constitutionality). According to the impugned provision of the Law, it is prohibited to perform enforcement actions in accordance with the Law of Ukraine “On Enforcement Proceedings” regarding objects of state property rights, which, on the day the Law came into force, were included in the lists approved by the Law of Ukraine “On the List of Objects of State Property Rights Not Subject to Privatisation”, within three years from the date when the Law has come into force, except for the collection of funds and goods pledged under the credit agreements. According to the Supreme Court, paragraph 3 of Section III “Final and Transitional Provisions” of the Law “restricts an individual's constitutional right to judicial protection and violates constitutional guarantees on the binding nature of the court decision.”

– the procedure for removing a member of the High Council of Justice from office, established by subparagraph six of paragraph 4 of Section II “Final and

¹⁹ See in details – The Constitutional Court of Ukraine Information Report, 2020. Approved by the Resolution of the Constitutional Court of Ukraine dated June 29, 2021, No. 4-p/2021. Available at: https://ccu.gov.ua/sites/default/files/annualreport_2020.pdf

Transitional Provisions” of the Law No. 1635, which may lead to the termination of the activities of the state authority, i.e. the High Council of Justice, which performs constitutional function, and the procedure for dismissing a member of the High Council of Justice, regulated by paragraphs five to eleven of the said paragraph, has signs of inconsistency with the rule of law.

– the conformity with the Constitution of Ukraine (constitutionality) of Article 34.1.11, paragraph 101 of Section XIII “Final and Transitional Provisions” of the Law of Ukraine “On Enforcement Proceedings” of June 2, 2016, No. 1404-VIII, paragraphs 51, 52 of Section III “Transitional and Final Provisions” of the Law of Ukraine “On the Peculiarities of the Formation of a Joint Stock Company of Public Railway Transport” of February 23, 2012, No. 4442-VI with the Constitution of Ukraine (constitutionality). According to the subject of the right to constitutional petition, the impugned provisions of the Laws Nos. 1404 and 4442 do not comply with the provisions of Article 8, Article 19.2, Articles 55.1 and 55.2, Article 129.2.9, Articles 129.1.1 and 129.1.2 of the Constitution of Ukraine (are unconstitutional).²⁰

6. Set-up of judiciary

The judicial system in Ukraine is based on the principles of territoriality and specialisation and is defined by the Law.

The Courts are established reorganized and dissolved by law, and any such law shall be submitted to the Parliament of Ukraine by the President of Ukraine after consultation with the High Council of Justice.

The Supreme Court is the highest in the system of judiciary in Ukraine.

High-specialised courts may operate under the law.

Administrative courts shall operate to protect the rights, freedoms, and interests of a person in the field of public relations.

The establishment of extraordinary and special courts is not permitted (Art. 125 of the Constitution of Ukraine).²¹

The system of Judiciary operates under the Law on the Judiciary and the Status of Judges.²²

Why the “Supreme Court” (SC) is not the “Supreme Court of Ukraine” (SCU)?

²⁰ See in details – The Constitutional Court of Ukraine Information Report, 2021. Approved by the Resolution of the Constitutional Court of Ukraine dated June 16, 2022 No. 13-p/2022. Available at: https://ccu.gov.ua/sites/default/files/ocinka_2022en.pdf

²¹ Constitution of Ukraine (official translation) Available at:

<https://zakon.rada.gov.ua/laws/show/en/254%D0%BA/96-%D0%B2%D1%80#Text>

²² The Law of Ukraine On the Judiciary and the Status of Judges (official translation) Available at: <https://zakon.rada.gov.ua/laws/show/en/1402-19#Text>

As was mentioned previously the official name of the highest court in the system of judiciary in Ukraine is the Supreme Court.

The overview of the legal changes and challenges related to the restructuring of the Ukrainian judicial system, specifically focused, among other things, on the “renaming and abolition” of the Supreme Court of Ukraine is provided in the ECtHR’s judgment *Gumenyuk and Others v. Ukraine*.²³

The Supreme Court of Ukraine (SCU) was restructured and renamed as the Supreme Court (SC) through the amendments, which came into effect on September 30, 2016. The SC regained the power of cassation review, and it was composed of the Grand Chamber, the Administrative Cassation Court, the Commercial Cassation Court, the Criminal Cassation Court, and the Civil Cassation Court. A new method for determining judicial salaries was introduced, resulting in higher salaries for judges.

