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ANALYSIS

OF THE STATUS OF THE JUDICIAL SELF-GOVERNING BODIES IN UKRAINE

CHALLENGES AND RECOMMENDATIONS

June 2023

The analysis was prepared within the framework of the project "Ensuring the effective implementation of the right to a fair trial (Article 6 of the ECHR) in Ukraine", which is implemented by the Council of Europe's Division of Co-operation Programmes

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LIST OF ABBREVIATIONS

AGE	Advisory Group of Experts
CCJE	Consultative Council of European Judges
CCU	Constitutional Court of Ukraine
CoE	Council of Europe
CUJ	Council of Judges of Ukraine
HACC	High Anti-Corruption Court
HCJ	High Council of Justice
HQCJ	High Qualification Commission of Judges of Ukraine
LHCJ	Law on High Council of Justice
LJStJ	Law on the Judiciary and the Status of Judges
NABU	National Anti-Corruption Bureau
NGO	Non-governmental organisation
NSJU	National School of Judges of Ukraine
PCI	Public Integrity Council
PCIE	Public Council of International Experts
SAPO	Specialized Anti-Corruption Prosecutor´s Office
SC	Selection Commission
SCA	State Judicial Administration of Ukraine.

EXECUTIVE SUMMARY

The purpose of this document is to conduct an analysis of the status of three main self-governing bodies in Ukraine[1], the High Council of Justice (HCJ), the High Qualification Commission of Judges of Ukraine (HQCJ) and the Council of Judges of Ukraine (CJU) by considering their functions and identifying existing and potential challenges and proposing solutions to the existing challenges.

After an introduction, the analysis describes in its section II the legal framework of the three self-governing bodies and their subsidiary entities. Section III of the analysis reflects the overall situation of the justice system in Ukraine, section IV suggests possible amendments and measures for improvement and section V provides conclusions and recommendations.

The situation of the Ukrainian judiciary is dominated negatively by the fact that many positions in first and second instance courts are vacant, which results in enormous workload and backlogs in courts. The major reason, which can be identified clearly, is the suspension of functioning of both the HCJ for almost a year and of the HQCJ for more than three years. The military aggression of the Russian Federation against Ukraine created additional problems and challenges.

Nevertheless, regarding the recently amended legal framework, the Ukrainian judiciary now has means to remedy this situation.

The analysis identifies measures, which immediately could be started, like the competitions to fill vacancies and the re-starting of the one-time assessment of sitting judges and proposes priorities in this regard.

The proposal to reduce the duration of the judicial training is seen as complex issue and some proposals what should be taken into account are made.

In a midterm perspective, it is suggested to examine the possibility to formulate certain terms (criteria) in laws and by-laws more precisely so as to increase legal certainty concerning their application, reduce the workload in courts and provide the required legal remedies.

It is proposed to enforce the use of IT for exchange of documents, readable data in databases and also to strengthen the self-governing bodies.

After a consolidation of the now existing system, a further reform included in an holistic strategy can be envisaged, which could consider to merge the HCJ and the HQCJ, to re-structure the judicial administration, which is now dominated by the State Judicial Administration of Ukraine (SCA), and to decide on the role of civil society in this system.

Finally, the analysis deals also with the role of the Public Integrity Council and proposes to keep its role but to reform the respective by-laws according to this role and to provide some resources for its functioning.

[1] The Ukrainian legislation differentiates between 'bodies of judicial governance' and 'bodies judicial self-governance'. In this analysis, the term 'judicial self-governing bodies' (or 'bodies of judicial self-governance') will cover the meaning of both Ukrainian terms.

I. INTRODUCTION

1. The purpose of this document is to conduct an analysis of the status of three main self-governing bodies in Ukraine[2], the High Council of Justice (HCJ), the High Qualification Commission of Judges of Ukraine (HQCJ) and the Council of Judges of Ukraine (CJU) by considering their functions defined by law, the existing procedures of appointment/ selection of the members of the self-governance bodies defined by law, identifying existing and potential challenges and proposing solutions to the existing challenges.
2. The analysis is prepared by the international consultant Mr Gerhard Reissner[3], as part of the activities of the project "Ensuring the effective implementation of the Right to a Fair Trial (Article 6 of the European Convention on Human Rights) in Ukraine". The analysis is based on desk research of the relevant legal provisions, including the by-laws, and on the on-line exchanges with the Chairman and members of the High Council of Justice and the Chairman and members of the Council of Judges of Ukraine. The consultant is very grateful for the excellent preparatory work and the information provided by the project-involved local consultant Mr. Savchuk. The analysis was presented and discussed during a workshop on judicial self-governance in Ukraine, held in Strasbourg on 16 June 2023.

[2] The Ukrainian legislation differentiates between 'bodies of judicial governance' and 'bodies of judicial self-governance'. In this analysis, the term 'judicial self-governing bodies' (or 'bodies of judicial self-governance') will cover the meaning of both Ukrainian terms.

[3] Mr Gerhard Reissner is an international consultant of the Council of Europe, former President of the District Court of Floridsdorf (Vienna), former President of the Consultative Council of European Judges.

II. LEGAL FRAMEWORK

3. Justice in Ukraine is administered exclusively by courts.[4] Justice is administered by judges.[5] Independence and inviolability of a judge are guaranteed by the Constitution and laws of Ukraine.[6]
4. To govern the justice system, several bodies exist, the most important of which are the High Council of Justice (HCJ)[7], the High Qualification Commission of Judges of Ukraine (HQCJ)[8], the Congress of Judges of Ukraine[9], the Council of Judges of Ukraine (CJU)[10], the State Judicial Administration of Ukraine[11], the Service of Court Guard[12], the Commission on Top-Rank Civil Servants in the Judiciary[13], the National School of Judges of Ukraine[14], the Ethics Commission[15], the Selection Commission[16], the Public Council of Integrity[17] and the Public Council of International Experts[18].
5. Several tasks of administration involve two or more of these bodies, sometimes jurisdictions of the bodies overlap.

a) Judicial Self-Governing Bodies

6. Although the Constitution establishes the principle of judicial self-governance, it limits this competence to "protecting professional interests of judges and deciding internal activity of the courts."[19] Several international documents address all bodies as self-governance bodies, which are composed fully or partially of judges, independent of the government and the legislature, established by law or under the Constitution and endowed with powers of governance in the justice system.
7. Following the Constitution, Section VIII of the Law on the Judiciary and the Status of Judges (LJStJ) enumerates meetings of judges of a respective court[20], the Congress of Judges of Ukraine and the CJU as self-governance bodies, all of which are composed of judges only.
8. The meeting of judges of a court encompasses all judges of that court, who discuss and adopt collective decisions on the internal operation of the court (workload, distribution of cases etc.).
9. The Congress of Judges of Ukraine is the highest organ of self-governance. It is a meeting of delegates elected by the meetings of judges of all courts, whereby there is a certain number of delegates dependent on the size of the respective court. The congress has to be convened at least every second year. It elects and decides on dismissal of members of the HCJ, elects judges of the Constitutional Court of Ukraine

[4] Constitution Article 124
[5] Constitution Article 127 para 1
[6] Constitution Article 126 para 1
[7] Constitution Article 131 and Article 1 LJStJ
[8] Article 92 LJStJ
[9] Article 129 LJStJ
[10] Article 133 LJStJ
[11] Article 151 LJStJ
[12] Article 161 LJStJ
[13] Article 29 LJStJ
[14] Article 104 LJStJ
[15] Article 9-1 LJStJ
[16] Article 95-1 LJStJ
[17] Article 87 LJStJ
[18] Article 9 Law on High Anti-Corruption Court
[19] Constitution Article 130-1
[20] Article 128 LJStJ

(CCU) and one member of the Advisory Expert Group, in line with the Law on the CCU. It also elects all members of the CJU.

