Proposals for strengthening the capacity of the Ukrainian judiciary in the short and long-term perspectives [1]

Concept paper[2]

[1] The proposed ideas of this paper should be further specified in the relevant Action Plan.

[2] This Concept paper was prepared by judges of the Supreme Court (Ukraine): Olena Kibenko, Ivan Mishchenko, Kostiantyn Pilkov, and former judge of the Supreme Court, the BIICL senior fellow Tetyana Antsupova at the request of international partners promoting the Rule of Law in Ukraine.
The views expressed in this paper are those of the authors and do not necessarily reflect the views of the Supreme Court as an institution.

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(1) Introduction

(a) The purpose of this document is to provide concrete recommendations[3] to strengthen the capacity of the judiciary in Ukraine, which, taking into account its own context and legal culture, should be at the level of an EU member state with a developed democracy, i.e. which will ensure effective justice (in terms of duration and cost of the process and the enforceability of decisions) by an *independent* court that enjoys trust,[4] based on *the Rule of Law*.

(2) Historical context

Before making specific recommendations, it is necessary to outline briefly the main features of the Ukrainian judicial system as it is evolving. This will explain the system's current stage and the reasons for our proposals for its future development.

(a) Ukraine's judicial system is a product of the socialist judicial system of Soviet Ukraine, characterized by the perception of itself as part of the state apparatus, a formal and positivist approach to dispute resolution, a lack of self-criticism or ability to recognise its problems and mistakes, coupled with a tendency to depend on political power, a high level of perception of corruption, an extreme level of secrecy and a corporate culture generated by this secrecy.

(b) The most significant changes in the judicial system occurred in the following three stages:

- 2002–2005: introduction of appellate and cassation review instead of the Soviet cassation and supervisory review; abolition of the system of general

[3] The authors of this concept in no way claim to be the only experts who understand the essence and consequences, but only draw attention to the fact that a unified long-term strategy and institutional memory on the one hand, as well as independence and the desire to use it on the other, can break this vicious circle of often chaotic and ill-considered steps that address the situation "here and now" but completely ignore the consequences.
Some recommendations are general in nature, but outline a goal to be achieved in the short and long term. Any recommendation can be developed into a draft law and/or a specific *Action Plan*.
The implementation of any recommendation should be preceded by a thorough expert analysis and support up to the level of implementation.
Efforts should be focused on creating situations of synergy since experience shows that most of the momentum for change is spent on struggles within the system between stakeholders seeking to achieve fundamentally different results. Implementation of these ideas requires the system to be brave and admit its mistakes, to prioritize the common interest over individual ones. Without the active involvement of the judiciary as a full-fledged subject of change processes, such changes will not have a long-term positive effect

[4] High level of trust among the professional community, professional business associations, international investors, and donors.

judicial supervision; establishment of administrative jurisdiction alongside civil, criminal, and commercial jurisdiction; at the same time, concentration of influence on the judicial system in the hands of the President of Ukraine (the President)[5] ;

- 2010–2012: the creation of a four-level judicial system with cassation (specialized courts) and a fourth instance above them (the Supreme Court of Ukraine), building an authoritarian system of governance and strengthening the instruments of formal and informal influence over the judiciary by the President[6] ;
- 2016–2019: "reboot of the judicial system", first of all of the Supreme Court[7], the establishment of independent institutions (High Qualification Commission of Judges of Ukraine (HQCJ) and High Council of Justice (HCJ)), outside the political influence of other branches of state power (other than the President), return to a three-level judicial system[8].

