



**Further support for the execution by Ukraine of judgments in respect of Article 6 of
the European Convention on Human Rights**

ANALYSIS
of the Annual Report of 2019 prepared by the High Council of Justice
“On Ensuring the Independence of the Judiciary in Ukraine”

May 2020

ABBREVIATIONS

Consultative Council of European Judges	CCJE
Constitutional Court of Ukraine	CCU
European Convention on Human Rights	ECHR
High Council of Justice	HCJ
Annual Report of 2019 prepared by the High Council of Justice “On Ensuring the Independence of the Judiciary in Ukraine”	2019 HCJ Annual Report
United States Agency for International Development	USAID

TABLE OF CONTENTS

INTRODUCTION.....	4
COMPLIANCE OF THE 2019 ANNUAL REPORT AND THE GUIDELINES	6
Comprehensiveness of the Annual Report	6
Objectivity of the Annual Report.....	6
Relevance of the 2019 HCJ Annual Report	10
Flexibility of the Annual Report.....	13
Standards of the Council of Europe and the practice of the European Court of Human Rights on the independence of judges	13
Publicising the Annual Report	17
Impact of the Annual Report	17
Follow-up Procedure and Monitoring System of the Annual Report.....	17
CONCLUSIONS AND RECOMMENDATIONS.....	19

INTRODUCTION

1. The High Council of Justice (HCJ) requested an analysis of the 2019 HCJ Annual Report in the context of its compliance with Council of Europe standards as well as previously made recommendations and to provide assistance in organising a series of events aimed at discussing this analysis with the State, regional authorities, and the general public. The HCJ annual reports are an important tool for monitoring the implementation of the principles of external and internal independence of the judiciary in Ukraine and for monitoring the status of the execution of the *Oleksandr Volkov* group of cases.
2. This assistance was provided through the Council of Europe Project "Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights", which is funded by the Human Rights Trust Fund and implemented by the Justice and Legal Co-operation Department of the Council of Europe. The project requested that Assoc. Prof. Dr Diana Kovatcheva, who was involved in the events for the dissemination of the 2018 HCJ Annual Report on judicial independence, conduct such an analysis and participate in the following project events.¹
3. This analysis is based on the summary of the 2019 HCJ Annual Report, which was provided by the HCJ and translated into English by the Council of Europe Project. As regards the methodology, this analysis was prepared on the basis of the methodology used for drafting the annual reports by the HCJ (following Council of Europe Guidelines). The Council of Europe Guidelines were developed within the previous Council of Europe project in 2017 to provide options for the content of annual reports and to develop criteria for assessing judicial independence. The expert has also been provided with relevant documents by the Council of Europe Project. The written materials include the opinions of the Venice Commission,² the judgments of the European Court of Human Rights, Decisions of the Constitutional Court of Ukraine,³ Opinions of the Consultative Council of European Judges (CCJE), current Ukrainian legislation, public reports, expert opinions, and existing legal analysis related to the judicial reform in Ukraine that took place in 2019.
4. The purpose of this assessment is to analyse the 2019 HCJ Annual Report from the point of view of its compliance with the relevant Council of Europe standards and the Council of Europe Guidelines for drafting the HCJ annual reports. In addition, the current analysis aims to provide conclusions and recommendations on how to improve the 2019 HCJ Annual Report's content, structure, and impact.
5. In the context of judicial reform in Ukraine, the HCJ annual reports are an important tool for addressing a number of problematic issues related to judicial independence and for bringing them to the attention of institutions, the public, and the media.
6. An important asset of the 2019 HCJ Annual Report is its focus on the current developments in judicial reform in 2019 and the special critical focus on infringements of the independence of judges and the judiciary. Within this context, it should be mentioned that the 2019 HCJ Annual Report contributes to the execution of these

¹ Associated Professor, Doctor in International Law and Law of the EU, international expert of the Council of Europe.

² See Opinion 969/2019 of the Venice Commission on the amendments to the legal framework in Ukraine governing the SC and judicial self-governing bodies, which concerned the amendments introduced by Law No. 193.

³ See Decision of the Constitutional court of Ukraine: CCU No 2-p/2020 and CCU No 4-p/2020.

European Court of Human Rights judgments and especially to the execution of the Volkov group of cases which concerns issues related to the independence and impartiality of the judiciary and the reform of the system of judicial discipline and careers.⁴

7. Technically, the 2019 HCJ Annual Report consists of an introduction, two parts, and a conclusion. The first part is dedicated to important events, measures, and problems affecting judicial independence. The second part is focused on the analysis cases of interference in judges administering justice. This approach should be assessed in a positive way because, on the one hand, the 2019 HCJ Annual Report is focused on a number of matters related to the independence of the judiciary and, on the other hand, a specific focus is put on current and pertinent issues such as the legislative changes proposed by Ukrainian Law No. 193-IX, which introduced some controversial issues with regard to the intended judicial reform and the launch of the new High Anti-Corruption Court.
8. In general terms, it could be noted that the 2019 HCJ Annual Report is to a large extent in compliance with Council of Europe standards, including the Council of Europe Guidelines, and reflects their main recommendations. The main suggestions in the current assessment are aimed at creating the conditions for its more effective dissemination to a wider audience, which would increase its impact significantly.

⁴ See the judgement of the European Court of Human Rights of 9 January 2013 in the case Oleksandr Volkov v. Ukraine (application no. 21722/11).