10. The CJU is the executive body of the Congress of Judges of Ukraine. It ensures the implementation of decisions taken by the Congress of Judges of Ukraine. Among other things[21], it develops and provides for the implementation of measures to ensure the independence of courts and judges, improvement of the organizational support of the activity of courts, considers the issues related to the legal protection of judges, social security of judges and their families, adopts respective decisions on these matters; oversees the organisation of activity of the courts, and submits proposals on issues related to the activity of courts to state authorities and local governments. The CJU consists of 32 members, whereby the law provides a provision how the different levels and branches of courts have to be represented.[22]

b) High Council of Justice

11. The HCJ is a constitutional body[23] , which means that any changes in its composition or in its competences can only by implemented via an amendment to the Constitution of Ukraine. Additional tasks can be entrusted to the HCJ[24] through legislation.
12. The Constitution of Ukraine reserves the following tasks for the HCJ[25]:
    - to present submission for the appointment of a judge to office;
    - to decide on the violation by a judge or a prosecutor of the incompatibility requirements;
    - to review complaints on decisions of the relevant body imposing disciplinary liability on a judge or a prosecutor;
    - to decide on dismissal of a judge from office;
    - to grant consent for detention of a judge or keeping him or her under custody;
    - to decide on temporal withdrawal of the authority of a judge to administer justice;
    - to take measures to ensure independence of judges;
    - to decide on transfer of a judge.
13. In addition, the Law on the High Council of Justice (LHCJ) provides among other things the following tasks[26]:
    i. to adopt a resolution on assigning the judge to another court of the same level and specialisation;
    j. to adopt a resolution on suspending the judge's retirement;
    k. to determine the number of judges in the court as prescribed by the Law on judiciary;
    l. to approve the Regulations on the Unified Judicial Information and Communication System and/or Its Individual Subsystems (Modules);
    m. to appoint and dismiss the members of the HQCJ;
    n. to dismiss the members of the HCJ;
    o. to approve the Procedure for Maintaining the Unified State Register of Court Decisions;
    p. to give advisory opinions on the draft laws regarding establishment, reorganisation or liquidation of courts, the judiciary and the status of justice, which are mandatory for consideration;
    q. to consolidate proposals of courts, bodies and institutions of the judicial system regarding the legislation on their status and operations, the judiciary and the status of judges;
    r. to appoint and dismiss the Head and Deputy Heads of the SCA.

[21] Article 133 para 8 LJStJ
[22] Artiicle 133 para 2 LJStJ
[23] Constitution Article 131
[24] Constitution Article 131 para 1 point 9
[25] Constitution Article 131 para 1
[26] Article 3 LHCJ

14. The HCJ is a legal entity, and expenditures for its maintenance are allocated in a separate item in the State Budget of Ukraine. It performs the function of the key spending unit of the State Budget of Ukraine as regards financial support of its operations and participates in determining expenditures from the State Budget of Ukraine to maintain courts, bodies and institutions of the judicial system in accordance with the Budget Code of Ukraine.
15. The HCJ itself adopts the Rules of Procedure to regulate its operational procedures.
16. The HCJ is composed of twenty-one members[27], including ten members elected by the Congress of Judges of Ukraine from among the judges and retired judges, two members designated by the President of Ukraine, two members elected by the Verkhovna Rada of Ukraine, two members elected by the Congress of Attorneys of Ukraine, two members elected by the All-Ukrainian Conference of Public Prosecutors, and two members elected by the Congress of Representatives of Law Schools and Academic Institutions. The President of the Supreme Court of Ukraine is a member of the HCJ by virtue of the office.
17. The Constitution of Ukraine establishes the following requirements[28] to become a member of the HCJ, whereby the procedure is delegated to the level of ordinary law[29]: A member of the High Council of Justice shall not belong to political parties, trade unions, take part in any political activity, hold a representative mandate, occupy any other paid office (except for the office of the Chairperson of the Supreme Court), engage in other paid work except academic, teaching or creative activity. A member of the High Council of Justice shall be a legal professional and meet the requirement of political neutrality.
18. Additional requirements for a member of the HCJ may be provided for in the law.[30] The Law on HCJ in addition requires[31] that the office of the HCJ member may be held by a citizen of Ukraine who is at least thirty-five years old, speaks the state language, has the degree in law and has been working in the field of law for at least fifteen years, is a lawyer and meets the political neutrality criterion as well as the criteria of professional competence, ethics and integrity. There are also some incomparability criteria.[32]
19. The HCJ members perform their duties on a permanent basis, are paid the salary and subject to the requirements of the anti-corruption legislation. The HCJ members (except for the Chairperson of the SC) may not combine their job with other activities, except for teaching, academic or creative activities and rewards for such activities. The remuneration of a member of the High Council of Justice is established in the amount of the fixed salary of a judge of the Supreme Court.[33]
20. The term of office of the HCJ members is four years. The Law on HCJ forbids the same person to hold the HCJ member's office for two terms running.
21. Normally the HCJ works in plenary sessions and decides with majority of the members, who are present. The HCJ can establish other bodies.[34] The Law itself foresees that such bodies are created in cases of disciplinary liability of judges, which shall include at least four members of the HCJ.[35]
22. The HCJ is competent when at least fifteen members are elected (appointed), and the majority of them (which is at least 8 members) are judges or retired judges.[36]
23. If the HCJ can cease to be competent due to expiration of the authority of a member of the HCJ, such member shall continue to exercise his or her powers until another person

[27] Constitution Article 131 para 2
[28] Constitution Article 131 para 6 and 7
[29] Constitution Article 131 para 3
[30] Constitution Article 131 para 8
[31] Article 6 LHCJ
[32] Article 6 para 10 LHCJ et alt
[33] Article 21 LHCJ
[34] Article 26 para 1 and 6 LHCJ
[35] Article 26 para 2 – 5 LHCJ.
[36] Constitution Article 131 para 9; Article 18 LHCJ

is elected (appointed) to his or her office, but in any case, no more than three months upon expiration of the period for which the respective HCJ member was elected (appointed). There is no rule if such a cease of competence originates in the simultaneous - forced or voluntary -withdrawal of more than one member.