Chapter XII of the Judiciary Act 2016 provided for transitional provisions, including the establishment of the SC and the appointment of judges based on competition results. The SCU challenged the provisions of the Judiciary Act 2016 before the Constitutional Court, arguing that the abolition of SCU would be contrary to the Constitution.

On 18th of February, 2020 the Constitutional Court ruled that the renaming of SCU to SC did not affect its constitutional status, and the judges of the “old” SCU should continue their functions as judges of the “new” SC.

The HQCJ announced a competition for SC judge positions, and new judges were selected and appointed to the SC, which began operating on December 15, 2017.

On June 21, 2018, the State registrar registered the process of abolishing SCU.

Draft law no. 3711 was introduced in Parliament in June 2020, proposing the enrollment of SCU judges into the staff of the SC. As of June 2021, the law had not been adopted.

The SCU Abolition Commission offered to pay the salaries of the applicants based on the previous law on the status of judges, but the applicants did not appear to have collected those amounts.

High Specialised Courts

At present only one High Specialised Court in Ukraine has been established – the High Anti-Corruption Court of Ukraine.²⁴

The establishment of the High Court on Intellectual Property as well as the High Anti-Corruption Court of Ukraine is prescribed by the Law on the Judiciary and the Status of Judges (Part 2 Article 31).

²³ *Gumenyuk and Others v. Ukraine*, no. 11423/19, 22 July 2021, Para 6–19.

²⁴ The High Anti-Corruption Court of Ukraine was established on 11 April 2019. See the relevant Opinion of the Venice Commission. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2020\)063-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2020)063-e)

The HQCJ commenced a process of competitive selection to the High Court on Intellectual Property, which was not completed. It should fill the 21 positions for judges. The candidates for these positions had to submit their applications between 1 and 15 December 2017. As of 27 March 2018, the HQCJ had received 219 applications.

The establishment of specialized courts in Ukraine has given rise to a discussion concerning their legal nature. The discussion is important since Article 125 of the Constitution explicitly allows “High Specialised Courts” but prohibits “extraordinary and special courts”; similarly, the Consultative Council of European Judges (CCJE) stressed in its Opinion No. 15 that “providing specialist judges to meet the complexity or particular requirements in specific legal fields is a separate matter from setting up special, *ad hoc* or extraordinary courts as dictated by individual or specific circumstances. There is a potential danger of these latter courts failing to provide all the safeguards enshrined in Article 6 of the Convention.”²⁵

Number of courts in Ukraine

According to the data published on the official website of the Judiciary of Ukraine²⁶ the number of courts in Ukraine is following:

First instance:

661 district courts (general jurisdiction (civil and criminal));

26 district courts (commercial jurisdiction);

27 district courts (administrative jurisdiction);

Second instance:

27 courts of appeal (general jurisdiction (civil and criminal));

8 courts of appeal (commercial jurisdiction);

9 courts of appeal (administrative jurisdiction).

Number of judges

According to the Report of the High Qualification Commission of Judges of Ukraine (as of 2021), there are 7,304 full-time positions of judges and 5,244 judges were appointed (as of 17/10/2022).²⁷

Thus, there are more than two thousand vacant positions of judges at present.

For the first seven months of 2023, during which the HCJ has resumed its activities, 220 judges have resigned on general grounds (resignation at their own will and retirement).

²⁵ See the Opinion No.15(2012) of the CCJE on the specialisation of Judges.

²⁶ Data available at official website of Judiciary of Ukraine <https://court.gov.ua/vidxls>

²⁷ The statistical data available at: <https://vkksu.gov.ua/news/stosovno-zvitu-vyshchoyi-kvalifikaciyanoi-komisiyi-suddiv-ukrayiny-za-2021-rik>; https://www.vkksu.gov.ua/sites/default/files/field/pdf/spysok_suddiv_na_17.10.2022.pdf

Is there a shortage of judges and if so, why?

There are more than two thousand vacant positions of judges at present.

The HQCJ which is empowered to select the candidates stopped functioning at the end of 2019 and resumed on June 2023. Thus one of the core governing bodies of the judiciary, which is empowered to decide on the matters of judges' careers, was out of action for more than 3 years.

