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**Only in English**

**Written submission of the Ukrainian Helsinki Human Rights Union for the OSCE Human Dimension Implementation Meeting**

***Working session 13: Rule of law***

# Specific aspects of the right to fair trial in Ukraine[1]

The right to a fair trial is not explicitly secured either in the Ukrainian Constitution or in legislation, with only individual aspects protected by law.

During 2005-2006 the President of Ukraine and other high-ranking government officials referred repeatedly to problems in the functioning of the judiciary.

According to sociological surveys, an absolute majority of the public believe that the most important issue in the country is to ensure justice and independent court proceedings. Those who had approached the courts deemed the following to be the court's main problems: excessively long court proceedings (10.4%); lack of responsibility of judges (9.7%); insufficient level of information to individuals (9.5%), expensive lawyers' fees (9.3%). Those who had not had dealings with the courts also believed the main problems to be excessively long court proceedings (16.1%); overly high official expenses (12.9%); the need to pay bribes (12.8%); unfair court rulings (12%); inefficient enforcement of court rulings (11.5%). Thus, inefficiency of the courts' work is deemed an even greater problem than their level of corruption.

Given the long-overdue need for reform of the justice system and the public demand for such from the authorities, in December 2005 the National Commission for the Strengthening of Democracy and the Rule of Law which is a permanent advisory-consultative body under the auspices of the President began drawing up a Strategy Plan for Judicial Reform. On 10 May 2006 the President approved a Strategy Plan for improving the justice system to ensure fair trial in Ukraine in accordance with European standards, prepared by the National Commission.

Fair court proceedings and adequate protection of human rights and fundamental freedoms are possible only where there is impeccable procedural legislation. However, legal regulation of criminal proceedings has not been reformed since Soviet times. The Criminal Procedure Code of Ukraine from 1960, despite some updating, does not meet European standards with regard to human rights protection. The economic courts examine disputes applying rules which are not in line with contemporary trends in civil legal proceedings. Despite the adoption of the Code of Administrative Justice of Ukraine, a law has yet to be passed on administrative procedure which would define the standard relations between an individual and the authorities (public officials) adherence to which should be verified by the administrative courts. Cases involving administrative offences are generally examined with infringements of a number of standards of the right to a fair trial, numerous restrictions on the right to defence and the lack of possibility of appealing a ruling in the appellate courts, etc.

In the case of Gurepka v. Ukraine the European Court of Human Rights stated, in particular, that certain administrative offences due to the harshness of the penalties could effectively be classified as criminal. *"in the light of its settled case-law, the Court has no doubt that, by virtue of the severity of*

[1] This written submission is part of the Anual Human Rights Report for 2006, prepared by UHHRU. All report available in English on http://www.helsinki.org.ua/en/index.php?r=27 or http://www.khpg.org/en/index.php?r=a2b4c12.

*the sanction, the present case was criminal in nature and the purported administrative offence was in fact of a criminal character attracting the full guarantees of Article 6 of the Convention and, consequently, those of Article 2 of Protocol No. 7"*. In this case the European Court also examined the review procedure set out in the Code of Administrative Offences. This procedure, for example, could only be initiated by the prosecutor or on the decision of the president of a higher court. *Given that this procedure was not directly accessible to a party to the proceedings and did not depend on his or her motion and arguments, the Court considers that it was not a sufficiently effective remedy for Convention purposes*. It therefore found that there had been a violation of Article 2 of Protocol No. 7 to the Convention.

An extremely positive move taken by the authorities in 2006 was the implementation of an open register of court rulings. The law adopted "On access to court rulings" was drawn up by the Centre for Political and Legal Reform and tabled by National Deputy V. Onopenko. The Law envisages the creation of a Single State Register of Court Rulings as a database on open access via the Internet. Only information making it possible to identify individual parties to the proceedings, or information examined in a closed court hearing, will be removed. The mechanisms are also defined on access for individuals who did not take part in the case to the full text of the ruling and the material of the case where the court ruling directly concerns their interests. The Register began functioning on 1 June 2006 and is gradually being built up, although admittedly it was held up during the year due to a lack of funding. Another shortcoming in the database itself is the effective lack of contextual searches among available rulings this restricting their practical application. The user effectively sees only the name of the court, the date of the ruling and the case number. This means that cases cannot be found according to subject.

## Problems of the court system

The irrational structure of the system of court institutions and the sharing out between them of jurisdiction quite often leads to disputes being examined by different courts at one level and an unjust restriction of the right to appeal court rulings in specific categories of cases (for example, administrative offences). It is precisely the problem of jurisdiction that experts have identified as one of the main causes of corporate raiding. On the other hand such wide scope for manoeuvre in determining jurisdiction has always been the object of certain manipulation. An irrational court system also leads to disproportionate judges' workloads in different courts and levels.

The number of cases and files on them reaching the courts increases each year. In January – June 2006, the average number of cases received by a single judge of a local general court had increased in comparison with the same period of the previous year and came to 127 (against 116.5 in the first half of 2005). At the same time, there was no significant increase in the overall number of judges of local general courts, with only three more than in 2005. Under such conditions a judge cannot carry out his or her duties without violating procedural time periods stipulated for examining cases.