24. Since the Law of Ukraine dated 07/14/2021 No. 1635-IX came into force, in order to become a member of the HCJ and be elected or appointed by the competent agencies, the candidates have to undergo checks against the criteria of integrity and professional ethics by the Ethics Council and have to be included in a list of proposed candidates, which is forwarded to the electing/appointing agency by the Ethics Council.[37]
25. The Ethics Council is composed of six experts, three judges or retired judges elected by the Congress of Judges, one proposed by the Council of Prosecutors of Ukraine; one proposed by the Bar Council of Ukraine; one proposed by the Academy of Legal Sciences of Ukraine represented by its praesidium[38]. The members are appointed by the Chair of the HCJ, the duration of their mandate is six years not renewable.
26. Regarding the first composition of the newly established Ethics Council the Final and Transitional Provisions of the LHCJ were amended and item 23-1 added, which foresees that there are three judges or retired judges proposed by the Council of Judges and three international experts proposed by certain international and foreign organisations.
27. The Ethics Council was also entrusted with the task of a one-time assessment to check compliance of the sitting HCJ members with the professional ethics and integrity criteria.[39]
28. As a special part of the HCJ secretariat under the lead of the deputy head of the secretariat, the Disciplinary Inspection Service has to be established, which is set up for the purpose of exercising the HCJ's powers of administering disciplinary proceedings with regard to judges and shall operate based on the principle of functional independence from the High Council of Justice.[40] To become a Disciplinary Inspector, one has to have a degree in law, to have worked in the field of law for at least fifteen years, including at least eight years as a judge, a prosecutor or an attorney and to undergo a competition to confirm the integrity and conformity to ethical standards.
29. The HCJ also plays a role in the administration of the courts. The head and the deputy heads of the SCA are appointed by the HCJ, and several administrative decisions of the SCA need an involvement of the HCJ (proposal to change the judicial/courts map, to decide on the number of judges in a court etc)

c) High Qualification Commission of Judges of Ukraine

30. The Constitution of Ukraine provides a possibility that in the justice system, in accordance with the law, bodies and institutions could be established to provide selection of judges, prosecutors, their professional training, assessment, consider disciplinary responsibility cases, provide financial and organisational support for the courts[41]. The competences which are explicitly reserved to the constitutional bodies like the HCJ cannot be transferred to other bodies.

[37] Article 9-1 para 1 LHCJ
[38] Article 9-1 para 3 LHCJ
[39] Final and Transitional Provisions of Law 1635-IX item 4
[40] Article 27 LHCJ
[41] Constitution Article 131 para 10

31. The most important of such bodies in the judiciary is the High Qualification Commission of Judges of Ukraine (HQCJ)[42]. Its main tasks are[43]:
    - to select candidates for the position of a judge;
    - to submit the recommendation to the HCJ on appointment of the candidate for the position of a judge;
    - to submit the recommendation to transfer a judge;
    - to conduct qualification assessments;
    - to keep the judicial dossier of judges and the dossier of the candidate for the position of a judge;
    - to ensure and publish judges' declarations of integrity and the family relations of judges and candidates for the position of a judge.
32. Staffed with these important tasks, the HQCJ plays a central role in filling vacancies by providing the necessary proposals of candidates to be appointed to the HCJ and must also undertake the (extraordinary) assessment of all sitting judges, which may lead to a dismissal if it does not establish the assessed judge's ability to administer justice in the respective court.[44]
33. The HQCJ is composed of sixteen members appointed by the HCJ, eight of whom are appointed from among judges or retired judges for a tenure of four years. Only two consecutive periods of the membership are possible.
34. A member of the HQCJ may be a citizen of Ukraine who speaks the state language, has higher legal education, professional experience in the field of law for at least fifteen years, and meets the criteria of integrity, professional competence, determined by the LJStJ. A member of the HQCJ must adhere to political neutrality, may not belong to political parties, trade unions, participate in any political activity.[45] In addition there are a number of incompatibility criteria.
35. The Selection Commission (SC) assesses if a candidate, who applies to become a member of the HQCJ, meets the requirements defined by the law. The SC forwards a list of successful candidates to the HCJ, which decides whom to appoint.
36. The HQCJ shall be considered competent provided that at least eleven members are appointed to its membership of which at least six are appointed from among judges or retired judges. In case the term of office of the HQCJ member expires, and the HQCJ will be ceased to be competent, this member of the HQCJ shall continue to exercise his or her powers until the other person is appointed to his or her position, but for no more than three months.[46] A similar regulation, when more than one member simultaneously leave the HQCJ does not exist.
37. The SC is an auxiliary body of the HCJ, which was introduced to conduct the competition for the position of a member of the HQCJ and to form the list of the candidates for the position of a member of the HQCJ who meet the criteria of integrity and professional competence.[47] The SC is composed of six persons who have impeccable business reputation, high professional qualities, authority in the society, and meet the integrity criterion appointed by the HCJ for a tenure of four years not renewable: three judges or retired judges proposed by the CJU; one member proposed by the Council of Prosecutors of Ukraine; one member proposed by the Bar Council of Ukraine; and one member proposed by the National Academy of Legal Sciences of Ukraine represented by the Praesidium.[48] A decision is adopted if four members are in favour.
38. Regarding the first composition of the newly established SC, the Final and Transitional Provisions of the LJStJ foresee a deviation. The HCJ had to appoint three judges or

[42] Article 92 ff LJStJ
[43] Article 93 para 1 LJStJ
[44] Transitional Provisions of the Constitution para 16-1 item4
[45] Article 94 para 2 LJStJ
[46] Article 92 para 4 LJStJ
[47] Article 95 LJStJ
[48] Article 95-1 paras 3,4,9

retired judges proposed by the Council of Judges and three international experts proposed by certain international and foreign organisations. A decision of the first composition of the SC shall be adopted if at least four members of the SC two of whom were nominated by international and foreign organisations have voted for it. In case of an equal number of votes "for" and "against", the votes of three members of the SC, two of whom are proposed by international and foreign organisations, are decisive.[49] The tenure of this first SC will end two years after the newly appointed HQCJ becomes competent to start its work.

39. In order to involve civil society in the judicial selection procedure and thus to increase the trust in the judiciary and to provide the HQCJ with additional information on candidates to judges, the Public Integrity Council (PIC) was established.[50]
40. The PIC is composed of 20 representatives of human rights civic groups, law scholars, attorneys, and journalists who are recognized specialists in the sphere of their professional activity and who have a highly recognised reputation and meet the criterion of political neutrality These 20 persons are elected by a meeting of representatives of civic organisations for a term of two years, which is renewable. Civic organisations, who would like to participate and to have a voice in the meeting, in which the members of the PIC are elected, have to fulfil certain criteria and have to apply for participation, which is granted by the HQCJ, if the criteria of the law are met.
41. On the occasion of a qualification assessment the PIC may collect, check and analyse information about a judge or judicial candidate and provide this information to the HQCJ. The PIC might provide the HQCJ with a negative opinion – based on justifiable reasons – that a judge or a judicial candidate does not meet professional ethics and integrity criteria. If the HQCJ agrees with a negative opinion of the PIC, an appointment or promotion will not be possible or respectively the judge has to terminate his/her function or will be proposed for dismissed to the HCJ.
42. A negative opinion of the PIC will have two immediate consequences: the opinion has to be added to the dossier of the judge or judicial candidate, and the HQCJ needs a higher quorum (minimum 11 votes) if it wishes to overturn the PIC's opinion of non-conformity of the judge (candidate for the position of a judge) to the criteria of professional ethics and integrity.[51] According to the Law on judiciary and the Rules of Procedure, the PCI operates as four panels of five members each. According to the Rules of Procedure, a panel shall be deemed qualified if a meeting is attended by three members of the PCI. A resolution of the Panel shall be deemed adopted if it has been voted for by at least three members of the PCI.
43. The PIC adopted a Regulation which establishes the rules of procedure of the PIC, of its chambers and its coordinators, with a particular focus on the collection of information and the delivery of opinions. The PIC uses the possibility, which is provided in the law, to run a website[52], where everybody can submit information about a judge and where information on judges and the result of the examination by the PIC are published. The PCI has the right to delegate a representative to participate in the meetings of the HQCJ regarding qualification assessment.
44. Under the umbrella of the HQCJ the National School of Judges of Ukraine (NSJU) is established[53], which performs its activity in line with the LJStJ and a statute approved by the HQCJ, The rector and the vice-rectors are appointed by the HQCJ. The NSJU is a state institution with a special status within the system of the judiciary, which shall ensure training of highly qualified staff for the system of the judiciary and to conduct research and scientific activity.
45. The most important task of the NSJU is the delivery of a 12-month initial training of candidates to judges, between the selection exam and the qualification exam. The

