THE ANNUAL REPORT

2019

ON ENSURING JUDICIAL INDEPENDENCE IN UKRAINE

(abridged version)

AND CONCLUSIONS OF THE COUNCIL OF EUROPE EXPERTS

This publication is prepared in the framework of 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. Please note, the opinions expressed in this publication are the responsibility of the authors and do not necessarily reflect the official policy of the Council of Europe.

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(abridged version)

Approved by Resolution No. 933/0/15-20
of the High Council of Justice
on 9 April 2020

Kyiv, 2020

INTRODUCTION

The independence and inviolability of judges are guaranteed by Articles 126 and 129 of the Constitution of Ukraine, which establish that judges are independent in the administration of justice and are guided by the rule of law[1].

This report defines the "independence of a judge" as the impartiality and unbiasedness of a judge in administering justice in accordance with the rule of law and the freedom of a judge from any unlawful influence, pressure or interference by state authorities, institutions and organisations, local government authorities, their officials and employees, any individuals or legal persons, or their assemblies.

This annual report on ensuring judicial independence in Ukraine contains: (a) the review of the main achievements and challenges related to ensuring judicial independence in 2019, and (b) the analysis of typical cases regarded by judges as interference in the discharge of their duties in the administration of justice, as well as of the legal opinions of the High Council of Justice formulated following the consideration of the judges' notifications in 2019. Furthermore, the report attempts to provide for a conceptual synthesis of the very notion of "interference in the discharge of a judge's duties in the administration of justice", as well as of the notions of the "independence of a judge" and the "independence of the judiciary".

[1] Constitution of Ukraine.
URL: https://zakon.rada.gov.ua/laws/main/254%D0%BA/96-%D0%B2%D1%80, viewed 21.11.2019.

PART A.
REVIEW OF IMPORTANT EVENTS, MEASURES, AND PROBLEMS THAT HAVE AFFECTED JUDICIAL INDEPENDENCE

1. THE LAUNCH OF THE HIGH ANTI-CORRUPTION COURT

On 18 and 28 March 2019, the High Council of Justice considered the recommendation of the High Qualification Commission of Judges of Ukraine concerning the appointment of candidates for the posts of judges in the High Anti-Corruption Court. Following their consideration, recommendations for the appointment of 38 candidatures were submitted to the President of Ukraine, of which 11 concerned the posts of judges in the Appeal Chamber of the High Anti-Corruption Court and 27 concerned the posts of judges in the High Anti-Corruption Court.

The High Anti-Corruption Court started working on 5 September 2019.

As of 31 December 2019, the High Anti-Corruption Court concluded the consideration of **3,819** cases and materials, of which it considered **3,368** cases as the first instance court and **451** cases as the court of appeal.

It would not be possible to make final conclusions as to the effectiveness of the High Anti-Corruption Court until the end of the first year of its work, however, even this information demonstrates a positive trend in the work of the Court.

2. LEGISLATIVE CHANGES RELATED TO THE JUSTICE SYSTEM

According to Opinion no.10 (2007) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, all draft texts relating to the status of judges, the administration of justice, procedural law and more generally, all draft legislation likely to have an impact on the judiciary; for example, *the independence of the judiciary, or which might diminish citizens'(including the judges' own) guarantee of access to justice*, should require the opinion of the Council for the Judiciary before deliberation by Parliament. This consultative function should be recognised by all States and affirmed by the Council of Europe as a recommendation[2].

On 29 August 2019, the President of Ukraine submitted the draft Law of Ukraine "On amendments to certain laws of Ukraine regarding the functioning of judicial governance bodies", reg. No. 1008 dated 29 August 2019 (hereinafter referred to as draft law No. 1008 or Law No. 193-IX), to the Verkhovna Rada of Ukraine, and identified it as urgent.

The High Council of Justice approved, by its decision No. 2356/0/15-19 of 5 September 2019, the Advisory Opinion on draft law No. 1008, where it warned of the following.

The Verkhovna Rada of Ukraine approved draft law No. 1008 as a whole on first reading on 12 September 2019. The warnings of the High Council of Justice outlined in its Advisory Opinion, subject to mandatory consideration, have been totally ignored.

The text of draft law No. 1008 was amended before the second reading. The updated text of draft law No. 1008 has not been submitted to the High Council of Justice for the provision of an advisory opinion on it.

[2] Opinion no.10 (2007) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, paragraph 87.

When the Verkhovna Rada of Ukraine was voting on this draft law on second reading, it first rejected amendment No. 195 related to the dismissal of the High Council of Justice members in agreement with at least two international experts, but then returned to its consideration and amended, without any apparent motivation, the text of draft law No. 1008 by adding the following provision to it: "A decision to dismiss a member of the High Qualification Commission of Judges of Ukraine on the grounds provided for in the paragraphs 3-6 of part 1 of this Article shall be adopted on the basis of a submission by the Integrity and Ethics Commission at the joint meeting of the High Council of Justice and the Integrity and Ethics Commission within five days after the receipt of such submission. The decision on the dismissal of a member of the High Council of Justice shall be deemed to be adopted if the submission is not rejected by a majority of votes by the participants in the joint meeting of the High Council of Justice and the Integrity and Ethics Commission provided that at least two members of the Integrity and Ethics Commission that are from among international experts have voted in favour"[3].

The Law of Ukraine "On amendments to the Law of Ukraine "On the Judiciary and Status of Judges" and certain laws of Ukraine regarding the functioning of judicial governance bodies" was adopted by the Verkhovna Rada on 16 October 2019 and entered into force on 7 November 2019, the after its publication, except for subparagraph 16 of paragraph 1 of section I of this Law, which entered into force on 1 January 2020.

Draft law No. 1008 received negative feedback from the justice system authorities and professional legal organisations.

In particular, the Plenum of the Supreme Court approved on 16 September 2019 its Opinion on draft law No. 1008 in which it stated that this draft law "... creates potential threats to the independence of every judge, and its adoption will lead to a real infringement upon their independence and will have a negative impact on the validity of the rule of law as an integral part of a law-based State" and that "the review of existing disciplinary procedures related to judges, as provided for by draft law No. 1008, reduces the safeguards of judiciary independence and violates the principle of legal certainty"[4].

A public appeal[5] regarding draft law No. 1008 was approved by the Council of Judges of Ukraine.

Furthermore, draft law No. 1008 became subject to numerous warnings from representatives of civil society and business as well as international partners.

An official letter from the representative of the diplomatic corps accredited in Ukraine about draft law No. 1008, expressed "concern over the compliance of certain parts of the draft law with the principle of judicial independence"[6].

A joint letter of the EU Delegation to Ukraine and the Embassy of Canada dated 11 September 2019 contained a number of critical comments on draft law No. 1008.

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[3] The transcript of the plenary meeting. The 23rd meeting. The debate chamber of the Verkhovna Rada of Ukraine, 16 October 2019. 10:00. URL: https://iportal.rada.gov.ua/meeting/stenogr/show/7245.html, viewed 23.12.2019.

[4] The Opinion of the Plenum of the Supreme Court on the Draft Law of Ukraine "On Amendments to Certain Laws of Ukraine regarding the Functioning of Judicial Governance Bodies" (Reg. No. 1008 of 29 August 2019). URL: https://supreme.court.gov.ua/userfiles/media/Visnovok_postanova_11.pdf?fbclid=IwAR2IbLVg6MrPON7axT0TtzYWjzKt6XSq3NbUTX6ugs4VyF_go0rIf9d8sOE, viewed 18.11.2019.