As a result of the failings of the court system and of procedural legislation, the Supreme Court is inundated with cases which go for years without being examined. There are almost 60 thousands awaiting consideration in the Supreme Court and this figure rises every year. This in turn gives rise to certain manipulations. The Supreme Court does not look at cases in the order that they reached the court, but according to considerations known only to them. For example, some cases are examined within a month or two, while others lie there for several years, even though they arrived a few years earlier. The Supreme Court thus examines only the cases it needs which is unacceptable.

On 22 February 2007 parliament adopted amendments to the Law "On the judiciary" these providing temporary measures to address the above-mentioned problem. Temporary regulations were established for cassation review in civil cases. For example, civil cassation appeals against court rulings and cassation appeals not considered by the Supreme Court by 1 January 2007, aside from those where a preliminary review had been carried out, are to be submitted for examination and

judgment to boards of judges of appellate courts of the Autonomous Republic of the Crimea, all regions and the cities of Kyiv and Sevastopol. The composition of such panels of judges shall be determined at board meetings of the appellate courts, this not running counter to their authority with regard to the logistical work of the court. Civil cases based on cassation appeals against court rulings and cassation appeals submitted to the Supreme Court after 1 January 2007 shall be dealt with by the Supreme Court Civil Chamber.

It would seem that such a measure undermines the very concept of a cassation level, and there can be no question of the Supreme Court fulfilling its function of ensuring unified case-law. It is, furthermore, easily foreseeable that by the end of 2007 the Supreme Court will have at least 5 thousand cassation appeals still awaiting review since the fundamental problem still remains.

The creation of an integrated system of administrative courts responsible for defending the rights and freedoms of the individual in their relations with the authorities and their representatives has yet to be completed. These courts should become an effective means for affirming the rule of law and defending rights and liberties against encroachments by the authorities. However their formation is being actively stalled by the Supreme Court which has in general begun speaking out in favour of abolishing them as a separate system of courts.

On 18 December 2006 the Centre for Political and Legal Reform, UHHRU, the Association of Ukrainian Lawyers, the Institute for Civic Society, the Laboratory for Legislative Initiatives and the Civic Network "Opora" issued a public statement against stalling on creating administrative courts. The open appeal points out that at present only the High Administrative Court is in place, and working with only two thirds of the judges needed. District and appellate administrative courts have been at the organizational phase for two years and cases are not being reviewed. There are no premises available, or if there are, not enough judges have been appointed to enable them to commence work.

## Judges' independence

One of the key issues for fair court proceedings is the guarantee of judges' independence. This involves, on the one hand, the general guaranties of judicial independence and on the other guarantees with regard to each individual judge. The main criterion for impartiality is financial and administrative independence.

The selection procedure for judges is not transparent which can encourage abuse and dependence of judges on public officials involved in the procedure.

As of 1 January 2007 the number of vacancies for judges in local general courts (except administrative courts) came to 971, of which 452 vacancies (46.45%) were for local general courts; 399 or 41 % in appellate general courts; 47, or 4.84% in local economic courts and 73, or 7.51% in appellate economic courts. It is, however, impossible to find advertisements anyway for these vacancies, nor procedure by which one could apply for a position.

The State Judicial Administration of Ukraine (SJAU) drew up Regulations on the procedure for creating a reserve of candidates for judge vacancies, which was agreed through the decision of the Council of Judges of Ukraine on 7 July 2006 No. 32, approved by SJAU Order No. 79 from 4 August 2006 and registered with the Ministry of Justice on 21 August as № 991/12865. However, full reform of this procedure will only become possible after amendments are passed to the Law on the Status of Judges.

There is no clear legally established system for determining judges' remuneration. An inadequate level of material provisions for judges has made such positions unattractive for highly-qualified lawyers. At the same time, the favourable conditions the posts offer for receiving certain benefits

which are questionable from the point of view of their legality, are leading to their becoming attractive to people whose aims have nothing in common with the impartial administering of justice.

The inadequate material and social provisions for judges, especially those of local courts, places the independence of judges in jeopardy. This is exacerbated by a lack of appropriate financing of the courts which forces the latter to seek other options for meeting their requirements with regard to a good level in administering justice.

Judges in administrative posts carry out administrative and economic functions not intended for judges. The chairpersons of courts distribute cases among judges, form panels of judges for review of cases, have influence over judges' career issues and social provisions (holidays, bonuses, etc). In view of this, it would be sensible after the elimination of the State Judicial Administration's dependence on the executive branch of power, to make court personnel subordinate to that body. The chairpersons of courts in turn, due to the need to get additional funds for the court, depend on those who allocate these funds: local and central authorities, as well as commercial enterprises.

It is not uncommon for judges in handing down judgment to experience pressure both from the authorities, and from the interested parties. Flawed procedure for instituting criminal proceedings against judges allows this to be used by the accused party in order to exert influence.

An ineffective system of judge accountability in some cases allows them to avoid professional liability, while in others creates favourable conditions for exerting pressure on those judges who demonstrate independence and integrity in their work.