[49] Final and Transitional Provisions item 50 LJStJ

[50] Article 87 LJStJ

[51] Article 88 para 1 LJStJ

[52] Article 87 para 6 LJStJ

[53] Articles 104, 105 LHStJ

NSJU also provides in-service training, and the training, which was ordered within disciplinary proceedings against a judge as a sanction. The NSJU also conducts research in the field of improving the judiciary, the status of judges, judicial proceedings and it provides a scientific and methodological support to the functioning of courts, the HCJ and the HQCJ, among which also the elaboration of materials for the diverse admission and qualification exams.

III. THE EXPERIENCES OF THE PRACTICE AND THE STATUS QUO

46. Since the 2013-2014 revolution of dignity, Ukraine is on the way to safeguard the independence, impartiality, and integrity of the justice system. Several laws were adopted to increase the trust in the judiciary by eliminating those persons who lack integrity or professional competence: the Law on Restore the Trust in the Judiciary, the Law on Government Cleansing, the Law on Fair Trial.
47. The amendments of the Constitution of Ukraine in 2016 ordered a one-time qualification assessment of all sitting judges and provided the basis for a new version of the Law on the Judiciary and the Status of Judges, which improved the disciplinary procedures and created a competitive, transparent, and merit-based system of judicial appointments and promotions. In order to increase the trust in the system, participation of civil society was introduced by creating the PIC.
48. In addition, many anti-corruption measures were introduced like an improved declaration of assets, a declaration of conflict of interest and bodies to fight corruption strengthened or new ones created, such as the National Anti-Corruption Bureau (NABU), the Specialised Anti-Corruption Prosecutor´s Office (SAPO), the High Anti-Corruption Court (HACC).
49. In spite of all these endeavours there had been some blockade of the changes from inside and outside of the justice system and due to some serious suspicions even criminal investigations against persons within the judiciary had been started.
50. Following the commitments of Ukraine before the European Union and the International Monetary Fund, new legal provisions were adopted hastily. Two auxiliary bodies were created, the Ethics Council and the Selection Commission, which have to check if candidates to become a member of the HCJ or the HQCJ respectively fulfil the criteria. Only those who successfully passed this check and had therefore been proposed by these bodies can be appointed/elected by the competent agencies. In October 2019 on the day, when law 193-IX entered into force the powers of the membership of the HQCJ was terminated[54] and all respective procedures came to a standstill, which was ongoing till June 2023, when new members of the HQCJ were selected and appointed.
51. In addition, the Ethics Council was also entrusted to assess within six months if the sitting members of the HCJ fulfil the criteria of integrity and professional ethics. After the Ethics Council was established and started its work in February 2022, 12 members stepped down and only the four remaining members underwent the assessment, three of whom successfully. The HCJ had lost its competence because it had less members than 15, which is the minimum required by the law for the HCJ to be functional. The HCJ reassumed its work in January 2023 when the sufficient number of the new members was elected and took the oath.
52. The stillstand of the work of the HCJ for almost a year and that of the HQCJ for three years has aggravated the problems of the judiciary. At the end of 2022 at the courts, which are still working (several courts had to be closed due to the war and the occupation) 1840 positions of judges were vacant (1210 at local courts, 581 at appellate courts, 31 at high specialised courts and 18 at the Supreme Court).
53. In 2022, 3263 new disciplinary complaints (after 10044 in 2021) came in. The backlog is said to have accumulated already previously. Following a recommendation of the Venice Commission that the Disciplinary Inspectors Service should be established only after the one-time vetting of the siting members of the HCJ is finished[55], the steps to exercise the necessary competition could not start before July 2023. So far, the Disciplinary Service is not established, and it is not possible to apply the new rules of procedure, where the disciplinary inspectors play a central role.

[54] Final Provisions of the Law 193-IX para 2

[55] Venice Commission Opinion CDL-AD(2021)018 para 68 and 76

54. Several by-laws (regulations on the procedure for taking the examination and the method of evaluating its results, procedure and methodology of qualification assessment, indicators, criteria, regulation on the procedure to fill vacancies etc.) could not be amended, the additional necessary material for the assessments could not be approved.
55. Before the tenure of its member was terminated, the HQCJ had successfully exercised two rounds of competition for the Supreme Court and started again a competition to become a judge of first instance. The qualification assessment after the exam in that competition was interrupted. The evaluation of 368 remaining candidates is not finished. Also, the competitions for the High Court on Intellectual Property (60 candidates for 21 positions) and the Appellate Chamber of the High Court of Intellectual Property (38 candidates for 9 positions) were interrupted. Applications of 2208 persons for 346 vacant positions of appellate courts have been submitted whereby the proceedings have not started so far.[56]
56. End of March 2023, there were 214 persons in the reserve list to become a judge and they have not been appointed so far. 325 judges, who had worked as judges for five years, had to stop their work, because their probationary period of 5 years had ended and no further steps as to their further career were not undertaken.[57]
57. 2009 judges are registered to undergo the one-time qualification assessment, which was introduced by the legal amendments of 2016.[58] By the end of March 2019 only 2409 out of around 5700 sitting judges took part in this assessment.
58. One of the consequences was also that there was no possibility to convene a congress of representatives of non-governmental organisations to elect a new PIC, the tenure of the previous one had expired in December 2020.
59. The war further increased the problems by reducing available resources, complicating the overall communication, including the convening of meetings, and increasing the number of the necessary transfers of judges.