[5] The public appeal of the Council of Judges of Ukraine regarding the draft law No. 1008 dated 29 August 2019 "On amendments to certain laws of Ukraine regarding the functioning of judicial governance bodies". URL: http://rsu.gov.ua/uploads/news/rsu1008-571f9278a3.pdf, viewed 24.12.2019.

[6] URL: http ://supreme.court.gov.ua/userfiles/media/Razumkov.pdf, viewed 24.12.2019.

The Council of Europe experts also pointed out the shortcomings of draft law no. 1008 in the context of its compliance with the standards and recommendations of the Council of Europe[7].

Marija Pejčinović Burić, the Secretary General of the Council of Europe, in her letter of 1 October 2019 to Vadym Prystaiko, the Minister for Foreign Affairs of Ukraine, expressed concern over "wide-ranging changes", contained in draft law No. 1008, "which could have significant implications for the independence of the judicial system"[8].

The American Chamber of Commerce in Ukraine, the European Business Association, the Union of Ukrainian Entrepreneurs[9] and Annika Weidemann, Chargée d'affaires a.i. of the EU Delegation[10], also expressed their concerns in this regard.

At the beginning of December 2019, the Venice Commission published, at the request of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, its Opinion on amendments to the legal framework governing the Supreme Court and judicial governance bodies, adopted at its 121st Plenary Session (Venice, 6-7 December 2019).

This Opinion provides an assessment of the provisions in draft law No. 1008, adopted as the Law of Ukraine No. 193-IX[11].

The Verkhovna Rada adopted the Law of Ukraine of 16 October 2019 No. 193-IX "On amendments to the Law of Ukraine "On the judiciary and status of judges" and certain laws of Ukraine regarding the functioning of judicial governance bodies" prior to the issuance by the Venice Commission of its relevant Opinion.

The opinions of professionals, experts, international partners and representatives of the justice system were not appropriately taken into account in the course of the adoption of this Law.

The Supreme Court, in accordance with the decision of its Plenum of 15 November 2019, requested the Constitutional Court of Ukraine to assess compliance with the Constitution of Ukraine of certain provisions of the Law of Ukraine "On judiciary and the status of judges" and the Law of Ukraine "On the High Council of Justice" in the wording of the Law No. 193-IX (their constitutionality)[12].

The Constitutional Court of Ukraine requested, in its letter dated 10 December 2019, No. 362-13/5332, that the High Council of Justice express its position on the issues raised in the respective constitutional petition of the Supreme Court.

This request was satisfied by the decision of the High Council of Justice dated 16 January 2020, no. 98/0/15-20, which approved the Council's opinion regarding the constitutional petition of the Supreme Court[13], and its text was submitted to the Constitutional Court to be taken into account in the consideration of the constitutional petition.

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[7] https://supreme.court.gov.ua/userfiles/media/Opinion_UKR_final.pdf

[8] https://rm.coe.int/prystaiko-mfa-ukraine-01-10-19/16809800ea

[9] http://chamber.ua/Media/News/12725?fbclid=IwAR0bUNlj6CAkh8bI_owjYrU_YV5Zi-XtsdvMPaG7z5CfEHr4QEJ-MQXs96g

[10] See: URL https://www.facebook.com/EUDelegationUkraine/posts/2703640063013938

[11] Opinion on the Legal framework in Ukraine governing the Supreme Court and judicial self-governing bodies, adopted by the Venice Commission (the European Commission for Democracy through Law) at its 121st Plenary Session, Venice, 6-7 December 2019. URL: https://www.echr.com.ua/document/visnovok-shhodo-zmin-do-zakonodavchix-aktiv-yaki-regulyuyut-status-verxovnogo-sudu-ta-organiv-suddivskogo-vryaduvannya/, viewed 23.12.2019;

[12] http://www.ccu.gov.ua/sites/default/files/4_7155_2019.pdf

[13] On the approval of the position of the High Council of Justice regarding the constitutional petition of the Supreme Court. The decision of the High Council of Justice of 16 January 2020, no. 98/0/15-20. URL: https://hcj.gov.ua/doc/doc/1605, viewed 06.02.2020.

On 11 March 2020, the Constitutional Court of Ukraine adopted decision No. 4-r/2020[14] in this case (case No. 1-304/2019 (7155/19)) which in particular declared a number of provisions of the Law of Ukraine "On the judiciary and the status of judges" and the Law of Ukraine "On the High Council of Justice" as amended by Law No. 193-IX as inconsistent with the Constitution of Ukraine (unconstitutional).

Another telling example of legislative amendments related to the system of justice is the adoption, on 31 October 2019, by the Verkhovna Rada of Ukraine of Law No. 263-IX[15] which provides for *the additional grounds for the termination of powers of judges which are not provided for in the Constitution of Ukraine*.

These facts give reasons to argue about an unprecedented tendency to make assaults on the independence of the judiciary through amendments made by the Verkhovna Rada to the legislation on the judicial authorities and the judicial system, which does not only violate the principles of judicial independence enshrined in the Constitution of Ukraine but presents an encroachment on the validity of the separation of powers principle, provided for by Article 6 of the Constitution.

Besides that, in 2019 the High Council of Justice approved, by its decision of 17 September 2019, No. 2496/0/15-19, the Advisory Opinion on the Draft Law of Ukraine "On amending certain laws of Ukraine regarding reloading of power", reg. No. 1066 dated 29 August 2019.

The High Council of Justice pointed out in its Advisory Opinion that the amendments set out in draft law No. 1066 equated the High Council of Justice, which was the constitutional body on a par with other higher state bodies provided for in the Constitution of Ukraine, with ministries and other state bodies which were only a part of the executive power and were accountable to the Cabinet of Ministers of Ukraine.

Thus, the legislator actually changed the legal status of the High Council of Justice and downgraded it in comparison with the Supreme Court and the higher specialised courts, in the formation of which the High Council of Justice participates itself. This contradicts the Constitution of Ukraine and the Council of Europe standards.

The Verkhovna Rada yet again left the Advisory Opinion of the High Council of Justice without proper attention while considering draft law No. 1066.

Instead, the draft law mentioned was adopted by the Verkhovna Rada on 19 September 2019. The Law of Ukraine No. 117-IX "On amending certain laws of Ukraine regarding reloading of power" entered into force on 25 September 2019.

The growth in the number of legislative initiatives threatening the constitutional safeguards of judicial independence was observed as a whole in 2019.

In particular, in October 2019 the draft Law of Ukraine "On amending the Law of Ukraine "On the judiciary and the status of judges" with regards to enhancing the procedure for disciplinary actions against judges" (reg. No. 2271, dated 16 October 2019) was submitted to the Verkhovna Rada[16].

This draft law sets out that a judge may become the subject of disciplinary measures if a judgement passed with the participation of this judge is revoked or changed, which

[14] URL: http://www.ccu.gov.ua/sites/default/files/docs/4_p_2020.pdf, viewed 13.03.2020.

[15] The Law of Ukraine "On amendment of certain legislative acts of Ukraine on the seizure of illegal assets of individuals empowered to exercise government or local self-government functions and the sanctions for the acquisition of such assets" No. 263-IX of 31 October 2019. URL: https://zakon.rada.gov.ua/laws/main/263-IX, viewed 14.01.2020.

