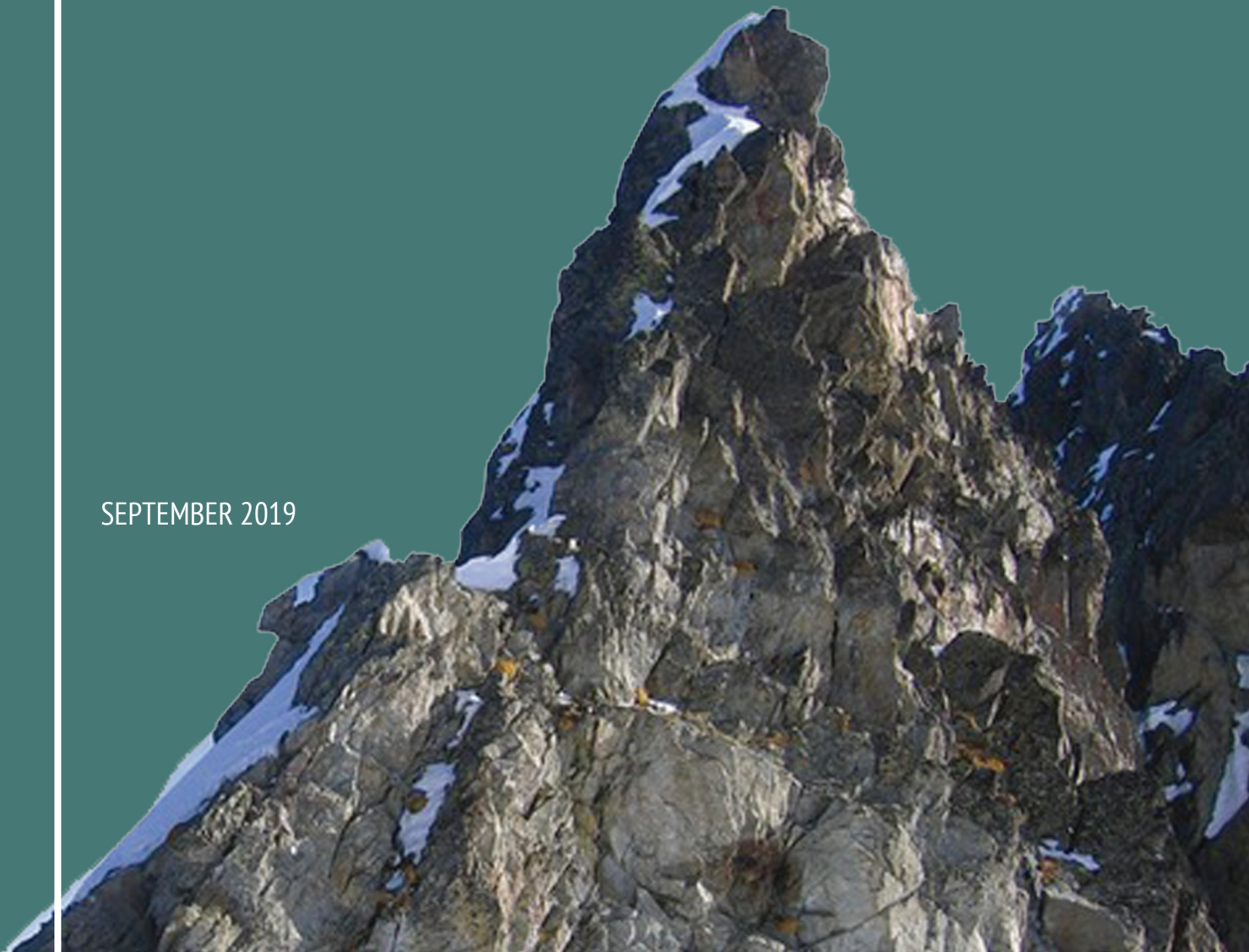


20 DELIVERABLES OF EASTERN PARTNERSHIP FOR 2020

UKRAINE'S PROGRESS WITH THE JUDICIARY

SEPTEMBER 2019



The document has been developed by the Center of Policy and Legal Reform and edited by Supreme Court judge Albert Yezerov and defense attorney, PhD in Law and UPLAN Network expert Dmytro Terletskyi.