[56] Figures Report of the HQCJ for 2022
[57] ibid
[58] ibid

IV. ASSESSMENT AND POSSIBLE MEASURES

a) General considerations and starting point

60. The consultant agrees with a number of Council of Europe´s assessments that in principle the legal framework, as it exists now and as it is described above, meets European standards and does not need fundamental changes. The laws regulating the organisation of the judiciary, its actors and their performance, as well as the laws which are intended to fight and prevent corruption, were significantly improved in the last decade.
61. This positive assessment should not prevent one from considering further improvements, which could make the system run smoother and more effective. Effort should be undertaken to avoid any blockades of functioning of the judicial bodies in the future. Also, last but not least, the necessity of the establishment of that many bodies of judicial self-governance has to be revisited.
62. The participation of three levels of bodies of judicial self-governance – (1) two bodies with a mixed composition, which determine the carrier of judges, (2) a separate body which is in charge of the resources, (3) a body which represents civil society and several auxiliary bodies – is a very specific construction, the origin of which lies in the historical reasons. A mistrust in the actors of certain bodies led to the creation of new bodies to limit or to control the powers of the existing ones. To change the Constitution of Ukraine in order to better streamline and organise the judicial self-governance bodies was at a certain time not an option, because of the wide spectrum of differing positions in Parliament. Amending the part of the Constitution regarding the judiciary in 2016 was already a big step forward.
63. As underlined above, the main driving moment for most steps in the reform process was the attempt to raise the very low trust of the public in the justice system. Transparency and reasoning of judicial decisions should have been the guideline but several times some actors in the system found loopholes or other means which reversed these efforts. This experience confirms that not only the legal provisions but also their application and the will of those who apply them is of outmost importance.[59]
64. The guiding idea of the recent reforms have been promising in this regard. Safeguarding that the central bodies of judicial self-governance – the HCJ and the HQCJ – are composed of trustworthy persons will also help to change the public attitude towards the justice system. The positive experience with the Public Council of International Experts (PCIE)[60] in the procedure of appointment of judges of the High Anti-Corruption Court gives confidence that the newly established Ethics Council and the newly established Selection Commission could become the game changers in the governance of the judiciary in its way to an effective and trustworthy protector of the rights of the Ukrainian citizens.
65. Regarding further improvements one can consider long-term measures, medium-term measures, and measures, which should be taken immediately. The latter could utilise the existing means and provisions and does not need legal amendments. The medium-term measures need some considerations, sometimes exchanges among the stakeholders and sometimes amendments of practice, by-laws, or even legislation. The long-term changes are larger changes of the system, the jurisdiction, the bodies involved. They should be embedded in a strategic plan and the intended change should be smooth and should not destabilise the system and endanger the legal security.

b) Immediate measures

ba) regarding the HQCJ

66. It is most urgent now to fill the vacancies at the first and second instance courts. There are more than 200 candidates on the reserve list to become a judge, they should be

[59] CCJE Opinion No.1 (2001) para 6

[60] Article 9 Law on the High Anti-Corruption Court

encouraged straightaway to apply for one of the vacancies. The period in which it is possible without a new assessment should be extended from three years to a longer period of time, and if necessary, once again.

67. The candidates to judges, who had participated in the admission exam should not restart the process. The results of the written test should be established by the newly composed HQCJ.
68. Presently, there are 325 judges, who had already exercised the job during a period of five years, the assessment to appoint them should be reduced to a minimum. They know the practice of a judge´s work. Besides the integrity check by collecting the information of the competent agencies, a quick look at the work within their five-year period, perhaps by requesting an opinion of the president of the respective court and a look in the dossier could be sufficient.
69. A new competition to become a judge of a first-instance court and a competition for appellate courts should be started. In parallel, the congress of representatives of non-governmental associations should be convened to restart the PIC.
70. The competitions for the new High Court of Intellectual Property and for its Appellate Chamber should be resumed based on the previous activities. The competition for the second composition of the PCIE could be started. The task to perform a qualification assessment of all sitting judges could be continued, even if this - when properly applied - may lead to additional vacancies. **Filling the vacancies in courts should therefore have a priority against quality assessment of sitting judges.**
71. In this first phase of activities, it will make sense to use the existing by-laws adopted by the previous HQCJ to re-start the suspended activity as quickly as possible, although there had been some critics on the Regulation on the Procedure and Methodology for the Qualification Assessment Criteria and Means of their Determination as adopted by the HQCJ. The international community praised the assessment of the two competitions to become one of the 200 judges of the new Supreme Court, while some national NGOs expressed some reservations, that some persons should not have passed the assessment. An in-depth analysis of the experiences so far and an open-minded exchange on the critics and weaknesses would be useful to make improvements possible in the medium-term horizon.
72. Several interlocutors referred to the idea to shorten the 12-month training of candidates to judges, which is a means that does not need to change the legal provisions, because the law provides the HQCJ a possibility to shorten or extend the duration of such training[61].
73. At the same time, it could be difficult to make a quick estimate if this proposal may not jeopardize the quality of the future work of judges. More detailed information is needed on the content of the training, as well as on the knowledge and skills that the candidates can be expected to have gained previously. The current requirement is that the candidates have to have a higher education in law and at least five years of record of professional activity in the field of law.
74. Education at the university should provide at least the theoretical knowledge. More and more universities try to also include some practical experiences in the studies they provide. The quality of the knowledge obtained therefore will depend on the quality of the universities. There are member states, with a large number of private universities, where it is quite easy to get a certificate without getting much knowledge. In some member states[62] a certain minimum result of the final examination is a criterion to be permitted to become a candidate for the judiciary.
75. Regarding the 5 years of related practical experiences, it is certainly a different aspect, considering if a person worked in a profession, which required a regular contact with courts (e.g., the defence lawyer) or a profession where such contacts were not a regular practice (e.g., the public servant in a ministry).

[61] Article 77 para 3 LJStJ

[62] e.g. Germany

76. One can also assume that the theoretical knowledge should already be checked by the HQCJ selection exam, which mainly aims at reducing the high number of interested persons to a number which the system can handle further on (during the training the participants are paid). Applicants must gain minimum 75% of the possible marks. The questions and tasks in this exam can be adapted in a way that forces the participants to try to gain the respective needed level of knowledge before, during the preparation to the selection exam, so that this part of knowledge does not need to be delivered during the training.
77. Nevertheless, the CCJE is of the opinion that even those who have long-lasting experiences with courts should have a minimum initial judicial training to provide the abilities, which are specifically needed by judges, including conducting a hearing or an interview, adopting and motivating decisions and, last but not least, the professional conduct.[63]
78. Regarding the length of the training, certain parts of it may also be substituted by IT-based tools. The CoE HELP-Program provides some on-line courses, among which there is also one on judicial ethics.[64] Another on-line course on judicial ethics was produced by the Global Judicial Integrity Network of the United Nations[65].
79. To speed up the competition to become judge at a higher court, similar considerations may help. Again, it makes much difference if a candidate already worked as judge before or if he or she has no experience in this regard. Drafting decisions should be known for those who were judges before. To check the specialised knowledge may be essential for those who apply for a special court, but for the knowledge needed in the second-instance courts, it should be the same as in the first instance. Another option could be to change the usual way how assessments of judges are done (in general following the European standards), by looking at the last performance of the judge. This can be checked in the judicial dossier, which is, in any case, already an element of the competition and perhaps by looking into (randomly selected) decisions of the judge concerned.

bb) regarding the HCJ:

80. It is definite that the decisions on judicial immunity and the decisions on suspension of judge's work in court have the highest priority, followed by the decisions regarding judicial appointments.
81. Concerning the disciplinary matters where the HCJ has overtaken a lot of old complaints, a strategy will be necessary how to deal with them. Here it may make sense to consider the order of dealing with the pending cases. The more serious offences may have priority, the stage of the proceeding and the likelihood of limitation of time may play a role. In other CoE member states, e.g., in the United Kingdom such prioritising is applied by the prosecution even in criminal cases if the workload is overwhelming.
82. Another urgent task is the competition to become a disciplinary inspector, although it may need some legal amendments to increase the attractivity of this office. The interlocutors reported that the interest of capable persons to apply for this job is low. If it is necessary, the martial law regarding the suspense of competitions for civil servants must be amended.