(c) Specifics of these changes:

- None of these reforms was initiated by *the judiciary itself: the* changes were always caused by political processes, imposed from outside, which, on the one hand, resulted in resistance and, on the other hand, involved the judiciary doing its best to adapt to changes to preserve itself and imitate formal signs of reforms;
- chaotic, *lack of a long-term strategy* (as underlined by the Venice Commission "Following presidential elections, the new political power would often start new changes to the judicial system. In the absence of a holistic approach, various pieces of legislation were adopted that did not have the character of a comprehensive reform"[9]), ignoring and covering up real problems, and reacting without understanding the consequences.
- *the radicalism of the civil society sector, which has been* involved in judicial reforms for the first time since 2016, fueled by donor assistance, has often led to the opposite results from those that the reforms were aimed at

[5] Powers to establish courts, appoint judges for the first time, appoint presidents of courts, determine the number of members of the Supreme Court of Ukraine and other courts.

[6] The Law on the Judiciary stipulated that courts were established by presidential decree. Judges were initially appointed for a 5-year term by the President, who also decided on their transfer and dismissal.

[7] Holding open competitions in the judicial system. The first of these resulted in the newly formed Supreme Court in 2017. Qualification assessment of judges at all levels, which led to the largest dismissal of judges (40%).

[8] In 2017, the procedural codes were updated so that the Supreme Court's opinions became binding for all courts (some elements of case law were introduced).

[9] Joint Follow-up Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe to the joint opinion on the draft amendments to the Law "On the Judiciary and the Status of Judges" and Certain Laws on the Activities of the Supreme Court and Judicial Authorities (CDL-AD(2020)022), adopted by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023), Para 24. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2023)027-e

(suspension of the HQCJ in 2019 and the HCJ in 2022, which resulted in a critical shortage of judges and imbalance in the system; the refusal of well-known and well-qualified lawyers to participate in competitions for judicial positions for fear of public shaming, disgrace (bordering on bullying).

(3) Contemporary context: The 20s – unique time for changes

(a) The process of European integration, which has become an existential choice and more realistic than before the war, is the main driver of the qualitative upgrade of the judicial system.

(b) The mid-20s – time of generational change in the judiciary[10] ;

(c) The Supreme Court has been the focus of all reform efforts over the past ten years. Despite the "reboot of the Supreme Court" in 2017, the scandal involving its former President V. Kniaziev led to a gradual recognition by the political and civil society sectors of the need to assess the integrity of its judges by investigating the reliability of their declarations of integrity and financial declarations[11].

After announcing such a review, we suppose with a high degree of probability that approximately 40-60% of the Supreme Court judges will resign[12]. So, due to the vetting, the number of Supreme Court judges will reduce significantly; only about 50-70 judges may remain.

We should emphasize that a special (extraordinary) integrity check of the Supreme Court judges can only take place after the lifting of martial law in Ukraine under the European standards of judicial independence.

This opens up two possible options for the further development of the Supreme Court. The choice, which will determine the development of the entire judicial system, is between (1) recruitment of new judges up to 200 or (2) transformation of the Supreme Court into a *super-cassation court* with a relatively small number of judges, which will require significant changes in the procedural law and reasonable restrictions on access to cassation review.

[10] Most judges, whose legal consciousness was formed in the Soviet tradition, retire due to age or various vetting procedures. At the same time, the judicial system needs to be filled with "fresh blood," primarily lawyers and academics from a different generation. This process makes the selection procedures currently being held in the judiciary extremely important.

[11] As far as we know, such an audit will take place sooner or later, and the Public Council of International Experts (6 members have recently been elected) may be involved.

[12] Currently, 158 positions of judges of the SC out of 200 are occupied, and about 100 are eligible for retirement.

(4) The components of the judicial system where changes are needed and the conflicting trends at these levels

(a) In the following section, we consider the need for changes in the judicial system at the following components:

i. *institutional* (changes in the judiciary and the system of judicial governance institutions);
ii. *procedural* (changes to the procedural law that will make the administration of justice fair and effective, and consistent with the goals of strengthening the capacity of the judiciary);
iii. *staff* (changes that will allow establishing a system for attracting staff to the judicial system that will be able to implement the goals of strengthening the capacity of the judiciary);
iv. *management* (changes in the management of the courts beyond the administration of justice aimed at improving efficiency and reducing corruption risks).