On the other hand, only two cases are known where parliament gave its consent to arrest judges:

- Oleh Pampura, judge of the Arbuzynsk District Court in the Mykolaiv region (Verkhovna Rada Resolution from 22.02.2007);

- Zinovy Koval, judge of the Dolynsk District Court in the Ivano-Frankivsk regions (VR Resolution from 13.07.2000).

During the year the President only dismissed three judges in connection with criminal charges.

Administrative pressure is much more often brought to bear on judges via disciplinary proceedings, as well as proceedings over violating their judge's oath. The latter generally provides wide scope for manipulating the wide-ranging content and inexact text of the oath.

From 2003-2005 qualifying commissions of general court judges completed disciplinary proceedings and imposed disciplinary penalties against 250 judges (including 187 reprimands, 22 reductions in their qualification class and 41 recommendations to the High Council of Justice to dismiss the judges. The economic courts' qualifying commission received over 1 thousand appeals on the basis of which 45 disciplinary proceedings were launched and 4 judges received reprimands. The High Qualifying Commission launched 25 disciplinary proceedings against judges of appellate courts.

American Bar Association analysts believe that one of the most serious problems for the judicial system comes from external influences on the judgments handed down by judges. This can take many forms. "The perception of judicial corruption is widespread, and while judges are reluctant to discuss bribery or improper influence from court chairmen and upper-level courts, they are rather straightforward about the interference coming from other branches of government, as well as from prosecutors, advocates, and the media".

Various forms of influence are applied, ranging from letters, telephone calls and personal visits to the judges and chairpersons of the courts, to open criticism of the court rulings in specific cases if they

have a different view as to a just outcome. Such non-procedural relations between different parties and the judge are not prohibited by law and are a common occurrence.

## Financing of the judiciary

It is established practice that the State Budget designates funding for the judiciary which is considerably less than what is needed to provide for the real needs of the courts, especially those needs directly related to the administering of justice. Despite the fact that the role and functions of the courts, and their workload, have radically increased, the methods for determining annual expenditure on them have not changed in any significant way over the last many years.

Furthermore, at the present time, the principle of division of power is being violated in the case of the judiciary. Courts administer justice and must be independent of any other branch of power or particular individuals, yet at the same time they are dependent on the executive with respect to financial, material, technological and social issues. This is confirmed by the status of the State Judicial Administration which is a central executive body.

State duty which is paid for applications to the court is not directly channelled to meet the needs of the courts. In general, this duty is too low.

As of 1 January 2007 the court network in Ukraine was made up of 780 courts, of which 665 were local general jurisdiction courts; 13 – military garrison courts; 27 - appellate courts of general jurisdiction; 2 - military appellate courts; 11 – appellate economic courts; 27 – local economic courts; 7 – appellate administrative courts and 27 district administrative courts.

Throughout Ukraine there are 7,672 judges. Of these, 4,622 are in local general jurisdiction courts; 54 in military garrison courts; 1,713 in appellate courts of general jurisdiction; 23 in military appellate courts; 341 in appellate economic courts; 638 in local economic courts;66 in appellate administrative courts and 215 in district administrative courts

Spending from the State Budget on the various types of courts in 2006 can be broken down as follows:

- local economic courts – 120.4 million UAH, of which 66.5 million UAH went on salaries;
- appellate courts – 312.3 million UAH and 142.9 million UAH;
- local courts – 709.9 million UAH and 374.4 million UAH;
- military courts – 24.6 million UAH and14.3 million UAH;
- appellate economic courts – 73.3 million UAH and 37.9 million UAH;
- appellate administrative courts – 8.1 million UAH and 1,3 million UAH;
- local administrative courts – 8.9 million UAH and 2.1 million UAH.

It should, however, be noted that according to figures from the SJAU the level of spending on the direct administration of justice in the 2006 Budget came to 59.7% of actual needs which influenced the organization of the court's work accordingly.

Considerable problems are presented by the incomplete funding of the courts. Even the small amounts allowed for by the Budget do not actually reach the courts. Under-funding of court bodies on 1 January 2007 constituted 87.4 million UAH. The programme for judges' accommodation, for example, failed to receive more than 30% of the planned amount.

On the other hand, a considerable part of funding for the judiciary is not used as intended or with other infringements of legislation. Audits carried out in from 2004-2006 found financial irregularities amounting to 13766.0 thousand UAH including 1432.1 thousand UAH on unlawful expenditure; 954.4 thousand UAH on non-Budget loan indebtedness; 6.8 thousand UAH on untargeted expenses,

with other infringements of financial discipline to the sum of 11,372.7 thousand UAH. We are unaware of any criminal proceedings over these violations.

An important development in 2006 was the change in the system for calculating judges' salaries pursuant to the Cabinet of Ministers Resolution No. 865 "On remuneration for judges" from 3 March 2006, and for employees of the system as per CM Resolution No. 268 "On regulating the structure and conditions of payment for employees of executive bodies, prosecutor's offices, courts and other bodies" from 9 March 2006. In 2003 payment of wages rose by 41% in comparison with 2002 in 2004 by 27% against 2003; in 2005 compared with 2004 – by 36%, and in 2006 compared with 2005 – by almost 59.1% Over recent years there has been a reduction in the difference between the average sizes of judges' salaries, between for example, general, appellate and economic courts. As of March 2006 the minimum salary for a judge was 2.5 thousand UAH.