[63] CCJE Opinion No 4 (2003) para 25 and 26
[64] https://help.elearning.ext.coe.int
[65] https://elearningunodc.org

c) Medium-term measures

ca) Amendments of the legislation:

83. The main reason for the existing deterioration of the functioning of the Ukrainian justice system recently has been the absence of the HQCJ for more than three years and of the HCJ for almost one year, the former originating from a hasty adopted legislation while the latter from a boycott and the stepdown of the HCJ members protesting the newly introduced integrity checks.
84. There are several reasons for which the members could lose their membership in a judicial self-governing body, including their illness, death, suspension, or stepdown. Such reduction in the number of members can create a situation where the respective body loses its competence. It cannot be avoided completely but the likelihood that such a situation of a standstill occurs can be reduced.
85. Regarding the HCJ and the HQCJ, the law provides that in the case that they could lose their respective competences due to the fact that term in the office of a member expires, this member should stay till the new member is appointed, but for no more than three months. The Venice Commission even proposed to consider a case when at the same time more than one member leaves the HQCJ.[66] Such provisions could also be envisaged for other relevant bodies of judicial self-governance.
86. The alternatives may be that, together with the election/appointment of the members of a body, a sufficient number of substitute members is elected, which can step in when a member is missing either permanently or until the new member is appointed/elected.
87. The risk of deadlocks may also be reduced if the members of a body are not replaced at the same time but in a kind of rotation system. To change to such a system would mean that at a certain point of time the tenure of the mandate a part of the members must be prolonged or shortened, which certainly needs a legal, regarding the HCJ even a constitutional, amendment for this transitional period. There may be a side effect of such a provision that the experience accumulated in the body could be better passed to its next composition. The CCJE recommends such procedure for the replacement of members in a council for the judiciary.[67]
88. Finally, it may be an option of last resort to transfer the powers of one body of judicial self-governance to another body of judicial self-governance until the body in question has regained its competence. An example for such a solution was the transfer of certain powers of the HCJ to the President of the Supreme Court, by the martial law, during the time, when the HCJ had ceased its competence.[68] Under this option, it should be taken into account that the powers of the bodies within the judiciary should remain within the judiciary and not be transferred to the other branches of the state power.
89. A disturbance of the judicial system can also be created if certain required actions are delayed intentionally, which must be avoided. To a certain degree, the time limits may help in this regard. For the moment, most steps in the appointment procedure of judges entail a time frame.
90. Some of the timeframe requirements may be amended as follows. There is no timeframe when an entity which has the right to appoint/elect a member of the HCJ should start the procedure, and in which period of time they had to choose the respective member after they had received the list of checked candidates from the Ethics Council. Similarly, the time frames are missing for the acceptance and the pre-check of documents from the candidates to become a member of the HQCJ. It is then within the discretion of the HCJ as to the decisions on the proposed candidates after the HCJ received the list from the Selection Commission. The time frames could also be considered for the decisions of the Ethics Council and for the Selection Commission themselves and perhaps also for the nomination of candidates to become a member of the Ethics Council or the Selection Commission in their next compositions.

[66] Venice Commission Opinion CDL-AD(2020)022 para 49

[67] CCJE Opinion No 10 (2007) para 35

[68] Law 2128_IX of 22.3.2022 et alt.

91. When introducing the time frames, attention should be given that their lengths are realistic and fair.
92. Regarding the HCJ vacancies, it could be considered to entrust the start of the competitive procedure to re-fill the respective vacancy to the HCJ itself but not to the body in charge of the election/appointment of a new member. It will then commit the respective election/appointment body to convene the necessary conference or the meeting accordingly within a given (realistic) timeframe after that.
93. Differences in the interpretation and application of criteria of assessment of candidates also hamper a smooth and quick procedure and legal certainty. It also gives ground for possible unnecessary and irrelevant investigations and delays in a final decision. Therefore, the repeated expressed recommendation to put more in the law itself then in by-laws should be reconsidered, but foremost the existing by-laws should be re-checked in this sense too.
94. The HQCJ and the PIC should make an effort in finding a common ground. There are sub-criteria in the "Regulation on the Procedure and Methodology for the Qualification Assessment Criteria and Means of their Determination" adopted by the HQCJ in 2018 and there is the "Decision of the PIC on Indicators to Determine Noncompliance of Judges and Judicial Candidates with Integrity and Professional Ethics Criteria", which is based on the Code of Ethics adopted by the Congress of Judges in February 2013 and the Bangalore Principles of Judicial Conduct.[69]
95. It certainly will be a step forward if the criteria, which both bodies have as a basis for their respective checks, are interpreted in the same way. This would not change the fact that the scope of investigation of the PIC is limited. The PIC is entrusted to assess professional ethics and integrity and not the correctness of judicial decisions[70].
96. It also is clear and in line with the European standards that, although an involvement of civil society may contribute and add additional information and is appreciated, the decision must remain exclusively in the hands of the competent body[71]. It is also self-evident, that a negative conclusion should be based on verified information. It may therefore be to clarify these requirements explicitly in the law.
97. The amendment of the law in this regard could also be used to strengthen the capacity of the PIC. Some financial gratification for the members and some support staff would be helpful and contribute that the PIC can deliver work of better quality. It could be envisaged that representatives of the HQCJ and the PIC, as well as other stakeholders, together elaborate a handbook comparable to the Commentary on the Bangalore Principles[72].
98. The previous experience with the legal provision has been that the regulation, as to how the PIC is involved in the functioning of the HQCJ, is delegated to the HQCJ, proved problematic. The debates concerning the documents and which documents should be forwarded to the HQCJ came up. It led to conflicts and tensions, which resulted in a withdrawal of the PIC in its first composition from the selection of judges. It is therefore recommended that, after consultations between the HQCJ and the PIC, the involvement of the PIC should be regulated more precisely in the law itself.
99. In their analyses of the one-time assessment of the sitting judges (the qualification assessment) NGOs expressed some concerns about the practical application of the results of the assessment that was delivered till April 2019.[73]
100. The NGO representatives doubt that the assessment is effective because, out of 2409 judges who took part in the assessment, only 156 were recommended for

[69] Bangalore Principles on Judicial Conduct, ECOSOC Resolution 2006/23 endorsed by UN General Assembly 2200 A (XXI)

[70] There was a principle difference of opinions regarding the decision of some judges during the Maidan events

[71] CCJE Opinion No 17(2014) para 38

[72] UNODC Commentary on the Bangalore Principles of Judicial Conduct, elaborated by the Judicial Integrity Group

[73] Qualification Assessment of Judges , Summary of Interim Results, published by Centre of Policy and Legal Reform, DEJURE Foundation and All-Ukrainian Association Automaidan

dismissal for the reasons that half of them already failed in the exam and the rest – during the interview. The exam does not show the necessary level because almost everybody successfully passed it.

101. The NGOs believe that the legality of sources of origin of wealth, which were not proved by the judge concerned, was arbitrarily treated; that the interviews were taken in a too hasty way, too many on one day; that the results were announced by providing the gained points only but not why in a concrete case a certain number of points was gained.

102. The issues related to the psychological testing of judges were addressed highly critically, with NGO representatives stating the inadequacy of the questions for the testing and the total lack of transparency of the procedure. The latter is also shared by the consultant. An abolishment of the psychological testing would save the time and money and would not reduce the basis for an accurate assessment result.