The restoration of the HQCJ's functions in June 2023 is a positive development, as it can now resume its essential functions and address the challenges accumulated during its period of inactivity. However, there might be a need to assess and address the implications of the hiatus and take measures to ensure the proper functioning and stability of the HQCJ moving forward. Restoring the functionality of core governing bodies like the HQCJ is crucial to maintaining a strong and independent judiciary in Ukraine.

Judicial Council – The High Council of Justice

The HCJ functions by the Constitution provisions (Article 131) and the Law on the High Council of Justice which defines its status, powers, principles of organization and procedure for its activities.²⁸

The HCJ consists of twenty-one members: ten are elected by the Congress of Judges of Ukraine from judges or retired judges; two each are appointed by (i) the President of Ukraine, (ii) the Verkhovna Rada of Ukraine; and two each are elected by (i) by the Congress of Advocates of Ukraine; (ii) the All-Ukrainian Conference of Public Prosecutors, and (iii) by the Congress of Representatives of Law Schools and Law Academic Institutions.

The procedure for election or appointment to the HCJ is prescribed by law. The Chairperson of the Supreme Court is a member of the HCJ ex officio. The term of the office for elected (appointed) members of the HCJ is four years.

The national/international Ethics Council was established on 9 November 2021 to evaluate candidates for membership of the HCJ and to perform a one-off evaluation of the sitting members of the HCJ.²⁹

The HCJ was unable to work due to a lack of quorum from the end of February 2022. Restoring the work of the HCJ in January 2023 has been a positive development for the governance and functioning of the judiciary in Ukraine. With the HCJ back in operation, it can now resume its essential role in overseeing and making critical decisions related to the judiciary.

²⁸ See the relevant Opinion of the Venice Commission, available at:

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2020\)067](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2020)067)

²⁹ See relevant Joint amicus curiae brief on certain questions related to the election and discipline of the members of the High Council of Justice, adopted by the Venice Commission at its 132nd Plenary Session (Venice, 21-22 October 2022), available at:

[https://venice.coe.int/webforms/documents/?pdf=CDL-AD\(2022\)023-e](https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)023-e)

The Council of Judges of Ukraine

The Council of Judges of Ukraine (CJU) is the highest body of judicial self-governance and acts as the executive body of the Congress of Judge of Ukraine.³⁰

The Congress of Judges of Ukraine elects the members of the CJU, who include:

- 1) eleven judges from local general courts;
- 2) four judges from local administrative courts;
- 3) four judges from local commercial courts;
- 4) four judges from the appellate courts for civil, criminal cases and cases on administrative offences;
- 5) two judges from administrative appellate courts;
- 6) two judges from commercial appellate courts;
- 7) one judge per each high specialized courts;
- 8) four judges of the Supreme Court.

The proposals for nominations to the CJU are submitted by judges participating in the CJU.

The judges who hold administrative positions in courts or are members of the HCJ or the HQCJ cannot be elected to the Council of Judges of Ukraine.

In the event of election of a member of the CJU to the administrative position in court, his/her powers in the CJU are terminated.

The CJU has a duty to ensure the implementation of decisions of the Congress and implementation monitoring, as well as to decide on the convocation of the CJU.³¹

The powers and order of work of the CJU should be defined by law and the regulation of the CJU should be subject to approval by the Congress of Judges of Ukraine.³²

The selection of judges

The Procedure for Selecting and Appointing a Judges is set out in regulation of Article 70 of the Law on the Judiciary and the Status of Judges (LJSJ).³³

Selection and appointment of a judge are carried out by the procedure stipulated by LJSJ, and include the following stages:

- 1) the HQCJ announces that there is to be a selection of candidates for the position of judge, and forecasts the number of vacant judicial positions;
- 2) the HQCJ posts an announcement on its official website seeking applications from judicial candidates and publishes that announcement in a selected printed mass medium.

³⁰ The Law of Ukraine On the Judiciary and the Status of Judges, Part 1 Article 133 (official translation) Available at: <https://zakon.rada.gov.ua/laws/show/en/1402-19#Text>

³¹ Ibid, Part 6 Article 133

³² Ibid, Part 7 Article 133.