INTERNATIONAL
RENAISSANCE
FOUNDATION



UKRAINIAN NATIONAL PLATFORM OF THE
EASTERN PARTNERSHIP
Civil Society Forum



Centre of Policy and
Legal Reform

This analytical report was produced by Centre of Policy and Legal Reform with the support of the European Union and the International Renaissance Foundation within the framework of the Civic Synergy Project and under the auspices of the Ukrainian National Platform of the Eastern Partnership Civil Society Forum. Its contents are the sole responsibility of Centre of Policy and Legal Reform and do not necessarily reflect the views of the European Union and the International Renaissance Foundation.

DE | DEMOCRACY
JU | JUSTICE
RE | REFORMS

PRIORITY II: STRENGTHENING INSTITUTIONS AND GOOD GOVERNANCE

10. IMPLEMENTATION OF KEY JUDICIAL REFORMS

RECRUITMENT

Target by 2020

Track record of transparent and merit-based recruitment and promotion system disaggregated by gender in place in at least three Partner Countries.

Track record of judges' and prosecutors' performance, as per their career development, in place in at least three Partner Countries.

Ukraine. Current situation with the target (early September 2019)

Since 2014, the legislation has stipulated competitive recruitment procedures for prosecutors (except for the Prosecutor General of Ukraine), and since 2016 – for positions of judges in all courts.

► Judges

A new model of judge recruitment was tested when the new Supreme Court was formed and during the competitive recruitment for local courts. After the first stage of recruitment for local courts, initial training of future judges was organized, which was followed by a qualification exam. The recruitment for the High Anti-Corruption Court and for the position of the SAPO chief took place under a different, more transparent procedure.

It was a positive practice to invite scholars and defense attorneys, as opposed to only judges, to apply for positions in high-level courts. The composition of the new Supreme Court is balanced in terms of gender. There is information on the number of women and men in the judiciary (there are more women overall, but more men among chief judges of courts).

Copies of judges' and candidates' dossiers are published on the website of the High Qualification Commission of Judges and are freely accessible, but the scope of information is less than that defined by the law. As for prosecutors, there is no such requirement.

Real independence of recruitment bodies (the High Qualification Commission of Judges and the High Council of Justice) is questionable, regardless of the formally transparent election and appointment procedure of members of these bodies.

Ukrainian experts criticize these agencies' activity due to manipulative and non-transparent decisions on recruitment results, excessive discretion, lack of rationale behind most decisions, promotion of people who do not comply with integrity standards.

At the same time, the results of recruitment for the High Anti-Corruption Court were well-received, because international experts' involvement in the process helped to eliminate candidates with questionable reputations from the competition.

The new President of Ukraine Volodymyr Zelenskyy initiated a reboot of the High Qualification Commission of Judges with engagement of the High Council of Justice and international experts.

► Prosecutors

During 2017–2019, recruitment of candidates for positions of local prosecutors was held on a competitive basis for 300 applicants, objective qualification assessment was held, and special verification of candidates was organized, all of this for the first time. Having passed the qualification exam, 248 candidates underwent special training in the National Prosecution Academy and received certificates of completion.

At the same time, a merit-based promotion system for prosecutors has not been organized. Winners of competitive selection for positions in regional prosecutor's offices and the Prosecutor General's Office of Ukraine are selected in an opaque way and according to an unclear methodology. In many cases, competitive recruitment for positions in higher-ranking prosecutor's offices was not announced despite it being directly required by the law. Instead, new staff members were recruited through transfer of other officials of the respective regional prosecutor's office or the Prosecutor General's Office of Ukraine.

There is no open dossier register of prosecutors or candidates for positions of prosecutors.

Ukraine. Attainability of Eastern Partnership goals by 2020

The goals are partially attainable. Progressive legislation has been adopted, the necessary infrastructure is in place (the High Qualification Commission of Judges, the Qualification and Disciplinary Commission of Prosecutors, the High Council of Justice, the National School of Judges, the National Prosecution Academy, etc.). Formally, the goals have been achieved. However, the implementation of the new legislation has not been adequate, which has resulted in the underwhelming performance of the reform. The society expects a reboot of the High Qualification Commission of Judges and the High Council of Justice, since their current compositions do not include any change-makers (instead, they are mostly composed of judges and proteges of political forces).