[16] URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67098

contradicts Opinion No. 18 (2015) of the CCJE "The position of the judiciary and its relation with the other powers of state in a modern democracy", which stresses that "in accordance with the fundamental principle of judicial independence, the appeal system is in principle the only way in which a judicial decision can be reversed or modified after it has been handed down and the only way in which judges can be held accountable for their decisions, unless they were acting in bad faith"[17].

The High Council of Justice approved its Advisory Opinion on draft law No. 2271 on 14 November 2019, where it delivered a negative assessment of this draft law as one that may jeopardise the authority of the judiciary and threatens judicial independence[18].

As of now, draft law No. 2271 of 16 October 2019 has been forwarded to its proponent.

3. THE STATE OF PERSONNEL SUPPORT FOR COURTS AND SUPPORT FOR NEWLY-ESTABLISHED COURTS

The problem related to the insufficient number of judges in courts is now a particularly acute challenge for Ukraine, and the issue of the limited pool of judicial candidates is far from being resolved.

The State Judicial Administration of Ukraine informed that, as of 1 January 2020, the number of the Judges' positions in courts of appeal and local courts, established by the relevant orders of the State Judicial Administration of Ukraine, amounts to 7,039, and the actual headcount is 5,002 people. 2,044 judicial positions are vacant[19].

According to the data provided by the High Qualification Commission of Judges as of 31 December 2019, 3,230 judges have passed qualification assessment, of which 3,061 are active (they are not dismissed and their powers are not terminated). 2,019 judges were authorised to administer justice in 2019[20].

According to the information provided by the High Qualification Commission of Judges, eight courts are unable to administer justice due to the absence of judges, termination of judges' powers, or them being on maternity leave; 94 courts administer justice while their actual number of judges is less than 50% of the ceiling on the number of judges; 45 courts have an actual number of judges equalling 50% of their ceiling numbers. The High Qualification Commission of Judges of Ukraine planned to terminate in 2019 qualification suitability assessments of 3,153 judges, of which the qualification assessments of 933 judges were terminated.

The justice authorities took action together in 2019 to address the issue of the lack of judiciary personnel.

The Communication Committee of the System of Justice, a voluntary association of officials and chairs of judiciary authorities and institutions established to jointly implement the objectives of the Memorandum for the interaction and cooperation between judicial officials, hereinafter, the Communication Committee, met twice on 6 and 13 June 2019 and decided then, amongst other things, that all judicial governance bodies should seek, as their primary goal, significant and urgent changes with regard to addressing problematic issues

[17] See: URL: https://court.gov.ua/userfiles/vusn_18_kr.pdf, viewed 14.01.2020.
[18] See: URL: https://hcj.gov.ua/doc/doc/770, viewed 14.01.2020.
[19] The letter of the State Judicial Administration of Ukraine dated 31 January, No. 16-2242/20, signed by L. Hizatulina, Acting Chair of the SJA of Ukraine.
[20] The letter of the High Qualification Commission of Judges of Ukraine dated 30 January 2020 No. 21-162/20 signed by acting Head of the Secretariat O. O. Bystrushkin (in response to the letter dated 17 January 2020 No. 480/0/9-20).

related to personnel in the justice system.

The High Council of Justice approved by its decision of 18 April 2019, No. 1200/0/15-19, the temporary number of judges for 2019 in courts of appeal, established within appellate districts, in numbers approved by the State Judicial Administration of Ukraine for 2018.

The High Council of Justice approved by its decision of 18 April 2019, No. 1201/0/15-19, the temporary number of judges in district courts for 2019. As the State Judicial Administration, while identifying these numbers, failed to take into account the categories and the complexity of cases, as well as the current workload per judge, and used the methodology where indicators of 2015 served as the basis for calculations, this decision required the State Judicial Administration of Ukraine to provide within a month the reviewed proposals for the numbers of judges.

By its decision of 11 July 2019 No. 1844/0/15-19, the High Council of Justice approved the new temporary number of judges in districts courts of general jurisdiction and requested the High Qualification Commission of Judges of Ukraine to announce, in the shortest possible time, competitions for the 48 vacant positions of judges in the functioning commercial courts and the 105 positions in district administrative courts.

The State Judicial Administration informed that it had used old methodology to calculate the number of judges, however, workload indicators for 2018 had been applied. Additionally, the State Judicial Administration together with the Council of Judges of Ukraine and the support of the USAID New Justice Programme, undertake studies of new time standards for the consideration of cases of different categories, with due regard to amendments to procedure legislation in force, in order to develop a new methodology for the calculation of the number of judges.

On 6 June 2019, the USAID Programme responded to the relevant request by the High Council of Justice by informing that the results of these studies would be available no earlier than September 2019. However, as of now, this study has yet to be completed.

The High Council of Justice, in accordance with its decision of 20 June 2019, No. 1692/0/15-19, requested the High Qualification Commission of Judges of Ukraine to urgently announce the competition for vacant positions in the functioning local courts of general jurisdiction.

On 2 July 2019, the High Qualification Commission of Judges announced the competition for the 505 vacant positions of judges in certain local courts of general jurisdiction.

The High Council of Justice approved on 18 July 2019 the public appeal to the High Qualification Commission of Judges regarding the need to provide for equal opportunities within the competition for judges and the candidates for the positions of judges included in the candidates' pool.

The High Council of Justice did not consider the above-mentioned recommendations of the High Qualification Commission of Judges of Ukraine in 2019, as those judges of local courts who had intended to transfer to other courts, appealed the decision of 2 July 2019 on the announcement of the competition by the High Qualification Commission of Judges in the Supreme Court (court case No. 9901/378/19)[21].

The Grand Chamber of the Supreme Court held on 29 January 2020 the final decision in this case, the full text of which was published in the Unified State Register of Court Decisions on 4 March 2020, and afterwards the High Council of Justice started preparations

[21] URL: http://www.reyestr.court.gov.ua/Page/2, viewed 06.02.2020.

to consider the High Qualification Commission of Judges recommendations.

The procedure for the transfer of judges is crucial to addressing personnel problems.

As of 1 November 2019, the High Council of Justice, following the consideration of the recommendations by the High Qualification Commission of Judges with regard to transfers of judges of courts of appeal to newly established courts of appeal in the appellate districts, has decided on the transfer of **1,033** judges (about 98 % of their overall numbers).

The High Council of Justice recommended appointing 527 judges in 2019, of which 17 candidates have not been appointed by the President of Ukraine as of 6 February 2020.

The Standard regulation on court administrations[22] was approved by the order of the State Judicial Administration of 8 February 2019, No. 131, and agreed upon by the decision of the High Council of Justice of 17 January 2019, No. 140/0/15-19.

The approval of the Standard regulation on court administrations filled the gap which had existed for a long time in the legal regulation of this important area of institutional arrangements for the operation of courts.

4. THE QUALIFICATION ASSESSMENT OF JUDGES

The problem of non-compliance with the terms of the qualification assessment of judges remains urgent.

As of 31 December 2019, 3,230 judges completed the qualification assessment, 3,061 of these were serving judges (those not dismissed from their posts and whose powers were not terminated), according to the information provided by the High Qualification Commission of Judges of Ukraine, which examined whether or not they were suited to the posts they hold or proved to be able to administer justice in a relevant court following the primary qualification assessment or proved to be able to administer justice following the qualification assessment during a competition for a judge's post.

3,033 judges are recognised as being suitable for the posts they hold. Of these, 2,976 are serving judges (those not dismissed from their posts and whose powers were not terminated).