(b) Difficult choice between "quality" and "accessibility" of justice.[13]

The model has at one pole the model of "cheap but accessible court" – a court system in which access to justice is ensured with a minimum of restrictions (there are no or minimal court fees, access to court does not require qualified legal assistance, the court is obliged to help the "weak" party, the process has the characteristics of an inquisitorial rather than an adversarial process); at the opposite pole is the model of a qualified, adversarial process, a system of a quality public service for dispute resolution with reasonable costs paid by the parties.

All judicial reforms in independent Ukraine, without exception, have been characterized by a tendency to (1) declare a movement from low-quality but accessible justice without formal restrictions to building a system of high-quality but expensive justice and (2) result in a subsequent rollback movement in the opposite direction.

The declared direction is dictated by the need to build an effective and high-quality justice system in Ukraine, so it is positively perceived by the professional legal community and the international community, and the rollback is often a

[13] Inherent in the procedural and institutional components of the system.

consequence of populist tendencies, because any restriction or increase in the cost of public service is perceived negatively in society[14].

Our vision is to intensify the movement towards high-quality and effective justice, with only professional representation of litigants and restrictions permissible in a democratic society while avoiding any subsequent rollback.

[14] The struggle between these opposing trends (the movement towards high-quality legal proceedings with procedural restrictions and the populist rollback to "accessible" but low-quality legal proceedings) can be illustrated:

1) *Accessibility/quality/price of justice in general:* The introduction in 2005 in civil proceedings, and later in other court proceedings, of a stage-based system of proceedings, where procedural errors of a party (failure to perform certain procedural actions at the appropriate stage of the proceedings) could be decisive for the case. This trend should have contributed to the professionalism of representation in court proceedings and improved their quality.

Rollback: the trend was not accepted, first of all, by the judicial system itself, which continued to "forgive" procedural errors and unprofessionalism in the process by inertia (courts often accepted evidence and procedural statements submitted by the parties with violations). The correctness of the decision on the merits, as understood by the higher courts, had an unconditional advantage over the accuracy of the court's implementation of procedural rules.

2) *Professionalism of representation in courts:* Declared trend: movement towards ensuring professional representation in courts by lawyers. Introduction of the "bar monopoly" in 2016 (introduction of Article 132-2 to the Constitution on representation in court only by advocates, except for certain categories of cases). The system of free legal aid created at that time was supposed to provide professional representation for socially vulnerable groups.

Rollback: expansion of the practice of self-representation in 2017, enshrining in the procedural law the possibility of self-representation of a legal entity by its employees.

The absence of special requirements for attorneys who represent cases in the Supreme Court (the admittance to the practice at the Supreme Court), the availability of litigants' self-representation in a strict adversarial process (when the court cannot go beyond the arguments of the parties), combined with the absence of the *amicus curiae*, prevent the Supreme Court from achieving its goal of issuing well-reasonable binding opinions (due to the weak, inadequate arguments of the parties).

3) *Availability of cassation review*: The declared trend: the constitutional principle of access to cassation review *by default* established in the 1996 Constitution (clause 8, part 2, Article 129: "ensuring appeal and cassation appeal of a court decision, except in cases established by law") is changed in 2016 to "ensuring the right to appeal review of a case and, in cases determined by law, to cassation appeal of a court decision", i.e., the basis is laid for restricting access to cassation review.

The new versions of the 2017 procedural codes establish cassation "filters". The Supreme Court is positioned as a court of law only in important matters of law. However, since it started its work in 2017, it has been overloaded with a large number of cases, most of which are not important for the development of law. The court practice is overloaded with tens of thousands of legal positions of the Supreme Court outlined in the cases under consideration (since the beginning of the Supreme Court's existence, more than 230 thousand legal positions have already been issued). In 2020, additional cassation "filters" were introduced to cut off minor cases, but they are ineffective (even in times of war, the Supreme Court issues 20-25 thousand rulings a year). Neither lawyers nor judges themselves can navigate through so many legal opinions.