Ukraine. Recommendations

To truly implement the 2020 deliverables, it is necessary to reboot the judicial governance agencies (the High Council of Justice and the High Qualification Commission of Judges) changing the manner of their formation to one which would ensure integrity check of its members and inclusion of change-makers in these agencies (with civil society having the greatest ability to nominate them). At the same time, it is necessary to prevent potential attempts of the new government to make these agencies dependent on it. Recruitment for these agencies should be entirely transparent.

It is also necessary to establish clear rules and a specific procedure for competitive transfer of prosecutors. It is advisable to create an open dossier register of prosecutors and candidates for the positions of prosecutors and to introduce objective regular performance review. Competitive procedures should also be applied when the Prosecutor General of Ukraine is selected, which would eliminate appointment based on political affiliation alone.

DISCIPLINE

Target by 2020

Track record of reported disciplinary cases, proceedings initiated and convictions in line with EU standards.

Ukraine. Current situation with the target (early September 2019)

The disciplinary agencies for judges and prosecutors are the disciplinary chambers of the High Council of Justice and the Qualification and Disciplinary Commission of Prosecutors. The appeal instances are the High Council of Justice and the Supreme Court.

Before the 2016 changes, the High Qualification Commission of Judges, too, had disciplinary authority over judges, and disciplinary sanctions against prosecutors were imposed by individual decisions made by chief prosecutors of the respective office.

The High Council of Justice maintains the register of information on judges brought to disciplinary liability, which contains decisions of disciplinary chambers and the High Council of Justice (http://www.vru.gov.ua/add_text/204). There is also information on judges dismissed from office for a significant disciplinary violation (http://www.vru.gov.ua/add_text/263). In both cases, the information is sorted by year. There is also a separate section containing the acts of the High Council of Justice and its subordinate agencies with more advanced search options (http://www.vru.gov.ua/act_list). At the same time, the High Council of Justice does not publish the decisions of disciplinary chamber members on rejection of disciplinary complaints.

The Qualification and Disciplinary Commission of Prosecutors also maintains a register of information on prosecutors brought to disciplinary liability (<https://www.kdkp.gov.ua/punishment>) with search by years, type of sanction and context. It also publishes all of its decisions which can only be found by date of approval (<https://www.kdkp.gov.ua/decision>).

In spite of these achievements, the practice of applying disciplinary procedures, including new ones, has not yet conclusively proven that judges and prosecutors are now accountable. There is a deep-rooted stereotype in the society that the judicial system consists of mutual cover-up, which has not been overcome yet. On the other hand, there have been examples of disciplinary tools being used by others, including members of disciplinary agencies, to influence judges.

Ukraine. Attainability of Eastern Partnership goals by 2020

Formally, the goals have been attained.

Ukraine. Recommendations

The search system for decisions in disciplinary proceedings should be improved. Information on appeals and disciplinary body members' decisions to reject complaints should be included in the respective registers. If such decisions have adequate reasoning, this can help to predict the outcome when somebody intends to lodge a disciplinary complaint, which would reduce the number of complaints that tend to be rejected.

As for the more general problems of disciplinary liability, there is a risk that the new system is not adept, despite its formal compliance with EU standards, to handle a significant number of complaints. Another risk is that the mechanism of complaint review by representatives of the compromised judicial system (in the situation when the majority of the disciplinary body consists of judges elected by judges) will cement cronyism. That is why it is advisable to introduce transitional models which would allow reputable representatives of civil society to serve as members of disciplinary bodies alongside judges with impeccable reputations.

New members of the judiciary and the prosecution recruited under fair procedures and awareness campaigns designed to support their reputation may serve as factors reducing the number of disciplinary complaints.

Target by 2020

Improved access to justice in at least three countries, in particular for women, children and the most vulnerable groups, and whenever civil rights or obligations are at issue or criminal charges are to be determined. This would be assessed through the amount of legal aid spent per capita, public access to free legal aid, information mechanisms and special arrangements for vulnerable persons.

Ukraine. Current situation with the target (early September 2019)

In recent years, a broad system of free legal aid has been created and functioning in Ukraine, which gradually extends through amendments to the Law “On Free Legal Aid” (both in terms of the individuals it serves and the area of its application).

