



Commercial Court in Mykolaiv Region

22 Admiralska str., Mykolaiv, 54001 ☎ (0512) 37-01-71 ✉ inbox@mk.arbitr.gov.ua

№ _____

**Secretariat of the Venice Commission
Council of Europe
67075 Strasbourg Cedex France**

E-mail: venice@coe.int

**The Venice Commission of the Council of
Europe
To the Head of the External Relations
Department
Ms. Tatiana Mychelova**

E-mail: tatiana.mychelova@coe.int

On 14 August 2020, the website of the Venice Commission of the Council of Europe reported that the Chairman of the Verkhovna Rada of Ukraine requested an opinion of the Venice Commission on Amendments to the draft Law No. 3711 ‘On the Judiciary and the Status of Judges’ and certain laws on the activities of the Supreme Court and Judicial Authorities.

Paragraph 1 Section 3 Article 135 of the draft Law stipulates the setting of the salary of a local court judge in the amount of 30 subsistence minimums, which means its reduction by 41% of the salary determined and being effective for decades until the adoption of the Law of Ukraine No. 1402 ‘On the Judiciary and the Status of Judges’.

The same Law of Ukraine № 1402 (Paragraph 3 Section 3 Article 135), as well as the draft Law No. 3711, established the salary of judges of the Supreme Court in the amount of 75 subsistence minimums with the addition of a regional coefficient amounting to 1.25.

Law of Ukraine No. 193 (draft Law No. 1008) amended Law No. 1402, according to which the salary for a judge of the Supreme Court was reduced from 75 to 55 subsistence minimums.

The European Commission for Democracy through Law (Venice Commission) in par. 75-78 of the Opinion No. 969/2019 (draft Law No. 1008) dated 9 December 2019 on Amendments to the Legal Framework governing the Supreme Court and Judicial Governance Bodies stressed that a 27 percent reduction in salary will easily infringe judicial independence of this group of judges.

The Constitutional Court of Ukraine in Decree No. 4-p/2020 (Case No. 1-304/2019(7155/19) referring in particular to paragraphs 75-79 of the Opinion, noted that “the reduction of the judges’ salary by the Parliament reduces the amount of judges’ remuneration, which, in turn, is an encroachment on the guarantee of the judge’s independence in the form of material support and a prerequisite for influencing both the judge and the judiciary as a whole.”

Thus, the reduction of the salary by only 27%, even for a small group of judges, is already a fact of violation of the Constitution of Ukraine and the independence of the judiciary. As for the reduction of the salary by 41% for judges of local courts, who make up the absolute majority of the judiciary, this, as we see, is a more gross and serious violation of the Constitution of Ukraine and the principle of the judicial independence.

Taking into account the principle of equality of judges, regardless of the instance in which the judge works, I ask you to provide an assessment of Paragraph 1 Section 3 Article 35 of the draft Law and Law No.1402 in the same way as it was given by the Venice Commission regarding Paragraph 3 Section 3 Article 135 of Law No. 1402 in Opinion No. 969/2019.

The grounds for assessing and providing an opinion on Paragraph 1 Section 3 Article 135 of the Law of Ukraine ‘On the Judiciary and the Status of Judges’ should be the following facts and circumstances.

Paragraph 1 Section 3 Article 135 of the Law of Ukraine ‘On the Judiciary and the Status of Judges’ stipulates:

“3. The basic salary of a judge amounts to:

1) for the judges of the local courts: 30 subsistence minimums for able-bodied persons, which is set for the 1st January of the calendar year;”

The first Law of Ukraine, which determined the amount of judges’ remuneration, was the Law of Ukraine ‘On the Status of Judges’ No. 2862-XII of 15.12.1992.

Pursuant to Section 2 Article 44 of Law No. 2862-XII the judges’ salaries were set as a percentage of the salary of the President of the Supreme Court of Ukraine and could not be less than 50 percent of his/her salary. Section 2 Article 44 of the Law stipulates:

“2. The amount of the judges’ salaries shall be set as a percentage of the salary of the President of the Supreme Court of Ukraine and may not be less than 50 percent of his/her salary. The salary of a judge may not be less than 80 percent of the salary of the President of the Court in which the judge works.”