COMPLIANCE OF THE 2019 ANNUAL REPORT AND THE GUIDELINES

Comprehensiveness of the Annual Report

9. According to the Council of Europe Guidelines, the HCJ should decide for itself which procedure should be followed in the preparation process of the annual reports. The Council of Europe Guidelines suggest two options for the report in terms of its structure and content. The first option is to have an objective and short document, and the other is to have an objective, but larger and more comprehensive document.
10. As is obvious from the 2019 HCJ Annual Report, the HCJ opted for a large and detailed report. It should be noted that this option is more appropriate for the situation in Ukraine, where judicial reform is an important issue on the political agenda. The legislation is frequently amended and the judiciary is confronted with a number of challenges to its independence. Nevertheless, in the context of a large annual report in which all key issues of judicial reform should be addressed, it may be difficult for the HCJ to clearly highlight the main messages. This is why, in order to achieve a greater impact, it is essential that an annual report does not only contain findings but also offers clear conclusions and recommendations.
11. Within this context, the creation of a summary of each HCJ annual report (up to 30 pages) should be considered by the HCJ. The objective is to use this summary as an effective tool to present the information briefly and to address important issues that should be brought to the attention of the public, institutions, and the media. This information should be presented in a concise manner and permit the reader to find additional information in the full text of the report.
12. It would be appropriate to translate the summary of the HCJ annual reports into English in order to facilitate its understanding by international and European partners and institutions.

Objectivity of the Annual Report

13. One of the important recommendations of the Council of Europe Guidelines is related to the objectivity of the annual report and the need to reflect only the most problematic areas concerning the independence of the judiciary. This objectivity is closely linked to the issue of the relevance of the HCJ annual reports, which, in turn, is related to the reflection of both current problems regarding the reform and the opinion of the judges and courts, as indicated in their reports to the HCJ.
14. The 2019 HCJ Annual Report covers a significant number of topics related to the independence of the judiciary. It seeks to present an objective overview of the situation in the judiciary based on the assessment of judicial independence. This is achieved by reflecting on both the progress of the judicial reform and its negative aspects.
15. The 2019 HCJ Annual Report indicates the positive developments in 2019 (such as tackling insufficient staffing of courts, ensuring equal judicial remuneration in the context of qualification evaluation procedures, and ensuring the appropriate security for judges and courts) and the constraints that have left other important issues unresolved.
16. In addition, the 2019 HCJ Annual Report outlines current challenges to the judiciary by taking into consideration their negative impact on the independence of judges (unjustified amendments provided for in the Law of Ukraine No. 193-IX).

17. The objectivity of the 2019 HCJ Annual Report is strengthened by the fact that it addresses problems contained in the newly proposed legislation on the reform of the judiciary. Through this approach, the HCJ expresses its concerns about the threats to the independence of the judiciary. In particular, it should be noted in a positive way that in its 2019 Annual Report, the HCJ referred to specific legal provisions from the newly proposed legislation which contradict the principle of independence of the judiciary. These concerns were later confirmed by the Constitutional Court of Ukraine (CCU) in its decisions: CCU No 2-p/2020 and CCU No 4-p/2020.
18. The HCJ rightly points out a problematic approach in which the executive and legislative powers did not take into account the opinion of the judiciary (the HCJ and the Supreme Court) in the course of the development of the legislation in question.
19. According to the Council of Europe standards, the judiciary has the right and the obligation to express its opinion on legislative changes that concern its status and functions, and any attempts to neglect this important form of consultation with the judiciary infringes its freedom of expression (Article 10 ECHR) and its independence. Issues concerning the functioning of the justice system constitute questions of public interest, the debating of which enjoys the protection of Article 10 of the ECHR.⁵
20. In its Opinion No. 18, the CCJE underlines the importance of judges participating in debates concerning national judicial policies. The judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system.⁶ The judiciary can provide their insights on the possible effects of proposed legislation or executive decisions on the ability of the judiciary to fulfil its constitutional role.⁷ Judges and the judiciary should be consulted and involved in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system.⁸
21. According to the Magna Carta of Judges (Fundamental Principles), the judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation). The same view is taken by the CCJE in its Opinion No. 3, according to which judges should be consulted and play an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system.⁹
22. In view of this, the HCJ stresses the fact that Law No. 193-IX was adopted by the Verkhovna Rada of Ukraine and entered into force without paying due regard to the majority of remarks from the justice authorities in the course of its consideration. According to the 2019 HCJ Annual Report, the law was adopted "without due regard to the advisory opinion of the High Council of Justice, which is subject to mandatory examination".¹⁰
23. Moreover, the 2019 HCJ Annual Report rightly points out that Law No. 193-IX was adopted before obtaining the relevant opinion of the Venice Commission.
24. Another important issue raised in the annual report are the findings about unprecedented pressure on the judiciary in 2019.

⁵ See European Court of Human Rights case *Baka v. Hungary*, para. 168 and para. 125.

⁶ See CCJE Opinion No. 18, para. 31.

⁷ *Ibid.*, para. 41.

⁸ See CCJE Opinion No. 3 para. 34 and the CCJE's Magna Carta of Judges, para. 9. See also European Court of Human Rights case *Baka v. Hungary*, para. 168.

⁹ See CCJE Opinion No. 3 para. 34.