The High Council of Justice received **171** recommendations from the High Qualification Commission of Judges on *dismissals* of judges on grounds provided by the subitem 4 of item 16^1 of section XV "Transitional provisions" of the Constitution of Ukraine (judges being unfit for their positions or the refusal of judges to be assessed), of which **98** were considered, **36** were satisfied, **10** were not satisfied and **52** were left without consideration of the merits (judges whose resignation was accepted). Of these **36** decisions of the High Council of Justice mentioned above, **15** were appealed against in courts.

According to projected indicators, **3,153** judges should have completed qualification assessment by 2019, however, **933** judges did so.

The process of qualification assessment was suspended due to the entry into force of the Law No. 193-IX which terminated the powers of the High Qualification Commission of Judges of Ukraine from 7 November 2019.

After the Constitutional Court of Ukraine approved its decision of 11 March 2020 No. 4-r/2020, in which, in particular, it recommended that the Verkhovna Rada urgently bring the provisions of the Law of Ukraine "On the judiciary and the status of judges" of 2 June

[22] The order of the State Judicial Administration of Ukraine on the approval of the Standard regulation on court administrations of 8 February 2019, No. 131. URL: https://zakon.rada.gov.ua/rada/show/v0131750-19, viewed 27.08.2019.

2016, No. 1402-VIII, as amended by the Law of Ukraine "On amending the Law of Ukraine "On the judiciary and the status of judges" and certain laws of Ukraine on the functioning of judicial governing bodies" of 16 October 2019, No. 193-IX, into conformity with the decision of the Court, it is impossible for the time being to predict, with due regard, in particular, for the duration of the legislative process, when the members of the High Qualification Commission of Judges of Ukraine would be appointed and when the assessment of judges would be completed.

Paragraphs 24-27 of section VI of the Annual Report for 2017 on ensuring judicial independence in Ukraine" and sub-paragraphs 3.1–3.3 of Part A of the relevant Annual report for 2018 point out the specific problem related to the calculation of judges' remuneration during the qualification assessment.

Despite reservations expressed with regard to Law No. 193-IX, it contains provisions aimed at addressing problems related to the remuneration of all judges, those who completed qualification assessment and those whose qualification assessment is still to be completed.

This problem was addressed in such a manner that the level of salaries of the judges who completed qualification assessment and of those who did not was evened out. At the same time, a new problem was created relating to the reduction of judges' remuneration for the judges of the Supreme Court; it was more than once recognised by the decisions of the Constitutional Court as being inconsistent with the Constitution and infringing on the safeguards of the independence of the judiciary[23] and appealed against by the Supreme Court in the Constitutional Court of Ukraine. As of the time of the approval of the Report, this problem has been eliminated by the decision of the Constitutional Court of 11 March 2020 No. 4-r/2020.

5. PROVISION OF APPROPRIATE SECURITY TO JUDGES AND COURTS

The Constitution of Ukraine sets out that the State ensures personal security of a judge and members of his or her family[24].

Important events occurred in 2019, related to the start of the work of the Judicial Protection Service. The Head of the Judicial Protection Service was appointed in accordance with the decision of the High Council of Justice of 21 March 2019 No. 886/0/15-19, following a public competition.

On 4 April 2019, the High Council of Justice approved the Regulation on the Judicial Protection Service by its decision No. 1051/0/15-19 and the Regulation on the service career of the employees of the Judicial Protection Service by its decision

No. 1052/0/15-19.

The competition winners were appointed to the posts of the First Deputy Head and Deputy Heads of the Judicial Protection Service following the submission by the Head of the Service and by decisions of the High Council of Justice of 13 June 2019,

Nos. 1631/0/15-19, 1632/0/15-19 and 1633/0/15-19.

Amendments to the Regulation on the competition to fill vacancies in the Judicial

[23] The Decision of the Constitutional Court of Ukraine in the case under the constitutional petition by the Supreme Court of Ukraine on the compliance with the Constitution of Ukraine (constitutionality) of the provisions of Parts 3 and 10 of Article 133 of the Law of Ukraine "On the judiciary and the status of judges" as amended by the Law of Ukraine "On the provision of the right for a fair trial" of 4 December 2018 No. 11-rp/2018. URL: https://zakon.rada.gov.ua/laws/show/v011p710-18, viewed 14.01.2020.

[24] Constitution of Ukraine. Article 126, part 8.

Protection Service were approved by the decision of the High Council of Justice No. 1536/0/15-19 of 4 June 2019 which was aimed at addressing a number of issues related to the start of work of the service.

These amendments were approved according to the proposals submitted by the Head of the Judicial Protection Service (letter of 14 May 2019, No.18-46/19) and were aimed at a prompter and more effective organisation of competitions to fill vacancies in the regional units of the Judicial Protection Service.

Since the establishment of the Judicial Protection Service, the central management body and 15 regional departments have been established, the establishment of security units (platoons, squads) has started within regional departments, staffing and logistical support of the established management bodies and units have been organised.

However, the ceiling of expenditures to provide for the establishment and development of the Judicial Protection Service was brought up to the level of 1,023 million UAH and the deficit is 3,491.8 million UAH.

Of all funds provided in the state budget for the Judicial Protection Service, only one-third is allocated for logistical support, including uniforms, weapons, means of restraint and vehicles for its staff.

At the same time, the service lacks its own office space to accommodate the central office and regional departments; it has no parking places that are properly equipped and guarded to store and permanently park vehicles; no storage facilities for weapons, means of restraint, property, communication means, etc.

According to the data provided by the State Judicial Administration of Ukraine, National Police units provided 24-hour security for only 28% of the courts and daytime security for another 59% of the courts in 2019. 11% of court premises had no security whatsoever.

Also, as of 31 December 2019, according to the State Judicial Administration, the National Guard provided security to 48 premises of courts of appeal and local courts, the National Police did so to 190 such premises, the Judicial Protection Service to 208 premises, while *208 premises of courts of appeal and local courts remain without any security whatsoever in the daytime*.

The State Judicial Administration gave the following figures describing the level of provision of courts with technical means to detect items prohibited in the courtrooms, as of December 31, 2019: video surveillance systems (75% of the demand satisfied), stationary metal detectors (64%), hand-held metal detectors (90%), turnstiles (39%) and storage units (58%).

6. RESOURCES PROVISION AS FACTOR IN THE INDEPENDENCE OF THE JUDICIARY

An appropriate provision of material resources to judges is a safeguard of their independence.

According to the State Judicial Administration, its budget requests were satisfied in 2019 by 64.8%.

The increase in budget allocations for authorities and institutions of the justice system under the State Judicial Administration was 625.0 million UAH in 2019 or 4.6% compared to 2018.

At the beginning of 2019, the High Council of Justice submitted to the Cabinet of Ministers the mid-term priority targets for the provision of funds for the judiciary and its independence to be taken into account while preparing and approving the Budget Declaration for 2020-2022 and in the course of the establishment of ceiling indicators for the state budget expenditures allocated to main state budget holders of the justice system to meet the requirements of Article 130 of the Constitution of Ukraine which requires the state to provide funds and an appropriate operating environment to judges and courts.