Thus, Ukraine as a democratic state created a third branch of government and guaranteed each first-instance judge that his/her level of independence in terms of judicial remuneration - salary - could not be less than 50 percent of the salary of the President of the Supreme Court, **regardless of the salary to be set for the President of the Supreme Court.**

In 2007, the Verkhovna Rada of Ukraine adopted the Law of Ukraine 'On the State Budget of Ukraine for 2008 and on Amendments to Certain Legislative Acts of Ukraine' No. 107-VI. Subparagraph 2a Paragraph 61 Chapter II of this Law repealed Section 2 Article 44 of the Law of Ukraine 'On the Status of Judges', in particular regard to: 'as a percentage of the salary of the President of the Supreme Court of Ukraine and may not be less than 50 percent of his/her salary'.

The subject of the constitutional right – the Supreme Court of Ukraine – appealed to the Constitutional Court of Ukraine to verify the constitutionality (constitutionality test) of the mentioned Subparagraph, arguing that the abolition of these provisions would lead to disparities in the material support of the judges of different levels.

The Constitutional Court of Ukraine agreed with the arguments of the Supreme Court of Ukraine and in its Decree of 22 May 2008 N 10- пп/2008 stated that the provision of Subparagraph 2a Paragraph 61 Chapter II of the Law did not comply with Article 22(2), (3) and Article 126(1) of the Constitution of Ukraine.

Thus, the Constitutional Court of Ukraine, conducting a comparative legal analysis of compliance of this provision with the Constitution of Ukraine, has concluded that the reduction of the salary of a first-instance judge to less than 50 percent of the salary of the President of the Supreme Court is a violation of Articles 22 and 126 of the Constitution of Ukraine.

Further development of the legislation regarding the judges' remuneration confirmed the constitutional guarantee of the first-instance judges regarding the right to receive a salary in the amount of not less than 50 percent of the salary of the President of the Supreme Court.

The Law of Ukraine 'On the Judiciary and the Status of Judges' No. 2453-VI of 2010 correlated the ratio between the salaries and, accordingly, the remuneration of the judges of three instances to the ratio of 1 to 1.1 and 1.3 (Article 129 of the Law).

According to this Law, the President of the Court was paid another 10 percent of the salary of a judge of the relevant court.

Thus, the salary of the President of the Supreme Court amounted to **1.43** of the salary of a first-instance judge. Thus, the guarantees of the first-instance judges' independence established by previous laws and confirmed by the Constitutional Court were observed.

The same ratio was enshrined in the Law of Ukraine 'On Ensuring the Right to a Fair Trial' of 12.02.2015 No. 192-VIII (Article 133).

The analysis of the above facts allows us to conclude that after many years of existence of the established legislation (the principle of legal certainty), which met the requirements of the Constitution of Ukraine and was confirmed by the Constitutional Court of Ukraine, **every first-instance judge, wherever he worked - in a big city or small district center - was entitled to expect that his/her salary would not be reduced by more than 50 percent of the salary of the President of the Supreme Court, regardless of the amount of salary to be set for the President of the Supreme Court.**

However, in 2016, in violation of the requirements of Articles 22 and 126 of the Constitution of Ukraine, without any justification, the Law of Ukraine 'On the Judiciary and the Status of Judges' No. 1402 restricted the guarantees of the independence to the first-instance judges and **reduced** the minimum salary in the manner described below

The salary of the President of the Supreme Court was set at 103.4 subsistence minimums (salary 75 + 1.25 x so-called 'regional coefficient' + 10 % surcharge for administrative position), the salary of a local court judge was set at 30 subsistence minimums.