¹⁰ See The decision of the High Council of Justice dated 21 November 2019, No. 3099/0/15-19 "On the public appeal of the High Council of Justice". URL: <https://hcj.gov.ua/doc/doc/867>, viewed 14.01.2020.

25. It should be mentioned that from the point of view of Council of Europe standards, the role of councils for the judiciary in preserving judicial independence is crucial. However, their mere existence does not in itself guarantee the efficiency of such a crucial role. In order to be efficient, a council for the judiciary needs to be very active and monitor violations of the independence of judges and the judiciary. According to the Council of Europe standards, the practice of judicial councils to produce annual reports is very useful in this regard.¹¹
26. In view of this, judges should be able to have recourse to a council for the judiciary when their independence is violated or put to the test. According to CCJE Opinion No 1, a council for the judiciary is obliged to safeguard from any external pressure or prejudice of a political, ideological or cultural nature, the unfettered freedom of judges. Importantly, it should be underlined that the law should provide for sanctions against persons seeking to influence judges in an improper manner.¹²
27. In this respect, it could be noted that from the perspective of the Council of Europe standards, the 2019 HCJ Annual Report fulfils an important role in defending the independence of judges and the judiciary.
28. With regard to the reform process, an important matter that is the focus of attention in the 2019 HCJ Annual Report is the statement about interference with judges administering justice by law enforcement agencies, lawyers, prosecutors, people's deputies of Ukraine, deputies of local councils, other representatives of state and local self-government authorities, citizens and their associations, and the media, remain frequent. The register of notifications of interference in the work of judges indicates a high number of complaints from judges, which raises serious concerns about the independence of judges. Within this context, it should be noted that the HCJ has reacted accordingly by adopting decisions on measures related to ensuring the independence of judges and the authority of the judiciary in 2019.
29. It should be noted that since 2018, the HCJ has examined the judges' infringement reports, reviewed them, and used them as a basis for an in-depth analysis to identify and group together the main types of encroachment on the independence and impartiality of judges in the administration of justice. This approach is in line with the role of the HCJ in defending the independence of judges.
30. It could be noted that, as far as this problem is concerned, the HCJ fulfils its task, as required by the standards of the Council of Europe, to defend the independence of the judiciary and of the individual judges.
31. It should be mentioned that the findings of pressure being placed on the judiciary in the HCJ 2019 Annual Report also highlight excessive criticism of judges.
32. According to the Council of Europe standards, the judiciary must accept criticism as a part of the dialogue between the three branches of power of the state and with society as a whole.¹³
33. However, the analysis and criticisms by one branch of state power out of other branches of state power should be undertaken in a climate of mutual respect. As long as the criticism is undertaken in a climate of mutual respect, it can be beneficial to society as a whole. However, there is a clear dividing line between freedom of expression and legitimate criticism on the one hand, and disrespect and undue pressure against the judiciary on the other. The latter can undermine public trust and confidence in the judiciary and could, in an extreme case, amount to an attack on the

¹¹ See CM 2010/12, para. 36.

¹² See CM 2010/12, para. 14.

¹³ See Opinion 18, CCJE, para. 52.

constitutional balance of a democratic state.¹⁴ According to the CCJE, unbalanced critical commentaries by politicians about the judiciary or judges are irresponsible and can cause serious problems.

34. The CCJE suggests that individual courts and the judiciary as a whole should discuss ways to deal with such criticism because Individual judges who are attacked often hesitate to defend themselves.¹⁵ It should be noted that the role of the HCJ in such cases could be crucial in assisting judges in such situations, including highlighting the problem in the 2019 HCJ Annual Report. Such responses may take the pressure off an individual judge. They can be more effective if they are organised by judges with media competence.
35. Importantly, the 2019 HCJ Annual Report is focused on the matter of public trust in the judiciary which is one of the crucial factors for the maintenance of the independence of judges. The HCJ takes into consideration opinion polls indicating the trends in public trust in 2019. The 2019 HCJ Annual Report points out the negative link between the decrease in the public trust in the second part of the 2019 and the new legislative amendments introducing structural changes in the judiciary.
36. Low public trust can negatively affect the independence of judges by decreasing public support for their work but also by allowing disrespect and contempt for judicial decisions. This could lead to unacceptable public pressure in the work of judges and consequently to an infringement of their independence.
37. Judges, who are part of the society they serve, cannot effectively administer justice without public trust. They should be aware of society's legitimate expectations and complaints about the functioning of the judiciary. Permanent mechanisms to obtain such feedback set up by councils for the judiciary or other independent authorities, could be considered.¹⁶
38. On the other hand, according to the Council of Europe standards, the judiciary that claims independence but refuses to be accountable to society will not enjoy the public's trust. Like all other powers, the judiciary must also earn trust and confidence by being accountable to society and other branches of state power.¹⁷ The judiciary should be accountable to society and ensure that the public's perceptions of the judiciary are accurate and reflect the efforts made by judges.
39. From the perspective of Council of Europe standards, the independence of judges is also linked to the need for judicial transparency which has a positive effect on public trust. A dialogue with the public, directly or through the media, is of crucial importance in improving the knowledge of citizens about the law and increasing their confidence in the judiciary.¹⁸ The judiciary and individual courts should actively reach out to the media and the public directly.¹⁹

¹⁴ See Opinion 18, CCJE, para. 18 and para. 42.

¹⁵ Ibid. para 53.