³³ Ibid, Article 70.

The announcement should specify the deadline for submitting documents to the HQCJ, which may be no earlier than 30 after the date of the announcement, as well as the projected number of judicial vacancies for the following year;

3) the submission by persons who wish to be judges (candidates) of an application and documents specified in Article 71 of LJSJ, to the HQCJ;

4) verification by the HQCJ that candidates meet the requirements established in LJSJ to be a judge, based on the documents submitted;

5) admission by the HQCJ of candidates who, upon verification, meet the established requirements to participate in the selection process and sit for the admission exam;

6) taking the admission exam by candidates who qualify for selection;

7) determination of the results of the admission exam by the HQCJ and publication of the admission exam results on its official website;

8) holding a special verification procedure regarding the candidates who have successfully passed the admission exam, by the Anti-Corruption Law, taking account of the provisions of Article 74 of LJSJ;

9) completion of special training by candidates who have passed the admission exam and passed the special verification procedure, followed by receipt of a certificate of special training completion;

10) undergoing a qualification exam by candidates who have been trained and determining its results;

11) entering the candidates for positions of judges by the HQCJ based upon the results of their qualification exam, to the reserve list for filling the vacancies of judges; determining their ratings; publication of the list of candidates for positions of judges included in the reserve and the rating list at the official website of the HQCJ;

12) announcement by the HQCJ of the number of vacant positions of a judge in local courts of competition for filling such positions;

13) holding by the HQCJ of a competition for the vacant position of judge based on the rating of the candidates who took part in that competition, and making recommendations to the High Council of Justice regarding the appointment of a candidate for the position of judge;

14) consideration by the High Council of Justice of recommendation of the HQCJ and approving decision regarding a candidate for the position of a judge;

15) Issuance of a decree of the President of Ukraine on appointing to a judicial position – in case the High Council of Justice proposes appointing a judge to the office.

Training of judges

Ongoing Training of Judges is governed by Article 89 of the Law on the Judiciary and the Status of Judges.³⁴

Judges are required to undertake ongoing training at the National School of Judges of Ukraine.

A judge is to undertake ongoing training at least once every three years, and such training is to be at least 40 academic hours.

The National School of Judges of Ukraine is required to provide onsite training for judges as required to improve their knowledge, skills, and abilities depending on the experience, level, and specialization of their courts, and taking into account their individual needs. With this purpose, the National School of Judges must organize mandatory trainings as part of the training course, and training that a judge may choose as an option depending on his/her needs.

Disciplinary proceedings against judges

Disciplinary proceedings against a judge are conducted by the disciplinary chambers of the High Council of Justice within the procedure established by the Law of Ukraine “On the High Council of Justice” taking into account the requirements of the LJSJ.

In accordance with Article 106 of the LJSJ, a judge may be brought to disciplinary liability within the procedure of disciplinary proceedings on certain grounds.³⁵

The procedure of considering a disciplinary complaint against a Judge provides that any person shall have the right to file a complaint about misconduct by a judge or a notice of the committing of misconduct by a judge (the "disciplinary complaint"). Individuals may exercise this right in person or through an attorney; legal entities are required to do it through an attorney, and government agencies and local governments through their leadership or representatives.

An attorney is obliged to check any fact alleged in the disciplinary complaint which may lead to the disciplining of a judge prior to its filing.

A disciplinary complaint should be submitted in writing and must contain the following data:

- 1) Last name, first name, and patronymic (name) of the complainant, his/her place of residence, postal code and contact numbers;
- 2) last name, first name, and patronymic of a judge (judges) against whom the complaint was filed;
- 3) specific information about the alleged disciplinary offense in judicial conduct, which, according to paragraph one of Article 106 of the LJSJ may constitute grounds for disciplinary liability of a judge; and

³⁴ The Law of Ukraine On the Judiciary and the Status of Judges (official translation) Available at: <https://zakon.rada.gov.ua/laws/show/en/1402-19#Text>

³⁵ Ibid.

4) reference to actual data (testimony, evidence) which confirms the data mentioned by a complainant. A disciplinary complaint must be signed by a complainant and specify a date of signing.

The HCJ shall approve and place on the official web portal of the judiciary a sample of a disciplinary complaint.