The analysis of budget allocations for the Supreme Court, the State Judicial Administration and the High Anti-Corruption Court for 2020 demonstrated *the deficiency of the levels of funding for the main budget holders in the system of justice*. The expenditure levels in terms of salaries do not secure the remuneration for judges of courts that are to be abolished (the Supreme Court of Ukraine and highly specialised courts), *the remuneration for 1,146 judges to be appointed in 2020, salaries for 28,153 employees of courts of appeal and local courts and salaries of 11,658 employees of the Judicial Protection Service*.

The High Council of Justice submitted relevant proposals to the Ministry of Finance in its capacity as an authority whose proposals should be taken into account while planning the expenditures to be allocated for courts (Article 130 of the Constitution of Ukraine).

On 18 October 2019, the Verkhovna Rada adopted a resolution on first reading where it approved conclusions and proposals to the draft Law of Ukraine "On the state budget for 2020", of which it became clear *that the proposals by the High Council of Justice related to the increase of expenditures for courts were not taken into account*.

In November 2019, the chairs of courts and other authorities and institutions of the system of justice wrote joint letters to Volodymyr Zelensky, President of Ukraine, Oleksii Honcharuk, Prime Minister of Ukraine, Dmytro Razumkov, Chair of the Verkhovna Rada of Ukraine, Oksana Markarova, the Minister of Finance of Ukraine, Iryna Venedyktova, Chair of the Committee on the legal policy of the Verkhovna Rada of Ukraine, Yurii Aristov, Chair of the Committee on budget of the Verkhovna Rada of Ukraine, where they expressed their concern about the emergency which would arise in the system of justice of Ukraine if the Law of Ukraine "On the state budget of Ukraine for 2020" (registration No. 2000) was to be adopted as proposed by the Cabinet of Ministers.

According to the Law of Ukraine "On the state budget of Ukraine for 2020", adopted on 14 November 2019, the level of expenditures under the budget programme "Provision of administration of justice by local courts and courts of appeal and the functioning of authorities and institutions of the system of justice" is 14,619,144,800 UAH. The budget deficit under this programme is 9,746,022,400 UAH, of which 6,231,677,800 UAH is related to remunerations and salaries of judges and court employees.

At the same time, Paragraph 11 of the Final Provisions of this Law requires that the Cabinet of Ministers consider the increase of expenditures allocated to the State Judicial Administration of Ukraine to provide for a sufficient level of administration of justice, following the results of the execution of the state budget of Ukraine in the first quarter of 2020.

According to the State Judicial Administration, 88% of judges are provided with separate offices, 70% of courts have courtrooms and 22% of courts have deliberation rooms.

As of now, the majority of courts have office spaces and may function in a routine mode.

At the same time, only 19% of all courts are situated on premises that meet the basic parameters of building standards. The rest require the improvement of their accommodation.

7. INTRODUCTION OF THE UNIFIED JUDICIAL INFORMATION AND TELECOMMUNICATIONS SYSTEM

The amendments to procedural codes in force since December 2017 provide for the establishment of the Unified judicial information and telecommunication system which should secure e-justice in Ukraine.

As of today, the High Council of Justice is coordinating the finalisation of the draft Regulation on the System. In particular, following the initiative of the High Council of Justice, the State Judicial Administration of Ukraine should take into account all opinions and proposals submitted by judges at all levels and submit the finalised draft of the Regulation on the Unified judicial information and telecommunication system to the High Council of Justice for further discussion and proposals.

The State Judicial Administration issued on 7 November 2019 order No. 1096 approving the Concept of the development of the Unified judicial information and telecommunication system.

As of now, the State Judicial Administration failed to submit to the High Council of Justice the Regulation on the Unified judicial information and telecommunication system for its finalisation and approval, resulting in the report by the Head of the State Judicial Administration about the introduction of the System, planned for the first quarter of 2020.

8. EXECUTION BY UKRAINE OF THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS RELATED TO THE INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY

The Committee of Ministers adopted at its meeting of 23-25 September 2019 the resolution in the *Sovtransavto Holding v. Ukraine* case where it decided to close the examination of the European Court of Human Rights' judgement in this case[25].

The judgement of the European Court of Human Rights of 25 July 2002 in this case where the Court held that there had been a violation of section 1 of Article 6 of the Convention (the right to a fair hearing by an independent and impartial tribunal), and a violation of Article 1 of Protocol No. 1 to ECHR (the right to peaceful enjoyment of possessions), was extremely important for the development of the judiciary in Ukraine in line with the European standards.

The review of cases by national courts following the European Court of Human Rights' judgement in the *Kulykov and others v. Ukraine* case resulted in the cancellation of the decisions of the High Council of Justice and a resolution of the Verkhovna Rada in eight cases, the cancellation of only one Verkhovna Rada resolution in seven cases and the cancellation of a decision of the High Council of Justice and a Decree of the President of Ukraine in two cases.

The Supreme Court has not yet adopted its final decision in the case following the complaint by A. A. Kulykov.

[25] See URL: https://minjust.gov.ua/news/ministry/ivan-lischina-komitet-ministriv-radi-evropi-pripiniv-naglyad-za-vikonannyam-rishennya-evropeyskogo-sudu-z-prav-lyudini-u-spravi-sovtransavto-holding-proti-ukraini, viewed 21.01.2020.

All cases instituted following the *Kulykov and Others* judgement of the European Court of Human Rights and transmitted to the High Council of Justice after their consideration by the Supreme Court are being considered at the Council's plenary meetings in *corpore*. The High Council of Justice has considered **four** such cases as of now.

As a rule, the High Council of Justice establishes in such cases that judges committed actions which, within the current legal framework, can be recognised as one-time serious misdemeanours resulting in their dismissal.

However, as the statute of limitations ran out for such misdemeanours (three years since its commitment), the High Council of Justice did not elaborate on any final legal position on the application of statutes of limitations to the liability of judges in such cases.

At the same time, the Administrative Cassation Court within the Supreme Court ruled out that holding judges accountable outside the three-year statute of limitations was not compatible with the legal requirements[26], however, such a conclusion minimises disciplinary practice and therefore, the Grand Chamber of the Supreme Court should deliver the final judgment in these cases.

[26] The decision of the Administrative Cassation Court within the Supreme Court of 28 November 2019 in the case No. 9901/187/19. URL: http://reyestr.court.gov.ua/Review/86161981, viewed 14.01.2020.

PART B.
ANALYSIS OF CASES OF INTERFERENCE IN THE DISCHARGE OF JUDGES' DUTIES IN THE ADMINISTRATION OF JUSTICE

Article 73 of the Law of Ukraine "On the High Council of Justice" stipulates that, in order to guarantee judicial independence and the authority of justice, the High Council of Justice maintains and publishes on its official website the register of notifications from judges on interference in the discharge of their duties in the administration of justice, verifies the notifications, publishes findings, and adopts the respective decisions.

The register of notifications of judges on interference in the discharge of their duties in the administration of justice on the website of the High Council of Justice[27] contains 1,220 notifications of judges on interference, of which:

23 notifications were submitted in 2016,

312 notifications in 2017,

436 notifications in 2018,

450 notifications in 2019.

618 notifications from judges about interference were considered by the High Council of Justice in 2019.

Following the consideration of these documents, the High Council of Justice adopted, in 2019, 115 decisions on measures to secure judicial independence and the authority of justice and 417 opinions of members of the High Council of Justice about the absence of grounds to take actions to secure judicial independence and the authority of justice on the basis of judges' notifications.