¹⁶ See CM (2010)12, para 20

¹⁷ See Opinion No 18, CCJE, para. 19.

¹⁸ See Opinion No. 18, CCJE, para. 32.

¹⁹ Opinion No. 7 (2005) on justice and society, CCJE.

Relevance of the 2019 HCJ Annual Report

40. The Council of Europe Guidelines indicate that the annual reports of the HCJ should be relevant to current issues concerning the judiciary in the respective year.
41. It should be noted that the 2019 HCJ Annual Report is in line with this recommendation and a significant part of its content is dedicated to the relevant legislative amendments undertaken in 2019.
42. A number of essential developments took place in Ukraine in 2019 and the HCJ took note of the greater part of them in its 2019 Annual Report. As is obvious from the 2019 HCJ Annual Report, it takes a critical view on a large number of the proposed legislative changes and points out how they infringe the independence of the judiciary. This approach makes the 2019 HCJ Annual Report a useful tool in the context of the HCJ's obligation to protect the independence of the judiciary and the individual judges.
43. For example, the 2019 HCJ Annual Report focuses on the new Law No 193-X, which proposes significant changes to the status of the judiciary. The 2019 HCJ Annual Report indicates that this issue is reflected adequately both through the analysis of the situation and the legislative changes adopted by the Verkhovna Rada of Ukraine.
44. It should be noted that the HCJ is active in the provision of advisory opinions on the topics related to the legislative amendments affecting the independence of the judiciary, and they are duly reflected in the 2019 HCJ Annual Report. This approach increases the relevance of the 2019 HCJ Annual Report and makes it a useful instrument.
45. However, it should be noted with concern that the 2019 HCJ Annual Report indicates a disturbing practice by national institutions and, in particular, the Verkhovna Rada of Ukraine to disregard the advisory opinions of the HCJ while adopting laws on the judiciary and the status of judges although these opinions are made public and are duly submitted to the judiciary.
46. In the same context, another important problematic issue reflected in the 2019 HCJ Annual Report should be noted. It refers to the fact that the legislation does not provide the HCJ with the right to petition the CCU in order to respond to legislation, which violates constitutional guarantees of the independence of judiciary and judges, although this is the main reason for the existence of the HCJ.
47. Furthermore, one of the relevant remarks in the 2019 HCJ Annual Report is that the judiciary was not properly consulted in the course of the legislative amendments in 2019, and the negative feedback from the justice authorities and professional legal organisations was not taken into consideration (for example draft law No. 1008, provisions of the Law of Ukraine "On the High Council of Justice" or draft Law of Ukraine "On amending certain laws of Ukraine regarding reloading of power", reg. No. 1066). Failure to consult the judiciary on laws which concern them is contrary to Council of Europe standards.²⁰
48. As previously mentioned, a number of significant amendments were introduced in 2019 in legislation related to the judiciary in Ukraine. These changes are reflected in the 2019 HCJ Annual Report and their wide-ranging scope and controversial character are duly emphasised. A number of Council of Europe standards support the conclusions of the HCJ related to the infringement of the independence of the judiciary through legislative changes that judicial authorities in Ukraine have not been properly consulted on.

²⁰ On this issue of consultation with the judiciary, please see the Council of Europe standards mentioned in the section "Objectivity" from the current Assessment.

49. According to the Venice Commission, the principle of stability and consistency of laws is essential for the foreseeability of laws for individuals, including judges and others serving in the affected institutions. Frequent changes to the rules concerning judicial institutions and appointments can lead to various interpretations, including even alleging *mala fide* intentions behind these changes.
50. The question of when and how often the legislation should be changed falls within the responsibility of the legislature. However, according to Council of Europe standards, too many changes within a short period of time should be avoided if possible, at the very least in the area of the administration of justice.²¹ Therefore, the right balance should be found between the need to further improve the performance of the judiciary and the necessity to protect its independence from the negative influence of too many reforms in a short period of time.
51. The 2019 HCJ Annual Report indicates other significant problematic issues which should be brought to the attention of the institutions and society as a whole. Amongst them are the shortage or even total absence of judges in the courts, which is seen as the main current challenge to the judiciary, the insufficient financing of the judiciary, and the slow qualification assessment of judges, which began as far back as 2015.
52. As previously mentioned, the 2019 HCJ Annual Report indicates that the second half of 2019 was marked by unprecedented pressure on the judiciary.
53. According to Council of Europe standards, judges should not be held personally accountable where their decision is overruled or modified on appeal.²²
54. The purpose of judicial independence, as laid down in Article 6 of the ECHR, is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence.²³
55. Importantly, judges should have unfettered freedom to decide cases impartially, in accordance with the law and their interpretation of the facts.²⁴
56. Therefore, for example, a case should not be withdrawn from a particular judge without valid reasons. A decision to withdraw a case from a judge should be taken on the basis of objective, pre-established criteria and following a transparent procedure by an authority within the judiciary.²⁵
57. It should be noted that the finding of a breach of the ECHR by the European Court of Human Rights in a judge's decision or judgment, cannot *per se* lead to a disciplinary sanction unless such an infringement entails malice or gross negligence. Such requirements should be included in the definition of the elements of the offence, and by not doing so, if the scope of this provision is not corrected in practice, it may be problematic.
58. Indeed, it would be important to avoid any automatic negative consequences for the judge or prosecutor whose case is the subject of an unfavourable judgment by those courts.²⁶
59. Public prosecutors must strictly respect the independence and the impartiality of judges; in particular, they shall neither cast doubts on judicial decisions nor hinder their execution, save where exercising their rights of appeal or invoking some other

²¹ See Opinion No. 18, CCJE, para. 45.