Abuse of the right to apply to the body authorized to conduct disciplinary proceedings including initiating the issue of judicial liability without sufficient grounds, and usage of such right as a means of pressure on a judge about his/her administration of justice is forbidden.

A lawyer may be disciplined by the law for filing a knowingly unjustified disciplinary complaint.

A disciplinary case against a judge may not be opened if it is based on a complaint that does not contain sufficient evidence of a disciplinary offense of a judge or if it is based on an anonymous application and notification.

Where there are circumstances that cast doubt on the existence or authenticity of a signature of a person who has filed a disciplinary complaint, a relevant body of the HCJ can invite such person to acknowledge that he/she has indeed made the complaint.

According to Article 109 of the LJSJ³⁶, the disciplinary sanctions against a Judge may be the following:

- 1) admonishment;
- 2) reprimand – with deprivation of a right to receive bonuses on judicial remuneration for one month;
- 3) censure – with deprivation of the right to receive bonuses on judicial remuneration for three months;
- 4) temporarily suspend the judge from the administration of justice for a period between one and six months – with deprivation of the right to receive bonuses to judicial salary, and compulsory referral of the judge to the National School of Judges of Ukraine to pass an ongoing training course determined by the body which conducts disciplinary proceedings against judges and further qualifications evaluation to confirm the capability of a judge to administer justice in a relevant court;
- 5) transfer the judge to a court of a lower level; and
- 6) dismissal of the judge from the office.

Assessment of professional qualifications of judges

Article 90 of the LJSJ regulates the Objectives and Procedure for the Regular Evaluation of Judges.³⁷

Regular evaluation of a judge during his/her term in office is aimed at identifying the judge's individual needs for improvement and incentives to

³⁶ The Law of Ukraine On the Judiciary and the Status of Judges (official translation) Available at: <https://zakon.rada.gov.ua/laws/show/en/1402-19#Text>

³⁷ Ibid.

maintain his/her qualification at an appropriate level and for professional growth. The regular evaluation of the judge is to be conducted by:

- 1) lecturers (trainers) of the National School of Judges of Ukraine based on the results of training and completion of a questionnaire;
- 2) other judges of the relevant court by offering to fill in a questionnaire;
- 3) the judge himself/herself by filling in a self-estimation questionnaire;
- 4) Non-government associations using independent evaluation of the judge's work in court sessions.

Non-government associations may organize independent evaluations of the judge's work in open court sessions. Results of independent evaluation of a judge's work in a court session should be recorded in a questionnaire that includes such information as the duration of the trial, observance of the judicial rules and respect for the rights of the trial participants by the judge, communication culture, level of the judge's impartiality, level of satisfaction of the trial's participants with the judge's conduct, objections to the trial conduct and other information. The completed questionnaire of independent evaluation of the judge's work in court session may be attached to the judge's dossier.

The judge's dossier is a collection of documents and information relating to a particular judge.³⁸ It is a compilation of documents scanned and open for general access on the HQCJ's official website. Since the Russian aggressive war has been started, access to the dossiers by the general public has been closed. The substance of the Judicial Dossier consists of a set of data specified by law regarding the judge, evidence and documents related to the judge's career, the effective administration of justice by the judge, the disciplinary liability of the judge, compliance of the judge with professional ethics and integrity criteria, as well as other information on compliance of the judge with the qualification assessment criteria.

The procedure and methodology of the judges' evaluation and self-estimation are approved by the HQCJ.³⁹ Results of regular evaluations should be taken into account when the HQCJ is deciding in connection with the competition for vacancy filling in the relevant court.

Ethical standards of judiciary

The Code of Judicial Ethics was adopted on 22 February 2013 by the Decision of the XI Congress of Judges of Ukraine.⁴⁰

³⁸ Procedure for Completion and Administration of the Judicial Dossier. Approved by Resolution of the High Qualification Commission of Judges of Ukraine No. 150/zp-16 of 15 November 2016. Available at: [Dossierhttps://vkksu.gov.ua/sites/default/files/field/file/judicial_dossier.pdf](https://vkksu.gov.ua/sites/default/files/field/file/judicial_dossier.pdf)

³⁹ Procedure and methodology of qualification assessment of judges Available at: <https://vkksu.gov.ua/en/page-4>

⁴⁰ The Code of Judicial Ethics, 2013. Available at: https://newjustice.org.ua/wp-content/uploads/2018/06/Code_of_Judical_NEW_eng1.pdf

Article 58 of the LJSJ – “Judicial Ethics” – stipulates that matters of judicial ethics shall be defined by the Code of Judicial Ethics to be approved by the Congress of Judges of Ukraine at the proposal of the Council of Judges of Ukraine.