The overwhelming majority of courts are in cramped and unsuitable premises. There are not enough courtrooms, consulting chambers, rooms for remand prisoners brought to the court or defendants, for court managers, for prosecutors and lawyers, witnesses, etc. This means that the premises stipulated by procedural legislation and which are needed in order to properly examine cases are not available. In a lot of cases, judicial examination is postponed, leading to proceedings being dragged out and violation of people's rights and legitimate interests. The court, designed to administer justice, in fact is forced to break the law.

There have been a good few cases where courts newly-created in connection with judicial and legal reforms have simply not been provided with premises which has halted any further measures linked with the reform process.

In 2006 the SJAU carried out a check of court premises which showed that as of 1 January 2006 out of 786 general courts (except for military courts), only 63 (or 8 percent) were in premises which entirely met the needs of a court. The others needed reconstruction work or new buildings.

The problem, however, is that the premises allocated require repairs or reconstruction to adapt them to court needs and this remains a certain amount of capital investment. One fourth of them have already had repairs or reconstruction work done, while with the others the necessary work cannot begin due to lack of funds. As a result the majority of buildings allocated to the courts stand for years unheated and unguarded, gradually becoming dilapidated.

To achieve a systematic approach to providing court premises, the SJAU drew up a State Programme for providing courts with suitable buildings from 2006-2010, which was approved by Cabinet of Ministers Resolution No. 318 from 4 July 2006. If the Programme is implemented, then all general courts will be provided with premises suitable for administering justice. According to the forecasted breakdown in the amounts for specific measures, the government will need to allocate approximately 2 billion UAH. The Programme envisages the following:

- Reconstruction of 200 court buildings by 2008;
- Reconstruction and additional building work on 313 courts by 2010;
- Construction of 195 new court buildings by 2010.

According to this plan, budgetary funding in 2007 is set at 484.4. However the Law "On Ukraine's State Budget for 2007", only 30 million UAH are allocated towards the implementation of this Programme, this being 6 percent of what is needed.

Provision of court computers is unsatisfactory with only 60% of the needs of general court judges being met, and 75% of economic courts. It should be noted that of the overall number of personal computers available, 20 percent can only be used as not very powerful word processors and need replacing. Almost all courts have at least one outlet for the Internet and use emails in their work.

## Access to justice

Court costs which an individual will have to bear should not become an impediment to legal defence of his or her rights. This means that the requirement that justice be accessible can only be observed where there is an efficient system of legal aid, especially to those on low incomes.

One of the important conditions for access to justice is the level to which the public is informed about the organization and work of the courts. There can be no accessibility if the judicial system remains complicated and a person doesn't know which court has jurisdiction over his or her case.

At the same time, access to justice does not exclude the possibility for an individual of resolving his or her dispute without the involvement of the courts. The Government should promote the development of nongovernmental bodies such as Arbitration Tribunals, Mediation, etc with these helping to resolve disputes without going through the courts.

Information about procedure for approaching the courts is not sufficiently available and at times is difficult to understand. The texts of court rulings are largely inaccessible to people who were not involved in the case and yet whose interests are directly affected. Lower level court rulings are virtually not published. Due to the lack of courtrooms, judges often examine cases in their offices; there are infringements of the principle of open court hearings and the technical equipment for recording the proceedings is not available everywhere.

Another aspect of restricted access to justice is the fact that individuals can not lodge appeals with the court against laws, Presidential Decrees and Resolutions of the Verkhovna Rada in cases where their rights and liberties are limited. The said legal acts can only be declared unconstitutional by the Constitutional Court, and individuals do not have the right to lodge constitutional submissions.

There is a significant problem for people living in isolated rural areas to gain access to the courts. Results of a study showed that the overwhelming majority of district [raion] centres in Ukraine are not geographical centres of the districts. This leads to unequal opportunities for rural residents to reach the necessary local court. The lack of public transport routes makes access for rural residents to the courts even more problematical or downright impossible. This means that local (district, city-district) courts continue to be inaccessible for a certain part of the rural population due to both the considerable distances involved and / or the lack of transport between a person's home and the relevant court.

Another related problem can be seen in the creation of district administrative courts, since the proposed districts are too large and clearly inconvenient for some of the parties to court proceedings.

## The right to defence

Ukrainian legislation does not provide sufficient safeguards for the individual's right to defence. A particularly large number of problems arise in the criminal process and when examining cases involving administrative offences.

The following are the types of problem areas:

***- The right to choose ones defender and the right to communicate with him or her in private.***

According to Article 261 of the Code of Administrative Offences, a person does not have the right to meet with his or her defender, and during the subsequent investigation into such a case and examination of the case by the court, the presence of a lawyer is not mandatory. Yet the European Court of Human Rights has in many cases viewed these procedures as being criminal procedural in their essence, meaning that the right of the individual to a fair trial must be applied here as well.