²² See CM Recommendation (2010) 12, para. 70. See also Opinion 6, CCJE, para. 36.

²³ See CM Recommendation (2010) 12, para. 38.

²⁴ *Ibid.*, para. 5.

²⁵ *Ibid.*, para. 9.

²⁶ *Ibid.*, para. 70.

declaratory procedure.²⁷ In its practice, the European Court of Human Rights recognises the requirement of judges' independence from the executive power.

60. The sanctions applied based on a legal provision might have a chilling effect that could threaten the independence of the judiciary.²⁸ According to the practice of the European Court of Human Rights, disproportionate and punitive measures with their potential chilling effect compromised the independence of the judiciary as a whole.
61. In its judgement on the case *Baka v. Hungary*, the European Court of Human Rights reiterates that the fear of sanction has a "chilling effect" on the exercise of freedom of expression and in particular risks discouraging judges from making critical remarks about public institutions or policies, for fear of losing their judicial office. This effect, which works to the detriment of society as a whole, is also a factor that concerns the proportionality of, and thus the justification for, the sanction imposed on the judge.²⁹
62. Article 376 of the Criminal Code of Ukraine is in line with the standards of the Council of Europe as it regulates a concrete measure, which hinders abusive actions on behalf of law enforcement agents and prevents improper influence on the work of judges. In addition, it provides for sanctions which, if applied accordingly, could have a dissuasive effect on prosecutors. Therefore, it could act as a deterrent to attempts by prosecutors to put pressure on judges.
63. Imposing sanctions on law enforcement agents for deliberate interference in the work of judges with the clear aim of putting pressure on them to deliver "convenient" acts, is an important tool. Its proper and timely implementation could have an important preventive effect. The application of Article 376 of the Criminal Code of Ukraine should be encouraged in all cases of interference with judicial work.
64. By evidencing all of these problematic issues, the HCJ fulfils its obligation to report on specific concerns related to the independence of judges and the judiciary. However, the fact that no action is taken on behalf of the competent institutions to consider the recommendations of the HCJ is quite alarming.
65. The impact of the 2019 HCJ Annual Report could be strengthened if the analysis is used as a basis for making a list of specific recommendations, following the general conclusions, which could be used in the course of developing of further legislative amendments. It would be beneficial if the specific recommendations are outlined either at the end of the relevant part or/and at the end of the report.
66. In view of this situation, it would be a good measure if the HCJ endeavours to gain more public support as well as more media attention in order to promote its recommendations or at least launch public debates on problematic issues. This could be achieved through the conclusions and the list of recommendations from the 2019 HCJ Annual Report, which could be used as a basis for public press conferences, debates, and media interventions. They could also be used to approach representatives of international and European institutions and organisations (such as the Council of Europe, the European Union, USAID, the World Bank, etc.), which could develop their own recommendations and send them back to the relevant national institutions in order to put pressure on them.
67. Within this context, it is good to bear in mind the Council of Europe Guidelines which recommend the inclusion in the draft of the annual reports of as many actors as possible mentioned in the Law of Ukraine "On the High Council of Justice", such as judicial self-governing bodies and other institutions and agencies of the judicial

²⁷ See CM Recommendation Rec (2000) 19, para. 19.

²⁸ See European Court of Human Rights judgement on the case *Baka v. Hungary*, para. 114.

²⁹ *Ibid.*, para. 83 and para. 101. See also, *mutatismutandis* the European Court of Human Rights cases *Wille v. Liechtenstein*, para. 50, and *Kudeshkina v. Russia*, paras. 98-100.

system, plus non-governmental organisations. They could contribute in a very effective way to the content and the recommendations of the annual reports. Additionally, by adopting this approach, they would feel more involved and committed. This would increase the probability of gaining their support for the HCJ and its work in protecting the independence of the judiciary.

Flexibility of the Annual Report

68. The Council of Europe Guidelines recommend a flexibility in the structure or format of the report, which would allow for the addition of some new elements (aspects, topics) in the coming year(s) concerning the independence and impartiality of the judiciary in Ukraine.
69. As is evident from the 2019 HCJ Annual Report, the topical issues that apply to the current judicial reform are included in the report.
70. In view of this, it could be noted that the structure of the 2019 HCJ Annual Report is flexible enough to address current problematic issues.

Council of Europe Standards and the practice of the European Court of Human Rights with regard to the independence of judges

71. An important asset of the 2019 Annual Report is that the HCJ takes into consideration a number of Council of Europe standards on the independence of the judiciary and uses them as a tool to strengthen or clarify its arguments. In addition, the Council of Europe Guidelines strongly recommend that the HCJ annual reports take into account the case-law of the European Court of Human Rights on the independence and impartiality of a court.
72. It is widely known that the independence of judges is an important prerequisite for the validation of democratic values, the rule of law, the protection of human rights, and for the right to a fair trial. The 2019 HCJ Annual Report rightly mentions that the independence of the judiciary should be guaranteed because "judges are charged with the ultimate decision over the life, freedoms, rights, duties and property of citizens".³⁰
73. With regard to the judicial reform process and the current situation in Ukraine, it is of crucial importance to underline the link between the independence of judges and non-interference in their work. This aim is achieved by the HCJ in several ways.
74. The Council of Europe standards on independence are presented in the 2019 HCJ Annual Report in order to differentiate between the notion of the "independence of the judiciary" and the notion of the "independence of a judge". This aim is achieved by highlighting the opinions of the CCJE.
75. The issue is further clarified by outlining the national legal provisions dealing with the independence of judges, as well as by stating the practice of the Constitutional Court of Ukraine and the resolutions of the Plenum of the Supreme Court.
76. The HCJ uses the practice of the European Court of Human Rights to further clarify the notions of the "independence of a judge" and the "independence of court", by outlining a number of cases in which the European Court of Human Rights interpreted