Incompatibility of a judge with the position held by him/her based on criteria of competence, professional ethics, or integrity identified as a result of an evaluation, constitutes a ground for dismissing the judge from the office following a decision of the High Council of Justice based on a proposal of a relevant board of the HQCJ.

7. The “Strasbourg case law” concerning the independence of the judiciary and the most important recent judgments in respect of Ukraine.

The ECtHR has developed a clear meaning of the concept of internal judicial independence.⁴¹ Specifically, in the case of *Parlov-Tkalčić v Croatia* in 2009 the Court held that:

“[I]nternal judicial independence requires that they be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court. The absence of sufficient safeguards securing the independence of judges within the judiciary and, in particular, vis-à-vis their judicial superiors, may lead the Court to conclude that an applicant’s doubts as to the (independence and) impartiality of a court may be said to have been objectively justified.”⁴²

Usually, it is quite easy to make a distinction between internal and external independence. However, as the following case against Ukraine demonstrates, it appears that such a distinction is not always clear-cut.

The case of *Agrokompleks v. Ukraine* (2013)⁴³ concerned insolvency proceedings initiated by a private company (Agrokompleks) against the biggest oil refinery in Ukraine (LyNOS), in an attempt to recover outstanding debts. Agrokompleks complained, among other things, about the unfairness of the insolvency proceedings, alleging that the courts were not independent or impartial, given the intense political pressure surrounding the case as the State authorities had a strong interest in its outcome.

The ECtHR held that the interference of the government officials with the court proceedings constituted a violation of external judicial independence as laid down in Article 6 of the Convention, and also ruled that the instruction given

⁴¹ For example, an overview of relevant jurisprudence of the European Court of Human Rights on Independence and Impartiality of the Judiciary, 2021, available here: <https://www.rolplatform.org/wp-content/uploads/2022/01/independence-and-impartiality-of-judiciary-eng-update.pdf>

⁴² *Parlov-Tkalčić v Croatia*, no. 24810/06, 22 December 2009, Para 86.

⁴³ *Agrokompleks v. Ukraine*, no. 23465/03, 25 July 2013.

by the president of the court to his two deputies asking them to reconsider the earlier judgment violated the principle of internal judicial independence.

A landmark case concerning structural deficiencies within the dismissal (disciplinary) proceedings is *Oleksandr Volkov v. Ukraine*, application no. 21722/11, delivered by the Court in 2013. In that case, the Court concluded that the High Council of Justice, cannot be considered as an independent and impartial body within the meaning of Article 6 of the Convention. In its judgment, the Court held that the procedure as regards the disciplinary liability of judges before the HCJ and the Parliament disclosed several serious issues pointing to structural and general shortcomings that had compromised the principles of independence and impartiality.

Later, the ECtHR considered that those findings applied in other cases, in particular, *Kulykov and Others v. Ukraine* (2017).⁴⁴

It is worth mentioning that according to the ECtHR's case law, to establish whether a tribunal can be considered independent, regard must be had, *inter alia*, to the (i) manner of appointment of its members and (ii) their term of office.

The manner of appointment of judges is strictly connected to the autonomous concept of a "tribunal established by law".

In Ukraine after the two-wave competition for appointment to the SC in 2017–2019 and the competition to the High Anti-Corruption Court of Ukraine, there was rather a high number of claims from the candidates, who took part in that competitions, who argued that the mentioned courts were not established by law.

The most recent and relevant GC ECtHR's case *Guðmundur Andri Ástráðsson v. Iceland* (became final in 2021) concerned the applicant's allegation that the new Icelandic Court of Appeal (Landsréttur) which had upheld his conviction for road traffic offenses was not a tribunal "established by law", on account of irregularities in the appointment of one of the judges who heard his case.

In this case, the ECtHR refined and clarified all the relevant case-law principles. It formulated a three-step test to determine whether such irregularities were serious enough to violate the fundamental right to a tribunal established by law.