Rollback*:* in 2023, the Constitutional Court of Ukraine issued Decision No. 10-r(II)/2023, which declared unconstitutional certain "filters" for insignificance in civil proceedings.

4) *Availability of alternatives to court:* In the context of chronic staff shortages in the judicial system, which leads to overloading of judges, this overload is naturally perceived as a factor explaining the decline in the quality of reasoning for court decisions and failure to meet deadlines for consideration of cases and issuance of decisions. Despite this, the courts do not actively promote the development of alternative dispute resolution. The judicial system has been demonstrating arbitration-friendly practices over the past 6 years, but the development of ADR and the expansion of the category of cases that can be resolved through alternative means is almost never a requirement of the judicial system itself.

Instead, the development of ADR (in particular, the expansion of the scope of international commercial arbitration; the restoration of domestic arbitration proceedings after its decline due to the discrediting of this system due to its use for illegal purposes in the 2000s; and the intensification of mediation) would help to relieve the judicial system and establish a state of healthy competition between courts and alternative instruments.

(c) *Opposing trends of "independence–accountability"* (in the institutional and human resources components of reforms):

- Declaring guarantees of independence, which include, among other things, a high level and stability of judicial remuneration, removal of other branches of state power from the process of appointing judges and influencing their career;
- populist tendencies to ensure the "accountability" of judges, limiting their remuneration, calls for the individual accountability of judges for delivered judgments, implementing collective responsibility, and "resetting" of institutions after corruption scandals.

The consequence of the second trend was the decision of the ECtHR that Ukraine violated the ECHR guarantees through the practice of collective accountability of judges. The Venice Commission also critically assessed the system of bringing judges to justice as not complying with the principle of judicial independence.

Our vision: the completion of qualification procedures should be final, any statements by other branches of state power or the public sector that delegitimize the whole judicial institution through blaming the particular representative should be considered unacceptable; the emphasis should be on establishing a system of openness of judicial institutions, a system that minimizes corruption risks, and which brings to individual judges responsibility for corruption offenses and disciplinary offenses.

(d) Change from "survival" to efficiency of the court staff (management component)

The constant underfunding of the judiciary and the same deficiencies in the civil service system have kept the courts in a state where there has never been a real reform of the court staff [15].

As usual, judges prefer to avoid being involved in court management and finance on a day-to-day basis. So, the court President usually makes all the decisions and

[15] The judicial system is constantly struggling to ensure minimum acceptable working conditions for the bulk of its staff (court clerks, consultants, judicial assistants, and specialists). As a result, the system does not create incentives for initiative, optimization of work, adoption of best practices from other areas, or mobility. In general, effective court management is out of the question; at this level, the judicial system is busy "patching holes" and surviving from crisis to crisis.

has become very 'powerful' and 'unchangeable' for years. The court's internal business processes have remained unchanged for decades as well.

Our vision: capacity building among judges requires reform of the court management system, in particular, the establishment of a system of remuneration and guarantees that would stimulate staff development and the inflow of qualified personnel from other areas, including private practice; strengthening leadership, management, and communication skills among all judges.

A highly professional court staff will greatly improve the decision-making process in all levels of the judicial system.

At the same time, the court staff should report to the self-governing body of judges, and judges should supervise certain areas, in particular, court communication[16].

(5) Goals of strengthening the capacity of the judiciary:

The core goals are to build a judicial system that is efficient in terms of time and resources; enjoys public trust, where judges are recognized as an elite among the legal community and a desirable profession; and the Supreme Court – the intellectual leader of the judiciary.

(6) Performance and quality indicators that will be used to determine the achievement of the above goals[17] :

length of proceedings (timeframes); backlogs; clearance rate; disposition time[18]; costs of the judicial procedures (e.g. cost per case[19]); appeal ratio; satisfaction of "customers" (regarding the services delivered by the courts); productivity of judges and court staff; satisfaction of judges and court staff; general public and

[16] "Judges should supervise the work of court spokespersons or press officers" (see paragraph 35 of the CCJE Opinion No. 7 (2005) on "Justice and Society").