103. Other points mentioned above, which were raised by the NGOs merit at least some thought concerning possible changes in the assessment procedure.

cb) Use of IT by governance bodies

104. Having many stakeholders sharing a common flow of work, one using the outcome of the work of others within the system of judicial self-governance in Ukraine, it should be of high priority to make the use of IT-facilities available for all these exchanges. It has additional importance in the difficult situation caused by the war. Consequently, the martial laws already extended the overall use of IT-communication.

105. However, it is at any time that the broader use of IT in the exchange of documents – among the stakeholders and with the parties involved – speeds up the procedures, reduces work and improves transparency.

106. The judicial dossiers have a central importance for the administration of the justice system. They should be collected in a database where the data should be accessible for all who need them, be it for the assessment purposes, for the disciplinary procedures, for statistical reasons and especially for identifying needs and distributing resources. The documents made available therefore should be stored not as scanned copies but in a format which makes processing of the data possible.

107. The IT could provide a special opportunity for the bodies of judicial self-governance, especially for the Congress of Judges. The Congress of Judges now is a congress of delegates. Modern application of the IT tools could make direct participation of all judges possible. In the past there were discussions that elections during the Congress of Judges could be influenced by undue pressure on delegates. Such danger could be reduced through the use of IT.

108. Of course, as it is necessary for every application of IT, the data protection measures, the security aspects and effective defence against hacking and misusing data must deserve great attention.

d) Long-term measures

da) Legal certainty and stability of legislation

109. As mentioned above, the justice system of Ukraine has been in a permanent change for more than ten years. New bodies were created, and new procedures related to the functioning of these bodies were introduced. The amendments to the Constitution of Ukraine in 2016 provided the basis for a new organisation of the justice system and for a more independent and accountable judiciary, which brought the Ukrainian judiciary closer to the respective standards of the Council of Europe with each step of the reform.

110. Although such developments proved to be successful, they also foster insecurity due to the quick changes. It also endangers the trust in the judiciary. The quick changes

do not allow a transparent assessment of the roots of some problems: is it the previous faulty regulation, is it the new one, or is it the period of transition only that is in charge. In Ukraine in recent time one transitional period overlapped with the transitional period of the next reform, without providing the possibility to really examine the impact of the previous reform, its pros and contras and to learn from such analysis. The hasty changes cannot be the basis on which public trust can be built. A stable situation is necessary to understand if on the newly introduced systems or provisions are efficient.

111. The Venice Commission stated in its study: "Clarity, predictability, consistency and coherency of the legislative framework, as well as the stability of the legislation, are major concerns for any legal order based on the principles of the rule of law." [74] There is a clear connection between the stability of the judicial system and its independence. Trust in the judiciary can grow only in the framework of a stable system. It should be stressed at the outset that a genuine judicial reform and transformation are a lengthy and tiresome process. Often there are no visible and quick solutions, and positive elements may show only with time. Such considerations are also shared by the Venice Commission which lists stability and consistency of law as an element of legal certainty among the benchmarks of a state governed by the rule of law.

112. With regard to the situation in Ukraine, Venice Commission explained in 2019: "Trust in the judiciary can grow only in the framework of a stable system. While judicial reforms in Ukraine have been considered necessary in order to increase public confidence in the judicial system, persistent institutional instability where reforms follow changes in political power may also be harmful for the public trust in the judiciary as an independent and impartial institution."[75]

113. Further considerations reflected in this document are therefore not the proposals for immediate changes, but they rather show a possibility how in the future, when the now established system found its balance and fulfilled its task for some years, its simplifications and streamlining could take place. These recommendations maybe included in a long-term strategy, an instrument which the Venice Commission several times mentioned in its Opinions on Ukraine, where it claimed for a need for holistic approach towards judicial reforms.[76]

db) HCJ and HQCJ as the two bodies determining judicial careers

114. There are two judicial self-governance bodies which are the central institutions for the procedures related to the carrier of judges (appointment, promotion, transfer, disciplinary issues, assessment and dismissal): the HCJ, which is a constitutional body established by Article 131 of the Constitution of Ukraine, and the HQCJ, which is a body established by the LJStJ on the basis of the same Article of the Constitution.

115. The reason why the responsibility of the carrier of judges is entrusted to these two bodies is best explained by the Venice Commission which stated: "The HQCJ is a historical relict from a time when, due to constitutional restrictions, the HCJ was deemed difficult to reform."[77]There was some mistrust against the then HCJ and the idea that, by involving a second body composed of new people separate from those in the HCJ, may improve the trust in both bodies and their tasks. Later on, however, critical discussions concerning the work of the HQCJ members came up too.

116. The response to the criticism was to completely renew the HQCJ, to assess the sitting members of the HCJ, as well as to establish the Ethics Council and the Selection Commission, to guarantee that only trustworthy persons could be selected/appointed as the members of these two bodies.

117. If the recent reform proves successful, the members of HCJ and of HQCJ each will be able to fulfil their task perfectly and the argument that two bodies are necessary

[74] Venice Commission Study CDL-RoL(2016)007 Section II B item 4

[75] Venice Commission Opinion CDL-AD(2019)027, para. 17

[76] Venice Commission Opinion CDL-AD(2022) para 6, 13 et alt

[77] Venice Commission Opinion CDL-AD(2019)027 para 17

to guarantee that the legal requirements for decisions on the career of judges are met, will disappear.

118. This could be an argument to dissolve the HQCJ and entrust the full range of its activities as far as career of judges is concerned to the HCJ – a development, which the Venice Commission envisages: "In numerous opinions, the Venice Commission insisted that the system of judicial governance should be coherent and recommended simplifying the structure of the organs of judicial administration in Ukraine, notably as concerns the parallel existence of the HCJ, which is a constitutional body, and the HQCJ, which has its basis in the law only." and "In the long term, a merger of the HQCJ into the HCJ could be envisaged."[78]

119. Such a merger may shorten some procedures and make some procedural steps unnecessary. At the same time, it must be considered that both entities have a large and experienced staff and other resources, which also have to be merged and which will require careful planning.

dc) CJU, HCJ, SCA, which administration to whom

120. Possible reforms between the three levels of the Ukrainian judicial self-government bodies by using the possibilities provided by the IT have been addressed above. In any case, the CJU should remain the central body in charge here.

121. Article 130-1 of the Constitution of Ukraine entrusts the judicial self-governance with the task to "protect professional interests of judges and to decide on the internal functioning of the courts." The Law on the Judiciary and the Status of judges consequently lists in the Chapter of self-government the three bodies which are composed of judges only.

122. Nevertheless, the HCJ, with its mixed composition, should also guarantee the independence of the judiciary but its membership also includes the view of other parts of the society. This is also significant, because to have an independent judiciary and a balance of powers is in everybody's rights and interests in a democratic society.

123. As the CCJE notes in its Opinions on Councils for the Judiciary[79], there is no standard model for a Council for the Judiciary, and the competences may vary quite a lot. In the same way, there are differences as to how the election of the judicial members of the Councils are exercised and if the assembly/conference of judges, which oversees this election, has a standing organ like the CJU in Ukraine, the respective tasks are assigned to this body. As a consequence, there should be a distribution of various administrative tasks between the respective self-governance body and the Council for the Judiciary, when both bodies exist.