³⁰ Opinion No 1 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges, 23 November 2001. Paragraph 10. URL: , viewed 21.11.2019. The key principles of judiciary independence endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. URL: , viewed 1.11.2019.

the requirements of the Article 6 of the ECHR regarding an independent and impartial court.

77. It should be noted that violations of the independence of judges could happen in different ways, and this is why a council for the judiciary should take account of all of them. The 2019 HCJ Annual Report considers cases in which the principles of the irremovability and tenure of judges, the selection, evaluation, and disciplinary procedures of judges are seriously challenged. In this respect, it should be underlined that the Council of Europe has a stable and longstanding practice and offers recommendations for similar situations.
78. Within this context it is important to mention the reform of the system of judicial discipline in Ukraine urged by the convictive judgement of the European Court of Human Rights. In view of this, the 2019 HCJ Annual Report emphasises the importance of some of the most essential European Court of Human Rights judgements that are relevant for Ukraine (such as *Oleksandr Volkov v. Ukraine*³¹ and *Kulykov and Others v. Ukraine*).³² In addition, the HCJ states other crucial judgments which fall within the context of the independence of judges and contribute to a better understanding of this concept.³³
79. By taking into consideration the practice of the European Court of Human Rights, the HCJ brings its recommendations closer to the Council of Europe standards. It also contributes to the obligation of national institutions to monitor the implementation of the European Court of Human Rights judgments and to implement them in a more efficient way.
80. The independence of the judiciary and the good administration of justice requires that the judiciary be protected against arbitrary dismissal and interference in the exercise of the functions through disciplinary proceedings.³⁴ The Council of Europe standards contain a number of principles as regards disciplinary procedures in the context of the protection of the independence of judges. From the perspective of these standards, the disciplinary proceedings should take place before an independent body, with the possibility of recourse before a court.³⁵ According to the European Charter on the Statute for Judges, states should set up “by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself”.³⁶
81. According to the European Court of Human Rights judgement on the case *Volkov v. Ukraine*, the accuracy and predictability of reasons for disciplinary liability are

³¹ The judgement of the European Court of Human Rights of 9 January 2013 in the case *Oleksandr Volkov v. Ukraine* (application no. 21722/11). URL: , viewed 20.11.2019.

³² The judgement of the European Court of Human Rights of 19 January 2017 in the case *Kulykov and Others v. Ukraine* (application no. 5114/09). URL: , viewed 20.11.2019.

³³ The judgement of the European Court of Human Rights of 6 September 2005 in the case *Salov v. Ukraine* (application no. 65518/01). URL: , viewed 20.11.2019.

³⁴ In the Joint Opinion of the VC and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the Draft Law on Amendments to the Organic Law on General Courts of Georgia, adopted by the VC at its 100th Plenary Session (Rome, 10-11 October 2014, CDL-AD (2014)031), the issue of the termination of the mandates of court presidents was examined as follows (footnotes omitted). See case *Baka v. Hungary*, p. 39.

³⁵ See the CCJE's Magna Charta of Judges, para. 6.

³⁶ Ibid.

preferable given the goals of legal certainty, especially for ensuring the independence of judges.³⁷

82. On its last meeting for the supervision of H46-38 *Oleksandr Volkov group v. Ukraine* (Application No. 21722/11), held on 3-5 March 2020, the Committee of Ministers of the Council of Europe admitted that from 2014 through 2018, the Ukrainian authorities, in close cooperation with the Council of Europe, took significant steps to reform the system of judicial discipline and careers through constitutional amendments, legislation and also practical and institutional measures. However, the Committee of Ministers of the Council of Europe identified the same problems as already identified by the Judicial Council in its 2019 Annual Report, related to the amendments of Law No 193.
83. It is not the first time that the European Court of Human Rights sees as problematic a situation in which the law does not provide appropriate guarantees against abuse and misuse of disciplinary measures to the detriment of judicial independence.³⁸ In view of this, according to the European Court of Human Rights the law must provide a degree of legal protection against arbitrary interference by the authorities and be sufficiently foreseeable in terms of the conditions under which they are entitled to take measures affecting rights.
84. In addition, although violations of ethical and professional standards can be considered in the evaluation process, a clear differentiation must be made between evaluation and disciplinary measures. In view of this, the principles of security of tenure and of the irremovability of judges are well-established key elements of judicial independence and must be respected.³⁹
85. According to the Council of Europe standards, disciplinary proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. The disciplinary sanctions should be proportionate.⁴⁰
86. The Venice Commission adopts the opinion that disciplinary proceedings against judges, based on the rule of law, should correspond to certain basic principles, which include the following: liability should follow a violation of a duty expressly defined by law; there should be a fair trial with a full hearing of the parties and representation of the judge; the law should define the scale of sanctions; the imposition of the sanction should be subject to the principle of proportionality; and there should be a right to appeal to a higher judicial authority.⁴¹
87. According to the Council of Europe standards, disciplinary proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial

³⁷ See European Court of Human Rights judgement, the case *Oleksandr Fedorovych Volkov v. Ukraine*, para.79.