Criminal procedure legislature is also inadequate. It all begins with the fact that it is the investigator who issues a decision allowing a defence lawyer to take part in the case. One should also note the difficulty for a defender in communicating with a person in custody. On the one hand a person remanded in custody does have the right to see their defender without others being present, without any limitation on the number of such visits or their duration. However on each occasion notification is required from the investigator to the administration where the person is being held. Investigators often make use of this.

With people held in custody there are also problems with confidentiality of correspondence. According to legislation, all letters, barring those to the Human Rights Ombudsperson, the prosecutor and the European Court of Human Rights, are checked by the administration, and accordingly, censored. This means that letters to a defender are not confidential, this being a clear infringement of the right to defence. There are also frequent cases where letters addressed to the European Court of Human Rights are checked, despite a clear ban on this.

Considerable problems are seen with free legal aid provided in criminal proceedings, which really only exists formally. Legal aid is not given at all in civil cases, this violating Article 6 of the European Convention on Human Rights.

Another problem arises with the examination of cases, especially civil proceedings or on administrative offences, without a defender or in the absence of the person or his/her representative.

***- Lack of equality of arms and the limited rights of the defender***

This problem is vividly seen in the criminal process and when examining cases involving administrative offences where the principles of adversarial procedure and equality of arms remain mere words. It is impossible to ensure adversarial procedure with the limited rights to defence which Ukrainian legislation recognizes. Here we have in mind the procedure for allowing a defence lawyer to defend the individual, with this exclusively at the consent of the investigator; the seriously limited rights of the defender to independently gather evidence of the person's innocence (at the pre-trial investigation stage only the prosecution has the right to order a forensic examination, interrogate witnesses, request evidence, etc).

The defender also experiences certain difficulties in getting to see the case materials where cases involving administrative offences are being examined. The protocol on the administrative offence is available, but not with any other material (for example, the conclusions of a forensic examination, etc), since this right is not stipulated in legislation.

## The system of legal aid

One of the most widespread systemic problems in the human rights sphere is violation of the right to defence and the failure to provide qualified legal aid. At the present time there is no standard government policy for ensuring that individuals receive free legal aid. The situation with free legal aid in Ukraine is unsatisfactory and not in keeping with basic European requirements for safeguarding the individual's access to justice.

Ukraine's legislation contains a number of separate provisions regulating free legal aid, yet no system ensuring real access to such assistance has yet been created. For example, legislation names many groups in society entitled to free legal aid, yet up till now State funding has only been allocated to pay for legal aid in criminal proceedings in cases defined by the Criminal Procedure Code.

The procedure for appointing a defence lawyer (defender) via lawyers' associations as set down in the Criminal Procedure Code was introduced under different historical circumstances and it therefore fails

to take into consideration present forms and conditions for the functioning of the profession and does not ensure high-quality and timely legal aid.

For the groups in society stipulated in other legislative acts there is no provision for providing free legal aid, nor is the procedure for receiving this defined.

The legally stipulated size of the payment to lawyers appointed to provide legal aid in criminal cases amounts to 15 UAH for a full working day. This kind of payment for ones work, together with the complicated procedure for confirming the lawyer's participation in this category of cases, do not encourage lawyers' systematic and proactive participation, nor ensure a proper level for the legal aid provided at the State's expense.

In 2006 State-funded legal aid was provided for 1,591 criminal cases. The spending on this came to 1,637 thousand UAH (against 2,337 thousand UAH in 1,827 criminal cases during 2005). The Budget Programme "Provision of State-funded legal aid in criminal cases" allowed for spending of 1,960.9 thousand UAH. This means that even with the basic lack of effective legal aid, the State spending allocated for this is not fully utilized.

Legislation only empowers the Ministry of Justice to pay for appointed lawyers in criminal cases. Yet no monitoring of what kind of free legal aid people actually need is carried out, and the budgetary funding is assigned on the basis of outdated indicators.

The International Renaissance Foundation (hereafter IRF), in cooperation with the Ministry of Justice, the Legal Initiative of the Open Society Institute (Budapest) and the Charitable Organization "The Viktor Pinchuk Fund – Social Initiative", the Union of Ukrainian Bar Lawyers, the Ukrainian Association of Lawyers and other partners, began comprehensive measures last year, as part of the charitable programme "Free legal aid", aimed at creating a system of free legal aid in Ukraine.[2]

On 24 January the Ministry of Justice issued Order No. 58/7 "On measures to reform free legal aid" which created and approved Regulations on a Council coordinating reform to the system of free legal aid.

With the expert support of the IRF, this Council under the auspices of the Ministry of Justice drew up a Strategy Plan for creating a free legal aid system. This was approved by the National Commission for the Strengthening of Democracy and the Rule of Law, and on 9 June 2006 signed into law by Presidential Decree №509/2006.

The Strategy Plan establishes fundamental principles for the creation and running of a system of free legal aid. It specifically:

- establishes the criteria for access to such free legal aid;
- creates conditions for representatives of the legal profession to volunteer their services;
- offers new approaches to creating budgetary provision for the system;
- defines the principles for managing the system.