Under the first step of the test, it is necessary to consider whether there has been a manifest breach of domestic law, in the sense that the breach must be objectively and genuinely identifiable as such.

The second step of the test involves applying the principle that only those breaches that affect the essence of the right to a tribunal established by law are likely to result in a violation of that right.

The third step of the test is based on the legal consequences of the breach of the individual's Convention rights. Once a breach of the relevant domestic rules

⁴⁴ *Kulykov and Others v. Ukraine*, nos. 5114/09 and 17 others, 19 January 2017.

has been established, the assessment by the national courts of the legal effects of such breach must be carried out based on the relevant Convention case law and the principles derived from it.⁴⁵

This ruling has given rise to many discussions particularly because the applicant in that case was not a participant in the appointment process and that the court of appeal was already formed and had been functioning. The origins of the discussion come from the separate opinions of both the judgments of the GC and the Chamber in this case.

In the jointly dissenting opinion of judges Poul Lemmens and Valeriu Grițco wrote:

The judgment is in our opinion an example of “overkill”. The pilot in this case (the Minister of Justice, followed by Parliament) made a navigation mistake, but that is not a reason to shoot down the plane (the Court of Appeal).

The question of irregularities in judicial appointments was returned to in *Xero Flor v Poland* (2021) which concerned the appointment of Constitutional Court judges in the place of judges already elected by the previous term of Parliament but whom the President refused to swear into office. The ECtHR found that the president and parliament acted in manifest contradiction to national law by refusing to swear in properly elected judges, thereby exerting unlawful external influence upon the Court and impairing the legitimacy of the election process.⁴⁶

Likewise, in a recent case *Advance Pharma sp. z o.o v. Poland* (2022), the ECtHR found that there had been a manifest breach of domestic law that adversely affected the fundamental rules of procedure for the appointment of judges to the Civil Chamber of the Supreme Court. That was because the National Council of the Judiciary (NCJ), as established under the Amending Act on the NCJ of 8 December 2017, did not provide sufficient guarantees of independence from the legislative or executive powers. The Court found that a procedure for appointing judges that were unduly influenced by the legislative and executive powers was in itself incompatible with Article 6 § 1 of the Convention and, as such, compromised the legitimacy of the Civil Chamber of the Supreme Court.⁴⁷

The other important guarantee of the independence of the judiciary is the term of office for judges. The ECtHR has not specified any particular term of office for the members of a decision-making body, although their irremovability during their term of office must in general be considered as a corollary of their independence.⁴⁸ In *Baka v Hungary* (2016) the Court analyzed a case concerning the termination of the term in office of the president of the Hungarian Supreme

⁴⁵ *Guðmundur Andri Ástráðsson v. Iceland* [GC], 26374/18, 1 December 2020.

⁴⁶ *Xero Flor v. Poland*, no. 4907/18, 7 May 2021.

⁴⁷ *Advance Pharma sp. z o.o v. Poland*, no. 1469/20, 3 February 2022.

⁴⁸ *Ibid* (Para 239–240).

Court due to the entry into force of a new constitution that abolished the Supreme Court and created the Curia in its place. The ECtHR found a violation of the Convention because the former president of the former Supreme Court did not have access to an independent tribunal to review the expiry of his term in office, as provided for by the new Constitution.⁴⁹

In the case of *Samsin v. Ukraine*⁵⁰ a different aspect of the issue was considered – namely “automatic lustration” as a legal ground for the dismissal of judges. The case concerned the dismissal of a Supreme Court judge, Igor Samsin, under the Government Cleansing (Lustration) Act (GCA) brought in to address negative developments in public service in the period when former President Viktor Yanukovich was in power. The law was applied systematically to specific categories of public servants who had been in posts between 2010 and 2014. Mr Samsin was banned from employment in the public service until the end of 2024, and his name was put in a publicly accessible Lustration Register. In addition, as his resignation application was not considered, he was deprived of the benefits associated with judicial retirement despite being close to retirement age. The Court found a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights. In particular, it found that the measures envisaged by the GCA and imposed on the applicant had not been necessary in a democratic society.⁵¹

8. Judicial reforms or the camouflaged pressure on the judiciary?

The Polish cases demonstrate an encouragingly firm attitude on the part of the ECtHR to judicial reforms which undermine the independence of the judiciary.⁵²

⁴⁹ *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016.