1. INTERFERENCE IN THE DISCHARGE OF JUDGES' DUTIES IN THE ADMINISTRATION OF JUSTICE BY LAW ENFORCEMENT AGENCIES

The High Council of Justice identified in 2019 multiple cases of abuse by investigators and prosecutors of their powers related to entering information in the Unified register of pre-trial investigations regarding crimes committed by judges under Article 375 of the Criminal Code of Ukraine, in order to exert pressure on the judiciary.

In the context of the above-mentioned, the Council expressed the following opinion:

The investigator or prosecutor can enter in the Unified register of pre-trial investigations data with regard to an adoption by a judge of a deliberately wrongful ruling or commission of other offence during the administration of justice only if they find elements of such crime sufficient to subsequently serve the judge with notification of suspicion, and draft and submit an indictment to the court at the earliest moment.

The procedure for bringing a judge to criminal justice cannot be used to press on the judge to persuade him or her to adopt the "right" judgement. It is also inadmissible to register information in the Unified register of pre-trial investigations on an offence committed by a judge as a reprisal for a judgment that went contrary to the procedural position of a prosecutor. The existence of criminal proceedings should never be used as a means of pressure on a judge and persuading him or her into certain conduct[28].

[27] See: URL: http://www.vru.gov.ua/add_text/203, viewed 21.01.2020.

[28] The decisions of the High Council of Justice of 12 February 2019 No. 450/0/15-19; of 4 June 2019 No. 1530/0/15-19; of 23 April 2019 No. 1263/0/15-19.

Entering information on a criminal offence to the Unified register of pre-trial investigations as well as the conduct of a pre-trial investigation cannot be by themselves indicative of interfering in the discharge of a judge's duty in the administration of justice and therefore cannot be an absolute ground for the High Council of Justice to take measures under Article 73 of the Law of Ukraine "On the High Council of Justice".

Prompt and effective investigation of criminal proceedings related to deliberately wrongful judgements. The existence of criminal proceedings against a judge negatively affects in itself the authority of justice and public confidence in the judiciary, therefore it is essential that investigations in such proceedings be as prompt as possible and without unjustified delays[29], as abuses by prosecutors related to opening cases under Article 375 of the Criminal Code could be used against a judge with respect to his or her adjudication;

If a judge becomes a suspect or an accused in criminal proceedings, it is the grounds for him or her to be temporarily suspended from administering justice due to criminal prosecution.

At the same time the High Council of Justice, supporting the exclusion of Article 375 from the Criminal Code, proposed, furthermore, with the aim of reducing the number of cases when prosecutors and investigators exert pressure on judges by initiating criminal proceedings, to establish by law (by amending Article 214 of the Criminal Procedure Code) that the Prosecutor General (or his or her Deputy) should be the holder of the special right to enter information on crimes under Article 375 of the Criminal Code in the Unified register of pre-trial investigations (the decision of the Council of 1 March 2018 No. 707/0/15-18 on the submission of proposals to entities entitled to initiate legislation related to ensuring judicial independence and the authority of justice). This proposal of the High Council of Justice has been neither supported nor transformed into law so far.

Furthermore, the High Council of Justice, on the grounds of established evidence related to the interference of investigators and prosecutors in the administration of justice through entering information in the Unified register of pre-trial investigations on alleged deliberately wrongful judgements delivered by judges, requested the Prosecutor General's Office, in line with the procedure set out in Article 73 (1-6) of the Law "On the High Council of Justice" and following its decisions of 2019, to submit information on the detection and investigation of crimes within relevant criminal proceedings initiated under Article 375(2) of the Criminal Code and entered in the Unified register of pre-trial investigations.

In response to these requests of the High Council of Justice, the Prosecutor General's Office and regional law enforcement agencies provided information on the current state of pre-trial investigations in criminal proceedings initiated under Article 375 of the Criminal Code (see section 4.2).

In 2019, there were numerous cases where information on criminal offences against judges was not entered in the Unified register of pre-trial investigations following judges' notifications about interference in the discharge of their duties in the administration of justice, which the High Council of Justice regards as a serious violation of the requirements set out in the criminal procedure legislation.

The High Council of Justice has repeatedly drawn attention to the fact that the requirement for a judge to promptly give notice to the Prosecutor General on interference

[29] The decisions of the High Council of Justice No. 450/0/15-19 of 12 February 2019; No. 1263/0/15-19 of 23 April 2019; No. 1262/0/15-19 of 23 April 2019.

with the discharge of his or her duties as a judge in the administration of justice means that a pre-trial investigation of circumstances related to the relevant criminal offence should be initiated as promptly as possible on the grounds of such notice.

When verifying judges' reports on interference, the High Council of Justice found that the Prosecutor General was not entering data on criminal offences against judges in the Unified register of pre-trial investigations.

In addition to the above, the practice was rather frequent when the Prosecutor General's Office was referring notifications of judges about possible interference in the discharge of their duties by officials of regional prosecutor's offices to the same regional prosecutor's offices following the investigative jurisdiction. The High Council of Justice repeatedly revealed that relevant regional law enforcement agencies failed to enter information following such judges' notices in the Unified register of pre-trial investigations. The question arises as to the conflict of interests of law enforcement agencies to which the Prosecutor General's Office refers judges' notifications on interference, and this casts doubts on their ability to verify facts communicated by judges in full and in a comprehensive and impartial way.

Whenever failures to enter relevant judges' notifications on criminal offences in the Unified register of pre-trial investigation are established, the High Council of Justice takes actions to secure judicial independence and the authority of justice and, in particular, submits requests to the Prosecutor General's Office to prosecute by law persons for their failure to act in the form of non-entering of the information contained in the notifications of judges in the Unified register of pre-trial investigations and draws the attention of the Prosecutor General to the requirements of Article 19 of the Constitution of Ukraine and Article 214 of the Criminal Procedure Code pertaining to the obligation of competent authorities to register information on criminal offences, etc.

However, when the Prosecutor General's Office referred notifications of judges on alleged interference in the discharge of their duties by officials of regional prosecutor's offices to the same regional prosecutor's offices following the investigative jurisdiction, information regarding such notifications of judges was not entered in the Unified register of pre-trial investigations even after the High Council of Justice had decided to submit relevant requests.

As of today, the functioning of the Qualification and Disciplinary Commission of Public Prosecutors *is suspended until 1 September 2021* by the Law of Ukraine of 19 September 2019 No. 113-IX "On amending certain legislative acts of Ukraine on priority actions to reform public prosecution authorities" and no new authority has been established so far, which seriously undermines the safeguards for an independent judiciary and leads to legal uncertainty with regard to the disciplinary liability of public prosecutors for, in particular, interference in the discharge of a judge's duties[30].

Following the verification of judges' notifications, the High Council of Justice also found in 2019 other cases of abuse committed by law enforcement authorities, in particular:

Abuse of procedural rights. At the same time, the High Council of Justice draws attention in its decisions to the fact that judges as public figures should bear in mind the public interest towards them and the right of others to make arbitrary and, in particular, critical judgements with regard to the administration of justice. Also, judges should be aware that

[30] The Law of Ukraine "On amending certain legislative acts of Ukraine on priority actions to reform public prosecution authorities" of 19 September 2019, No. 113-IX. URL: https://zakon.rada.gov.ua/laws/main/113-IX

parties to court proceedings in high-profile cases would publicly comment them and should avoid being too susceptible or vulnerable[31].