Therefore, if in the Law of Ukraine 'On the Judiciary and the Status of Judges' of 2010 and in the Law of Ukraine 'On Ensuring the Right to a Fair Trial' of 12.02.2015 No. 192-VIII (Article 133) the salary of a first-instance judge amounted to **70%** (1 to 1.43), in relation to the salary of the President of the Supreme Court, then Article 135 of Law No. 1402 **reduced** this percentage, **instead of the minimum allowable 50% (i.e. 51.7 subsistence minimums (hereinafter SM)), to 29.01% (30 SM and 103.4 SM).**

Thus, the salary of a local court judge has been **reduced** by almost **41%** (from 70% to 29.01%).

I would also like to draw your attention to the fact that, as indicated in the Explanatory Note to the draft Law No. 1402, the judges' salaries are increasing at the same time as their responsibilities increase.

However, if the level of responsibility for all judges was increased equally, then the increase in remuneration was introduced unequally, especially for the first-instance judges: the remuneration of the judges of the Supreme Court was increased from 13 to 94 (immediately), of the judges of appellate courts – from 11 to 50 (within three years), of the judges of local courts – from 10 to 30 (within 3 years).

At the same time, if we take into account the nominal 'increase', the salary of 15 minimum wages, which was entitled to a first-instance judge under the Law of 2010 (confirmed by the Decision of the CCU of 4 December 2018 No. 11- p/2018), is currently more than 30 subsistence minimums by UAH 10,035 (UAH 70,845 (UAH 4,723 x 15) – UAH 60 810 (UAH 2,027 x 30)).

The European Commission For Democracy through Law (the Venice Commission), establishing in Opinion No. 969/2019 of 9 December 2019 on Amendments to the Legal Framework the reduction of the salary of the judges of the Supreme Court by 27%, has indicated:

*«77. A second factor for considering a reduction of a judges' salary is whether or not such a cut is part of a general reform or if it is **directed against judges in general or against specific judges**. The remuneration of judges at an adequate level is closely linked to judges' safety of tenure and irremovability, which are both important for protecting judicial independence. However, a reduction of judges' salaries is not in itself incompatible with judicial independence. Paragraph 57 of the explanatory memorandum to CM Recommendation (2010)12 states: "Public policies aiming at the general reduction of civil servants' remuneration are not in contradiction with the requirement to avoid reducing specifically judges'*

remuneration". A reduction of the remuneration for a specific group of judges only, will easily infringe judicial independence. In this case, the reduction is specifically directed at the judges of the Supreme Court only.

The Constitutional Court of Ukraine in Decree No. 4-p/2020 (Case No. 1-304/2019(7155/19) referring in particular to paragraphs 75-79 of the Opinion of the Venice Commission, noted that *"the reduction of the judges' salary by the Parliament reduces the amount of judges' remuneration, which, in turn, is an encroachment on the guarantee of the judge's independence in the form of material support and a prerequisite for influencing both the judge and the judiciary as a whole."*

In this case, it is obvious that the reduction of the salary to 30 subsistence minimums stipulated by Paragraph 1) Section 3 Article 135 of Law No. 1402 *is specifically directed at the first-instance only* and is an encroachment on the independence of not only a small group of judges but the vast majority of representatives of the judiciary consisting of the first-instance judges.

The Council of Judges of Ukraine in the Open Appeal (par. 11) to the People's Deputies of Ukraine regarding to the draft Law 'On Amendments to certain laws on the activities of the Judicial Authorities' No. 1008 of 29 August 2019 also *"considers unfair the existing a gap between the remuneration of the first-instance and appellate judges" and believes that "the already achieved level of judicial remuneration cannot be reduced"*.

Thus, there are necessary and sufficient grounds for restoring the guarantees of the independence of the first-instance judges by bringing their salaries to the level already reached of 70% of the salary of the President of the Supreme Court (72.38 subsistence minimums), which was in effect for almost 30 years.

However, given that the salary of the appellate judges amounts to 50 subsistence minimums, the basic salary of a first-instance judge can be set at 45 subsistence minimums, which will comply with the principles of reasonableness and proportionality, although this amount will still be less than 51.7 subsistence minimums, i.e. 50% (of 103.4 SM) of the salary of the President of the Supreme Court.

Sincerely,

**Vice President of the Commercial Court
in Mykolaiv Region**

O.V. Tkachenko