[17] These are mainly indicators used by CEPEJ to assess national judicial systems (see Study on the functioning of judicial systems in the EU Member States. European Commission for the efficiency of justice (CEPEJ). 2021. page 58, https://commission.europa.eu/system/files/2022-05/part_1_-_eu_scoreboard_-_indicators_-_deliverable_0.pdf)

[18] [illegible]

[19] The costs per case is derived by taking the aggregate costs by case type and dividing this figure by the total number of cases disposed in the year (see figure 2: steps to be taken to calculate the costs per case (source: NCSC Courtool on Cost per case, US National Center for State Court, See www.ncsconline.org).

business trust and confidence in judiciary rate according to surveys; formula for determining the level of coverage[20].

(7) Specific steps to achieve the goals[21] :

(a) The judicial system in general:

1. abolition of the instrument of the President's Decree on the appointment of judges[22] ;
2. elimination of the position of the Deputy Head of the Presidential Office responsible for judicial reform;
3. formation of the Council for the Development of the Judicial System (Reforms) under the HCJ and the Supreme Court, not the President or his Office;
4. establishing a strategy for attracting the best lawyers and managers to the judicial system through the effective judicial social contract (a system of 'unshakable' guarantees for the independence of the judiciary and social guarantees in exchange for the expertise and integrity of judges);
5. unification of selective procedures for judges: checking only the most recent 15 years, *merit-based approach*, the principle of positive selection;
6. reforming the Bar, reducing the possibility of self-representation of the litigants in all courts (should be possible only within simplified procedure in online court or simple/small claims cases); introducing the special admittance for attorneys to represent cases at the Supreme Court; reforming the mechanism of disciplining advocates;
7. a fundamental change of approach to the qualification of judges,[23] reform of the National School of Judges[24], implementation of the *European Judicial Training Strategy (2021-2024)*;

[20] To evaluate digital justice with modern IT technologies.
[21] Each of our recommendations should take into account the time element: it is part of a short- or long-term strategy. Each section or idea can be elaborated upon upon request and should be developed in a corresponding Action Plan.
[22] Final deprivation of the President of formal instruments of influence on the judicial system.
[23] Knowledge of English and orientation in the business environment (private practice) is a priority, judicial diplomacy and the most active involvement of Ukrainian judges in the international context.
[24] Turning it into a modern coordination training centre or creating such a centre based on the Supreme Court, training not only on legal issues but also on personal development, leadership skills, attracting the best teachers, trainers, and public leaders (motivation), creating platforms for judges to communicate, massive foreign exchanges based on the job shadow system. Special attention should be paid to judgment writing skills (clarity and logic of judgments as a strategic priority that requires maximum attention)

8. reforming the system of disciplinary accountability of judges, creating effective barriers to manifestly ill-founded complaints of persons who disagree with the judicial decisions or judgments[25].

(b) The Supreme Court:

9. Transforming the Supreme Court into a cassation court which sets precedents in cases that are important for the development of law ("supercassation");
10. improving the procedural filters;
11. transformation of Cassation Courts in the structure of the Supreme Court into Chambers, while specialization is being preserved;
12. ensuring that the Grand Chamber operates *ad hoc*[26] ;
13. arranging for the Supreme Court to operate in the same building, which will, among other things, give an impulse to a renewed corporate culture;
14. composing a research and documentation unit to help research and analyze legislation and case law, draft simple or standardized documents, and monitor international/EU legislation and case law;
15. formation of a modern system of court management to ensure that the SC President has only limited representative functions, and creation of permanent committees of judges (budget, communications, HR);
16. providing for the Supreme Court to approve its Strategy by Plenum of judges every 5 years;
17. elimination of the existing conflicts in the powers of the Constitutional Court of Ukraine and the SC to interpret laws and resolve the issue of their unconstitutionality.