124. The independence of judges may also be infringed by a lack of resources. It is therefore also in "the professional interest of judges" that a due management of resources is organised. Budgetary decisions indirectly influence the independent performance of judges and are therefore of interest for them. The SCA is empowered with all budgetary tasks (drafting, forwarding, presenting, and executing the budget for the judiciary). The HCJ is competent for its own budget. Not only the budgetary aspects but most of the other administrative decisions are taken and implemented by the SCA. The Director and the deputy directors are appointed by the HCJ, which also had to be involved in some other decisions.

125. It raises a question as to how far the separation of the SCA from both the HCJ (governance body in the Ukrainian law) and the CJU (the self-governance body in the Ukrainian law) should be, taking into account that the SCA plays a decisive role in questions of judicial/courts mapping, staffing of courts, collection of judicial statistics, distribution of judicial workload etc.

126. In any case, a closer look should be encouraged, if the distribution of responsibilities in these broad areas of management are assigned optimally among the

[78] Venice Commission Opinion CDL-AD(2019)027 para 17 and 82

[79] CCJE Opinion No 10(2007) para 5 and paras 41 to 47; CCJE Opinion No 24(2021) paras 19 and 25

self-governing bodies, including if all bodies are necessary hereto in the best interest to support the judiciary and the independent exercise of its duties. But this would need a much closer insight in the existing structures and processes.

127. The possibilities which the proper use of IT could provide for the judicial self-governance bodies was mentioned above. In a more general sense, the use of IT by the judiciary may become central for the judge´s work. An involvement of the CJU in this regard may therefore very well fit to the role, which the Constitution assigns to the judicial self-government bodies. The involvement of judges in this regard is also encouraged by the CCJE.[80]

128. The In-service training of judges is of outmost interest for the judges to provide them with the knowledge needed for the delivery of justice and with regard to their duty to update their knowledge and skills. The CJU therefore could also be put in charge of these interests of judges and have a say in this regard. The CCJE supports the essential role of judges in organising appropriate trainings[81].

129. The NSJU is established by law as a national institution with a special status under the umbrella of the HQCJ. It may be considered that in the future the CJU could take over this umbrella function, whereby also the CJU's involvement in the programme of the in-service training should be created.

dd) PCI and involvement of Civil Society

130. Since the 2014 revolution of dignity, the justice reform in Ukraine is very much driven by civil society. There is quite a number of NGOs, which contribute to the reform by participating in developing new legislation, observing its application, and reporting on their monitoring. The PCI was created to give the civil society an official basis to contribute to the cleansing of the judiciary. It provides a possibility to enlarge the range of information for the competent bodies and at the same time contributes to transparency of the procedures.

131. It may be argued that on a long term, when the recent legal amendments of the laws regarding the judiciary and the anti-corruption efforts will have successfully cleansed the system, the PCI will not be necessary anymore. Experiences in other member states of the Council of Europe have shown that participation of the public in the selection of judges have contributed to the acceptance of the decisions taken and by that to the trust in the system at large.[82]

132. The CCJE in its last Opinion on Councils for the Judiciary recommends that a council also may have non-judicial members, which ensures a diverse representation of the society, decreasing the risk of corporatism.[83] This is also in line with the position of the European Network of the Councils for the Judiciary (ENCJ).[84]

133. In the recent debates regarding the preparation of the Law of Ukraine on Amendments to Improve the Procedure for Selecting Candidate Judges of the Constitutional Court of Ukraine on a Competitive Basis, the question of participation of civil society representatives appeared again. It was even debated if the civil society should be represented by a fully-fledged member in the newly created selection body, the Advisory Group of Experts (AGE).[85] The Venice Commission did not reject that but showed preference to limit the role of civil society in a way as it is defined to the PIC.

134. Certain stakeholders in Ukraine mentioned that the opinion of the civil society also played a positive role in the work of the Ethics Council, which was experienced as very fruitful. Representatives of the civil society supported the work of the Ethics

[80] CCJE Opinion 14 paras 32 and 36

[81] CCJE Opinion 4 (2003) para 16

[82] United Kingdom, Lithuania, Belgium

[83] CCJE Opinion 24 para 20

[84] ENCJ Report on Non-judicial Members in Judicial Governance

[85] Venice Commission Opinion CDL-AD(2022)054 paras 33 to 35

Councils in its task to “collect, verify, and analyse information on a candidate for the position of a member of the High Council of Justice including ……. information received from individuals and legal entities …., which is needed to exercise the Ethics Council's powers”.[86] The Ethics Council proactively invited citizens to provide information on candidates and also introduced an electronic form on its website to be used by the public to forward such information. The international members of the Ethics Council confirmed that all information was taken into consideration.

135. It is no doubt that the PCI, with the necessary amendments to the respective law and by-laws as was mentioned above and with improvements of its practice, should be kept with the tasks as foreseen in the law.

136. But on a long term, the idea to include one or more representatives of civil society in the HCJ as its members would need a constitutional amendment. A possible increase of the number of judges in the body may be considered too. The counterargument, which was raised as to the participation of civil society representatives in the AGE, concerned a difficulty in finding a way to determine the proper civil society representative for this purpose. It might not be the case with the judiciary where there is an experience in selection of the PIC members, which has already taken place twice.

[86] Article 9-1 para 20 item 4 LHCJ

V. CONCLUSIONS AND RECOMMENDATIONS

137. After long-lasting attempts to create a trustworthy justice system, the recent legal amendments most likely could promise a successful result. They offer a system which helps to create more trust in the judicial self-governing bodies HCJ and HQCJ and the commencement of their work may respond to the need to repair the still existing deficits in the judiciary at large.

138. The most urgent problem in the judiciary now is the large number of vacancies at the first instance and appellate courts. To fill these vacancies should be the priority.

139. The pool of candidates who are on the reserve list, of candidates whose qualification exam was interrupted and of those judges, who have already worked as judges for five years on the former probation period, should be used as efficient as possible.

140. The idea to shorten the 12-month training for the candidates to judges needs to be considered. Also, it may be meaningful to differentiate the training programmes depending on the knowledge and experiences, which the candidates gained previously. Similar considerations may determine the competition to judges of an appellate court.

141. To speed up the procedure in order to fill judicial vacancies, including in the judicial self-governing bodies, additional time limits should be established for certain steps of the selection procedure. To avoid deadlocks in the functioning of the HCJ and the HQCJ in the future, it may make sense that substitute members are foreseen, that the tenure of the respective members should start at different time or that, in case of a deadlock, as a last resort a shift of competences to another body within the judiciary should be possible.

142. Better definitions and clarifications in the law and the by-laws may contribute to a faster processing of different assessment procedures.

143. IT should open the possibility to easily exchange data among the judicial self-governing bodies, while the accessible data in databases could make their use easier and by that contribute to quicker decisions of assessment , of disciplinary procedures or in the administration of the justice system. It could also play a role in strengthening the judges and their self-governing bodies.

144. As an important tool to gain trust in the judiciary, the PIC should quickly restart its work, while the rules of procedure of the PIC and its co-operation with the HQCJ should be improved and resources should be provided.

145. In the interest of stability of the legislation and legal certainty, no fundamental changes in the jurisdiction and existence of the judicial self-governing bodies should be undertaken till the recent reforms are completed and the trust in the new system is stabilised. Later on, reform concepts and strategies may be developed to merge the HCJ and the HQCJ, to deal with the administrative functions over the proper distribution of resources and the role thereby of the HCJ and the CJU, and to define more precisely the role of civil society with regard to the selection procedure of judges.