The Strategy Plan envisages phased implementation of the measures.

On 19 September 2006 within the framework of the above-mentioned Strategy Plan, a pilot project was launched to provide free legal aid in criminal cases in Kharkiv, based at the Kominternsky District Police Station in the Kharkiv Region. The agreement reached with the Kharkiv Regional

[2] The Charitable programme "Free legal aid" is financed by the Viktor Pinchuk Fund – Social Initiative" and the International Renaissance Foundation.

Department of the Ministry of Internal Affairs envisages additional guarantees for people detained, including:

- access to a lawyer from the pilot project before the detainee is interrogated by a police officer;
- the possibility of rejecting the services of a lawyer only in the presence of a lawyer;
- reports to the project's lawyers of all cases where people have been detained.

The Kominternsky District Police Station has not always fully kept to the terms of the Agreement, however during later meetings, the Head of the MIA's Central Department for the Kharkiv region and other high-ranking officials of the Central Department affirmed police readiness to cooperate under the conditions of the Agreement. Five defence lawyers and one lawyer are involved in the pilot scheme at present. They can provide swift and qualified legal aid to people detained at any time of the day or night. This is fully in keeping with the requirements of Articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms with regard to the right to liberty and security, specifically the right to defence.

On 3 February 2007 the same project was undertaken in the city of Bila Tserkva in the Kyiv region. The Cooperation Agreement providing the same kinds of guarantees for people detained was signed with the Kyiv Regional Central Department of the MIA.

A third pilot project is planned for the Khmelnytsky region.

In addition, with the support of the International Renaissance Foundation, a study is being carried out into the present situation with free legal aid in the Kharkiv region, and an analogous study will soon begin in the Kyiv region. They will give actual data about the level of provision of such aid in cases where legislation requires that aid be granted and make it possible to compare this with data gathered after the start of the pilot project.

**Reasonable time limits in the judicial process**

Due to shortcomings in judicial procedure, as well as the not always warranted extended jurisdiction of the courts, for example, in examining administrative offences, judges are unable to give timely and high-quality consideration of cases.

Courts quite often return claims lodged without grounds, while judges procrastinate with investigating cases and hand down rulings outside what can be called a reasonable time frame.

No clear mechanism has been drawn up for establishing the court's liability for procrastination with examining cases, as well as judges' liability for not carrying out their duties in a qualified manner.

There is an irrational method for allocating judges to courts which leads to some having an excessive workload, while others don't have enough to do.

The time limits set down in procedural legislation are virtually never kept. For example, 67.6 thousand cases and applications, or 10% of the total, were examined with infringements of the time frame established by the Civil Procedure Code. At the end of June 2006 almost 217 thousand civil cases based on civil suits or applications from the prosecutor had not been examined, this being 26.1% of all cases which were scheduled for review during the first half of 2006. 24% of those cases had been awaiting examination for more than 3 months.

Ukrainian legislation basically fails to provide for the right of parties to legal proceedings to appeal against the excessive duration of proceedings. Nor does it guarantee the right to compensation of

damages incurred as a result of unwarranted delay in hearing a case in court. There have however been attempts by the Ministry of Justice to draw up such a draft law.

Understanding this problem, the Supreme Court of Ukraine sent the Chairpersons of appellate courts Letter No. 1-5445 from 25.01.2006 concerning adherence to reasonable time spans when considering cases. The letter analyzed the reasons why cases are dragged out on the basis of those cases which have been considered by the European Court of Human Rights. The letters gives the following main problems:

- the repeated return of a case for additional investigation;
- the scheduling of court hearings with considerable time gaps which is unacceptable when examining criminal cases, even where the defendant has not been remanded in custody;
- the failure of one of the parties to appear at a court hearing, with the judge not ordering that the person be brought to the court forcibly, where the case cannot be considered in the person's absence.

In the case of Antonenkov and others v. Ukraine criminal proceedings had been launched against three applicants on 26 June 1996 and the case submitted to the court on 3 March 1997. The case was heard in the Shevchenkivsky District Court in Kyiv from 2 April 1997 to 17-19 July 2002. It was twice, on 22 June 1998 and 20 April 2000, on identical grounds, sent back for additional examination. On 17 July 2002 the Court disjoined the proceedings concerning the charges of theft and embezzlement and remitted the case in this part for additional investigation. On 19 July 2002 the District Court terminated proceedings concerning some of the other charges as time-barred.

**Enforcement of court rulings**

The present system for enforcing court rulings is not efficient and there is effectively no system of control over the work of the State Bailiffs' Service. The European Court of Human Rights in judgments passed down against Ukraine most often finds that there has been a violation of the right to a fair trial especially due to the non-enforcement of rulings from domestic courts within a reasonable period of time.

In 2006 the State Bailiffs' Service [SBS] was supposed to enforce 5 321 378 writs of execution issued on the basis of rulings from courts of all levels, including foreign courts and arbitration tribunals, not counting writs to extract alimony and decisions of other bodies (public officials) to the sum of 44 773 180 942 UAH. The Bailiffs enforced 3 693 486 writs in the given category, or 69.4% of the number actually due for enforcement during the reporting period, for the sum of 21 209 438 364 UAH.