Despite the significant increase in the planned funding of free legal aid from the National Budget of Ukraine, the situation remains rather problematic. For instance, UAH 127 million was allocated for these purposes in fiscal year 2018, but as of the beginning of June, defense attorneys’ services had already reached UAH 99 million. In early July, the amount owed to defense attorneys exceeded UAH 60 million. It should be noted that similar cases happening during previous fiscal years show that there is a systemic problem, which cannot be explained away by the state of Ukraine’s social and economic development.

In this context, the fact that the expenditures for services and covering the expenses of defense attorneys who provide secondary free legal aid grew by 264% in comparison with 2017-2018 is a sufficient reason for cautious optimism.

The dramatic increase in court fees remains an obstacle preventing vulnerable social groups from going to court. In isolated cases, courts may reduce the burden of fee, but that happens quite rarely.

Ukraine. Attainability of Eastern Partnership goals by 2020

The goals are realistic and mostly attainable.

Ukraine. Recommendations

Court fees should be reviewed so that they would not be a significant barrier to court access for vulnerable groups.

TRAINING

Target by 2020

Comprehensive and effective training of the judiciary on judicial competences and ethics in at least three Partner Countries, demonstrated inter alia by an increase in budget allocated to initial and in-service training.

Independent training institutions delivering initial and continuous training to the judiciary, in line with the EU standards and best practices.

Ukraine. Current situation with the target (early September 2019)

In Ukraine, there is the National School of Judges, which provides initial and in-service training of judges. The National School of Judges of Ukraine is a beneficiary of international technical assistance projects. There is a similar institution for prosecutors – the National Prosecution Academy.

Ukraine. Attainability of Eastern Partnership goals by 2020

The attainability can be assessed depending on what is meant by “independent training institutions.” If the idea involves institutions functioning within the judiciary or the prosecution, they do exist. If what is meant is independent institutions which would be engaged in initial and in-service training on a competitive basis, their implementation in Ukraine looks questionable.

Ukraine. Recommendations

It is advisable to research the possibilities for the National School of Judges and the National Prosecution Academy joining forces where it is appropriate to ensure universal training content, especially in the sphere of criminal justice.

EFFECTIVENESS

Target by 2020

Substantial reduction of the backlog of civil and criminal cases and case disposition time across Partner Countries.

Improved enforcement of judgements in civil and administrative cases as well as court decisions’ execution according to enforcement timeframe and recovery rates indicators in at least three Partner Countries.

Ukraine. Current situation with the target (early September 2019)

In many cases, the reason behind the backlog is numerous vacant positions in courts.

Progressive changes to procedural codes, designed to speed up case review, have been passed (the number of instances has been reduced from four to three, writs have been implemented not only in civil but also in economic cases, the institute of typical cases in administrative justice and regulation of judicial disputes with the participation of a judge have been introduced, punishment for abuse of procedural rules has been implemented, etc.).

New procedural codes stipulate electronic justice, Unfortunately, the electronic justice system is yet to be implemented (it has been tested rather successfully, but implementation nationwide has not been possible due to judges not being prepared and possible violations with equipment procurement). The perspectives of its implementation are currently unclear. Automatic distribution of cases in courts was introduced back in 2010, but many violations have been recorded since.

As for judicial statistics, the record is maintained both in paper and digital form and published on the website of the judiciary. At the same time, there is no connection between these statistics and the ones of investigative and prosecution agencies, as well as with the statistics of fulfillment of judicial decisions. So far, there are no automatic tools that would enable tracking of the total duration of case review in all instances.

To improve the situation with implementation of judicial decisions, the institute of private legal executives has been introduced alongside the public executive service. There are much fewer private executives than public ones, though, and they are not engaged in enforcement of certain types of decisions. There is also information about pressure on private executives from the Ministry of Justice through disciplinary liability mechanisms.

Ukraine. Attainability of Eastern Partnership goals by 2020

The goals are not quite attainable by 2020, even though important steps have been made to reduce the scope of the problem.

Ukraine. Recommendations

It is advisable to implement electronic justice as soon as possible, to eliminate red tape and further simplify certain procedures (as long as it does not harm the parties' rights). Automatic statistical tools should be introduced, including those which would enable tracking of the general duration of cases.

The institute of private legal executives should be supported and developed.

FOR NOTES

FOR NOTES