While summoning judges to law enforcement agencies to make clarifications or as witnesses in criminal proceedings, as investigators are entitled to summon judges to be interrogated as witnesses, although within the framework of limitations established by law as to the nature of questions that may be asked.

The Report acknowledges the progress made in co-operation with public prosecution in preventing the use of Article 375 of the Criminal Code as the leverage of pressure on judges and securing effective pre-trial investigations of crimes under this Article. This became possible when the Prosecutor General's Office issued the order of 15 July 2019, No. 126 "On certain issues of organisation of functioning of public prosecution with regard to legal requirements related to the inviolability and independence of safeguards for judges" aimed at ensuring compliance with legal requirements as to the inviolability and independence of judges, the prevention of inappropriate pressure on the judiciary, and the development of appropriate co-operation in these issues with the High Council of Justice.

In addition to this, there was an unparalleled case when a statement *by the Prosecutor General[32] was published which raised concerns as to safeguards of judicial independence and required the High Council of Justice to approve a public appeal (decision of 21 November 2019 No. 3099/0/15-19).*

2. INTERFERENCE IN THE DISCHARGE OF JUDGES' DUTIES IN THE ADMINISTRATION OF JUSTICE BY PEOPLE'S DEPUTIES OF UKRAINE, MEMBERS OF LOCAL COUNCILS, OTHER REPRESENTATIVES OF EXECUTIVE AUTHORITIES, AND LOCAL SELF-GOVERNMENT

The High Council of Justice drew attention on several occasions to the fact that, according to the Laws of Ukraine "On the status of people's deputy of Ukraine" and "On the status of members of local councils", parliamentarians and local councillors are not entitled to submit deputy's appeals to courts (judges and presidents of courts) on the administration of justice in specific cases.

Therefore, People's Deputies of Ukraine and members of local councils who are not party to court procedures should refrain from submitting, by out-of-court communication, proposals to courts regarding specific judgments or any other directives related to the consideration of cases.

In addition, the High Council of Justice emphasises in its decisions the inappropriateness of People's Deputies using their mandates in breach of decency, human and citizen's rights and freedoms, and legitimate public and state interests; People's Deputies should not use their mandate for purposes other than those provided by the Constitution and the laws of Ukraine[33]. A deputy's appeal or request to a court may not always be regarded as an attempt to pressure the court or influence it.

Following the establishment of elements of interference in the discharge of judges' duties by People's Deputies of Ukraine and members of local councils, the High

[31] The decision of the High Council of Justice of 12 February 2019 No. 448/0/15-19.

[32] The dissemination by the Prosecutor General of information to discredit judiciary or influence the High Council of Justice is unacceptable. URL: https://hcj.gov.ua/news/poshyrennya-generalnym-prokurorom-informaciyi-z-metoyu-dyskredytaciyi-sudovoyi-vlady-abo-vplyvu

[33] The decision of the High Council of Justice of 12 March 2019 No. 727/0/15-19.

Council of Justice appealed, in accordance with the decisions approved in 2019, to the Verkhovna Rada and relevant local councils to take measures to prevent such actions by parliamentarians and local councillors that undermine judicial independence and the authority of justice and may be regarded as interference in the discharge of duties of a judge, and recalled the inadmissibility of such actions as recourse to courts by out-of-court means. Only one local authority responded to these appeals by the High Council of Justice informing it of the measures taken.

No response whatsoever came from the Verkhovna Rada which would inform the High Council of Justice of relevant decisions being considered and measures taken to prevent People's Deputies of Ukraine from actions which could be perceived as interference in the discharge of duties of judges in the administration of justice and undermine judicial independence and the authority of justice.

3. INTERFERENCE IN THE DISCHARGE OF JUDGES' DUTIES BY INDIVIDUALS AND THEIR ASSOCIATIONS, AND THE MEDIA

The High Council of Justice approved the largest number of its decisions on actions to ensure judicial independence and the authority of justice in 2019 on the basis of notifications from judges about interference in the discharge of their duties in administering justice by private individuals.

In their reports on interference, judges highlight breaches of order in court hearings by parties to proceedings or members of the public, in particular, non-compliance with the presiding judge's orders, contempt of court, insulting remarks against the court, threats, disruption of court hearings, obstruction of the discharge of judges' professional duties, violation of the secrecy of the deliberation room, etc.

The High Council of Justice points out in its decisions dedicated to such cases that the law imposes an obligation on a presiding judge to ensure that procedural law is complied with and that judicial authority be maintained by applying penalties to offenders as provided for in the Code of Ukraine on administrative offences[34].

At the same time, the High Council of Justice expressed its view in the Report that procedural codes should be appropriately amended to enable judges to take additional measures by adopting procedural decisions against contempt of court and disturbances in court sessions, in particular, to apply pecuniary penalties.

At the same time, the High Council of Justice emphasises that unlawful actions by parties to court proceedings and members of the public in court send erroneous messages to ordinary individuals that courts and court decisions could be affected in an out-of-court manner and that such actions might go unpunished. Such a situation generally affects the authority of justice and undermines the independence of the judiciary[35].

The High Council of Justice verified a number of judges' notifications on disturbances in court sessions and the disruption of hearings and arrived at the conclusion that there were grounds for taking measures to ensure judicial independence and the authority of justice.

Furthermore, the High Council of Justice drew attention in its Annual report on ensuring judicial independence for 2018 to the matter that statements about the alleged

[34] The decision of the High Council of Justice of 12 March 2019 No. 726/0/15-19.
[35] The decision of the High Council of Justice of 12 March 2019 No. 726/0/15-19.

illegitimacy of judges were a typical example of undermining the authority of justice.

The judges continue to inform the High Council of Justice of the cases when parties to court proceedings required judges to prove their powers by showing official IDs. Such actions lead to disturbances in court sessions and the disruption of hearings.

The High Council of Justice emphasises that such actions are inadmissible and the National Police should respond to them appropriately. The procedural laws do not enable parties to proceedings to require verification of presiding judges' official IDs during a court session. In this regard, the High Council of Justice points out that such actions could constitute abuse of procedural rights, disturbances in court sessions, and contempt of court.

The High Council of Justice, following the consideration of a number of notifications submitted by judges, arrived at the conclusion that actions by individuals addressing the court and attempting to affect it in an out-of-court manner constituted a real threat to the safeguards of judicial independence and the authority of justice.

Judges report provocations against them and such cases are not isolated incidents.

Members of the High Council of Justice, while delivering separate opinions on the absence of grounds to take measures to ensure judicial independence and the authority of justice, addressed the issues of whether relevant individuals committed actions actually threatening the independence of judges during the administration of justice. In such cases, it is important to note whether an action containing elements of an attempt to affect court in an out-of-court manner occurred prior to or after the termination of the consideration of a relevant case.

The High Council of Justice takes the following position with regard to the dissemination of false information and criticism against judges:

Media publications containing the opinions of their authors or expressions of certain personal assumptions as to the consideration of cases or a person by a judge contain no elements of pursuing the aim of interfering in the administration of justice by a judge[36].

Facebook is designed to allow individuals to freely share their opinions. It does not constitute mass media but is a means of communication which has become widespread in Ukraine and shapes the opinions of many individuals. The relevant international legal framework provides no grounds for assessing the nature of publications and discussions there as such that require action from the High Council of Justice to ensure judicial independence and the authority of justice, provided such publications do not contain direct threats or elements of persecution for the decisions approved or call into question the authority of justice.