Last year 855 650 writs to retrieve alimony were due to be enforced on the basis of rulings from general or foreign courts. Of these 224 844 were enforced, this being 26.3 % of the total. This means that almost 74% of such writs are not enforced.

Of the overall amount remaining under 8 categories of writs, execution was halted on 165 941 documents (6.5% of those remaining) worth 6 940 353 724 UAH. (65 % of the remainder of money not extracted. This is 1 897 writs less, and 3 392 546 997 UAH more than in 2005. Of these figures:

- On the basis of item 8 of Article 34 § 1 of the Law on Bailiff proceedings, in connection with the court's having initiated proceedings in a case involving the bankruptcy of the debtor, execution was stopped on 62 364 writs (37,6 %) to the value of 8 024 978 569 UAH, or 47,4 % of the value of the halted proceedings;
- On the basis of item 6 of Article 34 § 1 of the Law on Bailiff proceedings, in connection with the halting of execution by a public official who is empowered to take such a decision, on 18 863 writs (11,4 %) amounting to 1 564 206 544 UAH or 9,2 %;

- On the basis of item 13 of Article 34 § 1 of the Law on Bailiff proceedings, in connection with the court having granted a deferment, 3 816 writs (2,3 %) to the sum of 620 430 683 UAH. (3,7 %) were halted;
- On the basis of item 5 of Article 35 of the Law on Bailiff proceedings, in connection with an appeal lodged with the court against the actions of a state functionary or a refusal to have the person removed from the proceedings, 1 667 writs (1 %) amounting to 1 004 706 512 UAH, or 5,9 % were halted.

In connection with the Law "On imposing a moratorium on the forced sale of possessions", execution was made more difficult on 97 334 writs, this being 3.8 % of the total number of remaining writs, amounting to 8 682 809 587 UAH (33.3%).

## The presumption of innocence

In the present criminal procedure system the principle that a person is presumed innocent unless proven otherwise is often infringed. This is caused both by flawed legislation, and by the lack of respect for this principle demonstrated by public officials, including those who hold the highest posts in the country (the President, the Minister of Internal Affairs, the Prosecutor General and others.)

Nor does legislation guarantee the presumption of innocence in cases involving administrative offences.

The right to not testify against yourself is a part of the presumption of innocence, however cases remain common where a person is first interrogated as a witness, and then the testimony is used against him or her when charges are laid.

The following can also be considered infringements of the presumption of innocence in legislation:

– the practice by the court of returning criminal cases for further investigation;
– the possibility of launching a criminal investigation against a specific person, and not over a specific crime.

Another aspect of the criminal process was found by the European Court of Human Rights to be a violation of the presumption of innocence. In the case of Panteleyenko v. Ukraine, the European Court pointed out that the termination of criminal proceedings on exonerative grounds could constitute an infringement of the presumption of innocence since a person is considered innocent until a court finds the person guilty, yet in this case guilt had been determined before any guilty verdict.

However, as noted, considerable problems are presented by the lack of a proper level of legal culture among high level public officials. Virtually every press conference given by top officials of the MIA or the Prosecutor General's Office is accompanied by information about a crime uncovered or a criminal identified long before any verdict has been handed down by the courts on these criminal investigations.

The Co-Rapporteurs of the Parliamentary Assembly of the Council of Europe (PACE) have also called on high-ranking public officials to respect the principle of the presumption of innocence.

An additional infringement of this principle is the application of amnesties with respect to people whose criminal investigation is still in process.

## Corruption of the Judiciary

President Yushchenko speaking before the opening of the first session of the newly-elected Verkhovna Rada on 25 May 2006 said that in his view the deep-set corruption of the courts was a

critical and profound threat to Ukraine's national security. In response, the Council of Judges on 26 May issued a public statement in which it rejected cursory assessments and stated that such speeches undermined the independence and authority of the justice system.

We present all the cases known to UHHRU where judges have faced criminal charges.

In April 2006 the former Chairperson of the Kolomyysky City-District Court of the Ivano-Frankivsk region V. Manulyak was sentenced to three years imprisonment with confiscation of his property, stripped of his qualification level and banned from occupying the position of judge. In August 2005 on the basis of material from SBU [the Security Service], the Prosecutor General had initiated criminal proceedings over the judge being accused of demanding a bribe. Manulyak had demanded one thousand dollars for reclassifying the actions of the accused under another article of the Criminal Code which envisaged a much lighter sentence and which would enable the person to be released under amnesty. The judge was arrested at the place of the crime after the bribe had been handed over.

In June 2006 the Lviv Regional Appeal Court sentenced a judge of the Ivano-Frankivsk City Court to 18 months imprisonment. He was accused of involvement in a criminal gang which imported expensive foreign cars to Ukraine without paying the required duty, registering them with the MIA and then selling them. He had knowingly allowed false administrative cases. For material remuneration the judge had passed knowingly unlawful decisions according to which the cars of supposed offenders had been confiscated in favour of the State and passed to the members of the organized gang. Moreover, the individuals against whom his rulings were issued, had never owned the vehicles and were not at all aware of the court rulings issued. The latter were however the means of legalizing the cars.