⁵⁰ *Samsin v. Ukraine*, no. 38977/19, 14 October 2021

⁵¹ A similar conclusion the Court has already made in its judgment *Polyakh and Others v. Ukraine* (nos. 58812/15 and 4 others) of 2019.

⁵² The Court had already examined issues related to the reorganisation of the courts and the rule of law in Poland in several Chamber cases. Some of them were mentioned already in this Report. Of particular note are: *Xero Flor w Polsce sp. z o.o. v. Poland* (application no. 4907/18), in which the Court held that there had been a violation of Article 6 § 1 of the Convention (right to a fair trial) as regards the right to a “tribunal established by law” owing to the election of Constitutional Court judges to positions that had already been filled; *Broda and Bojara v. Poland* (nos. 26691/18 and 27367/18), in which the Court found that the applicants had been deprived of the right of access to a court, in violation of Article 6 § 1, in relation to the Minister’s decisions removing them from their posts of court vice-presidents before the expiry of their respective terms of office; *Reczkowicz v. Poland* (no. 43447/19), in which the Court held that the Disciplinary Chamber of the Supreme Court was not a tribunal established by law, finding a violation of Article 6 § 1; *Dolińska-Ficek and Ozimek v. Poland* (49868/19 and 57511/19), in which the Court found that the Chamber of Extraordinary Review and Public Affairs of the Supreme Court was also not a tribunal established by law; and *Advance Pharma SP. z o.o v. Poland* (1469/20), in which the Court held that the formation of the Civil Chamber of the Supreme Court, which examined the applicant company’s case was also not an independent and impartial tribunal established by law.

The first time that the Grand Chamber of the Court examined these issues was in the case *Grzęda v. Poland*.⁵³ The case concerned Mr. Grzęda's removal from the National Council of the Judiciary (NCJ) before his term had ended and his inability to get judicial review of that decision. His removal had taken place in the context of judicial reforms in Poland. Under the amending legislation adopted in 2017, his membership of the NCJ was cut short, ending when 15 new judges were elected to the NCJ by the Sejm on 6 March 2018. According to him, there was no avenue for contesting the loss of his seat. Mr Grzęda remains a judge of the Supreme Administrative Court.

The Court found in particular that the lack of judicial review had breached Mr Grzęda's right to access a court. It held that the successive judicial reforms, including that of the NCJ that had affected Mr Grzęda, had been aimed at weakening judicial independence. That aim had been achieved by the judiciary's being exposed to interference by the executive and legislature.

After the comprehensive judicial reform in Ukraine started in 2016, it would seem that there are no more threats to the stability of its judicial system. It was only necessary to consistently bring what was started to the end. Nevertheless, the attempts to reform the structure of the judiciary and especially the Supreme Court's structure and powers have not stopped since then.

9. Conclusion

Since 2010 the ongoing judicial reforms in Ukraine have raised concerns about the independence of the judiciary. The purpose of changes is not always connected to the real needs of the judiciary. This worrying trend is a cause for alarm as it threatens the proper functioning of the justice system and the protection of human rights.

The independence of the judiciary is a fundamental principle in any democratic society. It ensures that judges are free from external influence, political pressure, or any form of interference that could compromise their ability to make fair and impartial decisions. An independent judiciary is crucial for upholding and maintaining the rule of law and ensuring that the rights and freedoms of individuals are protected.

The rule of law is the cornerstone of a democratic society, and it rests on the principle that no one, including those in charge of the Government, is above the law. Governments and public officials must be bound by the law and held accountable for their actions. Courts play a pivotal role in upholding the rule of law by interpreting and applying the law to resolve disputes and ensure justice.

It is essential to safeguard the independence of the judiciary at all levels to prevent any erosion of the rule of law. The judiciary must remain impartial, free from political pressure, and secure in making decisions based on the law and the

⁵³ *Grzęda v. Poland* [GC], (Application no. 43572/18), 15 March 2022.

protection of human rights. Respect for and adherence to the rule of law are crucial for maintaining a just and democratic society, where everyone's rights are upheld and protected.