³⁸ Ibid., para. 170 and para. 199.

³⁹ See CCJE Opinion No. 17, para. 29.

⁴⁰ See Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities CM/Rec (2010)12, para. 69.

⁴¹ See Venice Commission Compilation of Opinions and Reports Concerning Courts and Judges, CDL-PI(2019)008 , para. 3.4.2.1. See also CDL-AD (2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, para. 4 and CDL-AD (2014)006, Joint opinion of the VC and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, para. 12. See also VC Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia.

and provide the judge with the right to challenge the decision and sanction. The disciplinary sanctions should be proportionate.⁴²

88. In addition, disciplinary proceedings should deal with gross and inexcusable professional misconduct but should never extend to differences in legal interpretation of the law or judicial mistakes.⁴³
89. Moreover, the European Court of Human Rights sees as problematic a situation in which the law does not provide appropriate guarantees against the abuse and misuse of disciplinary measures to the detriment of judicial independence.⁴⁴ In view of this, the law must provide a degree of legal protection against arbitrary interference by the authorities and be sufficiently foreseeable in terms of the conditions under which they are entitled to take measures affecting rights.
90. It should be noted that according to the standards of the Council of Europe, judges should be independent and impartial in their decision-making and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Judges should have unfettered freedom to decide cases impartially, in accordance with the law and their interpretation of the facts.
91. According to the Council of Europe standards, judges are accountable through the appeal process and the decisions of judges should not be subject to any revision other than for appellate proceedings or the re-opening of proceedings, as provided for by law. Judgments should be reasoned and pronounced publicly. Judges should not otherwise be obliged to justify the reasons for their judgments.
92. According to CCJE Opinion No. 18, disciplinary measures and criminal liability are acceptable only for deliberate acts or omissions.⁴⁵ Interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence.
93. The Council of Europe standards, mentioned above, are also relevant to the legal provision of Article 375 of the Criminal Code of Ukraine, which concerns criminal liability for knowingly delivering an unjust verdict, judgment, ruling or order and is already mentioned in para. 49-65 above. In fact, this problem was addressed with concern in several consecutive annual reports by the HCJ, from which it is clear that the implementation of this provision creates problems and risks to judicial independence. The decision of the CCU which declares Article 375 of the Criminal Code of Ukraine unconstitutional should be welcomed, however it is essential that the new text of Article 375 should be drafted by taking into consideration the relevant Council of Europe standards.
94. As mentioned above, this legal provision deals with interference in the activity of a judge. In a number of annual reports, the HCJ has expressed its concern that based on this legal provision, several judges are being investigated by law enforcement in order to see if their judgements were unjust or not.

⁴² See Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities CM/Rec (2010)12, para. 69.

⁴³ See Venice Commission Compilation of Opinions and Reports Concerning Courts and Judges, CDL-PI(2019)008.

⁴⁴ Ibid. para. 170 and para. 199.

⁴⁵ See Opinion No. 18, CCJE, para. 6

Publicising the Annual Report

95. The Council of Europe Guidelines attribute particular importance to the publicising of the annual reports on the independence of the judiciary. In particular, according to the Council of Europe Guidelines, the 2019 HCJ Annual Report should target not only the public but also the whole judicial system and all other state bodies and institutions.
96. As is obvious from the 2019 HCJ Annual Report, the HCJ publishes the annual reports on ensuring the independence of the judges in Ukraine in 2019. It is important to mention that the HCJ declares that it remains open to discussing it with all stakeholders and to comments on how to further improve the content of future annual reports. This approach should be indicated as a positive trend.
97. It should be recommended that the dissemination of the annual reports of the HCJ should be as broad as possible.
98. In addition to publicising the report on the website of the HCJ and submitting it to the Verkhovna Rada of Ukraine, a summary of an annual report drafted by the HCJ could be sent to other relevant national institutions, civil society representatives, and international organisations.
99. The presentation of the 2019 HCJ Annual Report could be followed by press conferences at national and regional levels and a number of media interventions. In addition, the HCJ could organise public discussions during seminars and conferences by inviting a wide range of participants (judges, institutions, civil society representatives, national and international experts, lawyers, and representatives of international and European organisations).

Impact of the Annual Report

100. However, it should be highlighted that it is not clear from the 2019 HCJ Annual Report whether the HCJ followed the recommendation in the Council of Europe Guidelines to involve a broad range of relevant stakeholders in the process of drafting the report or/and to provide a mechanism for consultations.
101. It could be recommended that the HCJ develops a clear and predictable mechanism for consultations with relevant stakeholders in the course of the drafting of the annual reports. This process should be visible and reflected in the annual reports in order to strengthen its messages.
102. In order to strengthen its impact, the 2019 HCJ Annual Report should provide for a comprehensive list of specific recommendations. They could be drafted at the end of the report in order to outline the main problematic issues and to attract the attention of the institutions and society as a whole. This approach could increase the impact of the annual reports, make them more accessible to the public, and contribute to the more successful monitoring of their implementation.