A judge of the Velykolepetynsky District Court of the Kherson region was convicted of abuse of power and his official position leading to serious consequences. He was given a three year suspended sentence and banned from holding any office connected with court work.

In 2006 a judge of the Zaporizhya District Court of the Zaporizhya region O. Yevseyev was convicted of bribe-taking on a particularly large scale and sentenced to four years imprisonment with confiscation of his property, and a ban on occupying the position of judge.

In March 2007 parliament gave its consent for the arrest of Oleh Pampura, judge of the Arbuzynsk District Court in the Mykolaiv region. In March 2006 a criminal investigation was launched against the judge on suspicion of the crime "bribe-taking by a civil servant". In connection with the accusations, the President had removed O. Pampura from his post pursuant to Article 147 of the Criminal Procedure Code while the judge himself was on the police wanted list.

The President through Decrees:

- № 480/2006 from 3 June 2006 dismissed V. Kapichak from his post as Chair of the Drohobych City-District Court of the Lviv region over criminal charges having been brought against him;
- № 1124/2006 from 25 December 2006 dismissed L. Novovska from her post as Chair of the Khartsyzk City Court of the Donetsk region over criminal charges having been brought against her.

Yet the MIA and SBU reported a much greater number of cases of corruption among judges. These cases however slipped from view. Here, for example, is a typical report which so far has not resulted in anything: "The Lviv Regional Prosecutor's office has launched a criminal investigation against the Deputy Chairperson of one of the local courts of the Lviv region over elements of the crime set out in Article 368 § 2 of the Criminal Code, being implicated in demanding and receiving a bribe for issuing knowingly unlawful rulings in court cases".

In July 2006 an analytical report was published on the results of the study "Corruption and the provision of services in the Ukrainian judiciary"[3].

According to the report, the courts are in fourth place among State institutions, after the State Automobile Inspection, the police and customs. Most respondents believe that corruption is widespread in these bodies.

The same view is held by people who have had direct experience of approaching the court. 43.6% of respondents consider that corruption is prevalent among officials in the court, with almost one quarter (23%) believing that corruption is present at a 50/50 level, while 22% did not know how to answer. Only 11.4% believe that corruption is not widespread among officials in the court.

Those respondents who had used the services of intermediaries, including legal ones or lawyers (45.3% had) in the court, were asked about handing over unofficial payments to officials of the court via such intermediaries. One fifth 20.7% (or 9.3% of all respondents) considered that the expenses paid intermediaries included unofficial payments to officials of the court. More than half of them (58.2%) excluded the possibility of such unofficial payments, while 21.1% were either unable or unwilling to answer this question.

64.7% of the lawyers surveyed believe that to some degree or other corruption is prevalent in the judiciary, while only 6.1% were able to assert that corruption is "not at all widespread".

The average percentage of unofficial payments to officials of the court came to 48.4% of the amount paid to intermediaries.

If one bears in mind the percentage (21.1%) who couldn't decide how to answer the question about handing over unofficial payments via intermediaries, and if we also assume that those who don't have an intermediary, may also give bribes, then one can with certainty assume that no less than 20% of the people who have approached the courts have given bribes (20.6% of all Ukrainian citizens gave money or presents to officials during the last year).

The most corrupt (the biggest bribe-takers) among officials of the judiciary were seen as being judges (19.5%). In second place in terms of bribe-taking were criminal investigators – 10.6% consider them to be corrupt, followed by defence lawyers (9,2%). 8.5% of the respondents consider all officials of the judiciary to be corrupt, while 5.5% do not regard any officials in the judiciary to be corrupt. 7.9% see the prosecutor's office as corrupt, and 5.4% - chairpersons of courts.

According to assessments given by lawyers of the level of corruption in branches of the judiciary, the least corruption was identified in administrative proceedings (33,5% of those surveyed saw this level as lower than average), while criminal and civil court proceedings were considered to some extent more corrupt. The most corrupt branch was deemed to be the work of the economic courts (38.7% of respondents classified corruption there as "probably widespread", or "extremely widespread").

More than half of the lawyers (52%) named the main reason for corruption in the judiciary as being the low pay of civil servants. The next most important reason was considered to be "inadequacies in legislation" ((34%), and the third cause, lawyers believed, was the effectively impunity for corrupt activities (30.2%).

[3] "Corruption and the provision of services in the Ukrainian judiciary" was financed by the Council of Europe under the auspices of the Delegation of the European Commission to Ukraine and supported by the UN Development Programme in Ukraine. The study was carried out by the Kyiv International Institute of Sociology in cooperation with the Ukrainian Ministry of Justice from 17 February – 22 May 2006. It was aimed at finding out the views both of the general public and of lawyers with experience of court proceedings with regard to corruption and the provision services in the justice system, with a specific focus on the court system. The study was based on three surveys of the public (1,028 respondents) and a survey of lawyers (966 respondents).