(b) Governance bodies in the judiciary:

18. Intensification of the work of the HQCJ and the HCJ to overcome the acute shortage of judges, and to this end, eliminating duplication of functions performed by the HQCJ in the HCJ, and, once the staffing crisis in the

[25] Currently, with 4.5 thousand judges, the HCJ has to consider almost 15 thousand complaints, which results in a waste of judicial resources (judges who have to submit explanations and the HCJ that considers all this).
[26] The judges who are members of the United Chamber simultaneously administer justice in the respective panels, but may have a reduced workload there due to the additional workload in the chamber.

judiciary is overcome, the HQCJ and HCJ should be merged following the Council of Europe's recommendations;

19. Clarification of the roles of the HCJ and the Council of Judges;
20. audit and possibly liquidation/reorganisation of the State Judicial Administration (SJA),[27] or optimization of the court administration system.

(c) Procedural improvements:

21. Introduction of tools that increase the efficiency of justice (in particular, the introduction of a stage of deciding whether a case is worthy of consideration on the merits);
22. digital transformation of justice, including digitization of existing processes[28], development of a full-fledged online court with an intuitive interface available 24/7 via smartphone to resolve simple disputes with simplified procedure rules ('people oriented'), a full-fledged and effective E-court system for proceeding the other cases ('attorney oriented'), and a modern digital office that allows the judge to be freed from routine processes;
23. provision of online broadcast of all open court sessions by default[29].
24. elimination of post-Soviet procedures,[30] and instead the implementation of the open and closed parts of the court hearings,[31] and publishing how members of the court voted in each case (for the Supreme Court);
25. implementation of written proceedings in the court of appeal and cassation as a default, with oral proceedings at the courts' discretion;
26. expanding the scope of ADR,[32] including making ADR a mandatory preliminary stage in online court proceedings;

[27] It was created to centralize the management of courts, reduce the cost of administrative and technical staff, but instead there was a duplication of these costs: a significant apparatus of each court has been preserved and requires expenses, and the SJA exists in parallel (central body and regional offices) and simply sucks funds from the judicial system.

[28] Common components of court automation (*hardware functions*: high speed copying, printing and scanning, network connectivity, Internet connectivity; *software functions*: workflow management, e-filing, video conferencing, audio and video recordings of proceedings, document (template-based) generation, electronic service of process, staff management, statistical reporting, on-line document review, digital archiving

[29] In this way, real and permanent public control over all judges will be achieved, and not on the basis of individual complaints against individual judges, which may have a completely different illegitimate purpose.

[30] These include, in particular, reading the introductory and operative parts of the decision aloud, producing the full text after, rather than before, the decision is made, and making decisions in the meeting room immediately after the hearing.

[31] In the closed part, the decision is made.

[32] Expanding the category of cases that can be submitted to arbitration and mediation.

27. introduction of procedural tools for referring the case or particular issues to mediation or arbitration [33] ;

(f) Management and communications courts' policy:

28. decentralization of the process of day-to-day management in courts, transferring it to collegial (self-governing) bodies. Distribution of management functions between the court President, Chief of staff, and Committees of judges approved by the assemblies of judges/Plenum of the Supreme Court;
29. Increasing the role of judges-speakers with the obligation to comment on high-profile cases[34];
30. transition to a paperless management and communication system in courts;
31. transition to modern statistical indicators (CEPEJ standards), employing user-friendly systems for presenting statistical information on the workload of courts and judges[35] ;
32. providing an internal system (by the courts themselves) of training and professional development for the staff of judges' offices.

[33] E.g. bifurcation of the process into the lability and damages, when the court decides whether an unlawful act has occurred and refers the issue of the amount of compensation to mediation.
[34] "Judges should supervise the work of court spokespersons or press officers" (see paragraph 35 of the CCJE Opinion No. 7 (2005) on "Justice and Society").
[35] Real-time dashboards for all courts and judges (how many cases were considered as a judge-rapporteur or panel member, how many days were spent on leave and business trips, terms of consideration of cases, open disciplinary proceeding etc.)