Follow-up Procedure and Monitoring System of the Annual Report

103. The draft of the HCJ 2019 Annual Report does not indicate the adequate use of a follow-up procedure or a monitoring system that is developed and recommended in the Council of Europe Guidelines for the report.
104. It would be beneficial to consider the use of a monitoring system, which could contribute to an objective overview of the recommendations and involve representatives of civil society. This system would allow the HCJ to identify and point out in the respective annual report specific proposals/recommendations/solutions for

the resolution of current (existing) problems and, accordingly, to monitor their implementation and application in the future.

105. In this respect, it should be mentioned as a positive trend that, on several occasions, the 2019 HCJ Annual Report indicates that the implementation of the newly-proposed legislation shall be subject to thorough monitoring and analysis by further annual reports from the HCJ on ensuring the independence of the judiciary in Ukraine.
106. It would be a good idea if the HCJ explicitly indicates the problematic issues which remained unresolved since its previous annual report. Such issues could be mentioned in the introduction and be included in a list of recommendations for the current report. In order to avoid duplications of previous reports where the relevant topics have already been discussed in detail, one recommendation would be to mention the remaining problem and refer to the previous report for additional information.
107. As mentioned above, the analysis and the recommendations from the monitoring process could be used for public advocacy and as a good opportunity to approach international and European institutions and urge their support.

CONCLUSIONS AND RECOMMENDATIONS

108. The 2019 HCJ Annual Report is to a large extent in compliance with the Council of Europe standards and the Council of Europe Guidelines in terms of the recommendations on its structure, objectiveness, and relevance.
109. The 2019 HCJ Annual Report provides for a comprehensive overview of the situation related to the independence of the judiciary in Ukraine. This Annual Report raises important issues regarding the reform of the judiciary, which was introduced in 2019.
110. However, the 2019 HCJ Annual Report indicates disturbing conclusions about infringements on the independence of the judges and the judiciary in Ukraine – the pressure on judges, the interference in the work of judges, excessive criticism of them, and low public trust. The reference to public opinion polls, indicating a decrease in public trust following the legislative amendments which infringe upon the independence of the judiciary, indicate that society is responsive and intolerant of such violations. This social energy should be used by the HCJ to further promote the standards for the independence of judges and the judiciary and to gain support for confronting attempts to violate this independence.
111. The conclusions about infringements on the independence of the judiciary made in the HCJ 2019 Annual Report are alarming, especially when the HCJ advisory opinions are not taken into consideration by the Verkhovna Rada of Ukraine and the drafts of legislative acts, which affect the judiciary, are not referred to the judges, bodies of judicial self-governance, and civil society for proper consultation.
112. It should be noted that the 2019 HCJ Annual Report has made an important contribution to the execution of the Volkov group of cases and to confronting the pressure on judges.

In order to contribute to the improvement of the 2019 HCJ Annual report, the following recommendations could be made:

Comprehensiveness of the Annual Report

119. The creation of a summary of the HCJ Annual Report (up to 30 pages) in order to present in a concise and comprehensive manner problematic matters and to highlight the important recommendations of the 2019 HCJ Annual Report. It would be advantageous for the summary to be translated into English for its wider dissemination.

Relevance of the 2019 HCJ Annual Report

120. The introduction of the 2019 HCJ Annual Report could highlight the problems that remain unresolved from previous annual reports. These problems should be included in a list of recommendations in the 2019 HCJ Annual Report. Also, a link to previous annual reports could be presented through a short summary of unresolved problematic issues.
121. A list of specific and comprehensive recommendations based on the identified problems should be developed. The recommendations could be placed either at the end of the relevant part of the 2019 HCJ Annual Report or/and after the general conclusions (at the end of the 2019 HCJ Annual Report).
122. A broad range of relevant stakeholders should be included in the drafting of the annual reports (such as representatives of bodies of judicial self-governance, other bodies and agencies of the judicial system, non-governmental organisations). In view

of this, the HCJ could develop and use a clear and predictable mechanism of consultations with relevant stakeholders in the course of drafting annual reports.

Objectivity of the Annual Report

123. Issues related to infringements on the independence of judges or the judiciary as a whole should be tackled by the HCJ and be indicated in the 2019 HCJ Annual Report and its summary. Journalists could be involved for a stronger impact.
124. The HCJ should endeavour to gain more public support as well as more media attention for the identified issues included in the HCJ Annual Report, in order to promote its recommendations in a more efficient way or at least launch public debates.

Impact and Publicising of the Annual Report

125. The dissemination of the HCJ annual reports and their summaries should be as broad as possible. The presentation of the 2019 HCJ Annual Report could be followed by press conferences at national and regional levels and by a number of media interventions.
126. In addition to publicising the 2019 HCJ Annual Report on the website of the HCJ, the summary could be sent to other relevant institutions (such as the Ministry of Justice of Ukraine), civil society representatives, media, and international organisations.
127. The summary and the recommendations stated in the 2019 HCJ Annual Report could be brought to the attention of the representatives of international and European organisations. Based on the 2019 HCJ Annual Report, they could develop their own recommendations and send them to the relevant national institutions in order to exert additional pressure.
128. The HCJ could organise public discussions (or seminars and conferences) on problematic issues by inviting a wide range of participants (judges, institutions, civil society representatives, national and international experts, lawyers, media, and representatives of international and European organisations).