There is a clear-cut distinction between freedom of expression and legitimate criticism, on the one hand, and unlawful pressure on the judiciary, on the other. Public figures including public activists should refrain from statements or actions which may undermine the independence of the judiciary and the authority of justice, and judges should exercise their professional duties independently, proceeding exclusively from facts established on the grounds of their assessment of evidence, understanding of the law, and the rule of law which guarantees fair trial independent of any external influence, incentives, threats, interference or public criticism[37].

[36] The opinion of a member of the High Council of Justice of 13 June 2019 following verification of facts contained in the notice by a judge of the Bohun district court of Zhytomyr.

[37] The decision of the High Council of Justice of 22 August 2019 No. 2239/0/15-19.

If a judge believes that information shared in the media about him or her or the results of his or her consideration of a specific case is false or incomplete, and may mislead the public opinion of the court or damage the authority of justice, he or she should involve the court press service to covering objective information on the status of case consideration and clarification of adopted judgments to the extent permissible by law[38].

It is important to establish a connection between criticism and the dissemination of false information about judges, on the one hand, and attempts to affect the administration of justice by a judge in certain cases, on the other, as well as to establish that there was purposeful interference in the administration of justice by a judge.

The High Council of Justice continues to emphasise the importance of appropriate interaction between the judiciary and the media.

The Memo for media and civil society organisations was prepared in 2019 with the support of the Communication Committee of the System of Justice and the Ukrainian-Canadian Support to Judicial Reform Project. This document was prepared by an initiative group consisting of court press secretaries, finalised by the relevant working group of the Communication Committee, approved by the Committee and became subject to public hearings in which media, civil society organisations, and experts participated.

"The Media play an essential role in shaping public opinion on the judicial system in Ukraine and the judicial reform as most Ukrainian citizens receive information on Ukrainian courts only from media"[39].

Regulating coverage in mass media of the system of justice, courts and judges would require that professional associations of journalists, in particular, establish norms to identify the admissibility and limits of criticism of courts and judges. Such criticism should be impartial and useful, enabling improvement in the work of judges. An example of the Code of ethics of a Ukrainian journalist could be interesting in this respect[40].

Some aspects related to the positions and professional activities of judges often cause parties to court procedures or members of the public to issue various threats against judges.

Sometimes, threats against judges provide substantiated grounds for concerns about their safety, the safety of their family members and that of court employees and therefore really imperil judicial independence.

It appears from the decisions of the High Council of Justice that, in order to establish whether there have been elements of interference in the administration of justice and pressure on judges related to the administration of justice, it is important to establish a connection between such actions (threats) and decisions adopted by a judge or the consideration of a specific case pending before a judge at the time when such actions were committed.

Each fact of oral or written threats against a judge must be thoroughly investigated by law enforcement agencies according to procedures established by the Criminal Procedure Code of Ukraine.

Sometimes, judges inform the High Council of Justice of submission to courts by some individuals of a large number of claims, applications, motions, or other procedural

[38] The decision of the High Council of Justice of 23 April 2019 No. 1262/0/15-19.

[39] The report of the research «Attitudes of the citizens of Ukraine towards the judiciary» / Razumkov Centre. Kyiv, 2019. URL: https://rm.coe.int/report-razumkov-final/16809537f0, viewed 26 December 2019.

[40] See: URL: http://www.cje.org.ua/ua/code, viewed 21.01.2020.

documents. Such procedural documents often contain derogatory statements and ill-founded accusations of crimes against judges. Judges also report that parties to court proceedings file claims related to specific court cases and directed against them as officials.

Submission of manifestly ill-founded claims, complaints, applications, or motions to courts could be declared, depending on specific circumstances, abuse of procedural rights (Article 44 of the Criminal Procedure Code, Article 45 of the Code of Administrative Procedure and Article 43 of the Commercial Procedure Code of Ukraine).

Courts must independently respond to cases of abuse of procedural rights in the manner prescribed by the procedural legislation.

The Ukrainian legislation in force does not provide for any limitations to the right of any individual to file complaints to the High Council of Justice against the disciplinary misdemeanours of a judge, and, in particular, any limitations on filing disciplinary complaints to the High Council of Justice by parties to court proceedings prior to the completion of their trials and, therefore, such actions could not be regarded as interference in the discharge of a judge's duties in the administration of justice. However, it should be taken into consideration that Article 107(4) of the Law of Ukraine "On the judiciary and the status of judges" states that it is inadmissible to misuse the right of appeal to an entity empowered to conduct disciplinary proceedings and, in particular, to raise the issue of a judge's liability without sufficient grounds and to use such right to apply pressure on judges in connection with the administration of justice.

The High Council of Justice shares the legal position of the Council of Judges of Ukraine set out in the revised paragraph 2 of its decision of 8 April 2017 No. 34 as amended by the decision of the Council of Judges of Ukraine of 1 March 2019 No. 13, as the presence of a complaint against a judge pending before the High Council of Justice does not give rise to a conflict of interests affecting the discharge of a judge's duties relating to the consideration of a particular case; the submission by a party to court proceedings of a complaint against a judge to the High Council of Justice prior to the completion of the trial could be indicative of an influence on the court if it is done to pressure the judge to curtail the performance of his or her professional duties or to induce them to a miscarriage of justice, etc., which may contain elements of the crime provided cited by Article 376 of the Criminal Code of Ukraine.

At the same time, the High Council of Justice established in some cases that submissions of disciplinary complaints contained elements of interference in the discharge of the judges' duties in the administration of justice. The Disciplinary Chambers refused to open disciplinary proceedings in such cases on complaints against judges or claims were dismissed without consideration of the merits and returned to complainants.

The High Council of Justice receives lots of inappropriate disciplinary complaints against judges which are being dismissed without consideration of the merits as non-compliant with legal requirements (around 45.2% of disciplinary proceedings in 2019 resulted in decisions by members of Disciplinary Chambers and Disciplinary Chambers themselves on dismissal without consideration of the merits).

The significant number of disciplinary complaints that are non-compliant with legal requirements or containing grounds for a refusal to open disciplinary proceedings undermines the effectiveness of disciplinary proceedings and, consequently, of finding ways to reduce the number of cases when individuals misuse their right to file complaints to the High Council of Justice against judges committing disciplinary misdemeanours. This

remains an important issue.

In the opinion of the High Council of Justice, additional awareness-raising campaigns to inform the public that complaints to the High Council of Justice are unable to impact the procedural result of a trial should be a priority in addressing this issue.

Furthermore, it would be useful to establish additional legal "filters" to limit the submission of inappropriate disciplinary complaints to the High Council of Justice.

In particular, it is worth considering the establishment of a moderate court fee for complaints (with the maintenance of all existing benefits), because such complaints are subject to quasi-judicial proceedings with an additional strain on the budget.

Instead, Law No. 193-IX undermined the existing procedural "filters", in particular, by removing the provision of the Law of Ukraine "On the High Council of Justice" which provided for the dismissal of ill-founded complaints without consideration of the merits and their return to vexatious litigants.

A claim that an offence has been committed should be based on the provisions of the law. According to the contents of Articles 55, 60, and 214 of the Criminal Procedure Code, every individual and every legal person is entitled to lodge a claim or a notice to law enforcement agencies that a criminal offence has been committed if there are circumstances possibly pointing to the commitment of a crime by a judge during the administration of justice.

Being a party to court proceedings cannot limit the right of a person to lodge applications that an offence has been committed.

The High Council of Justice holds the legal position (as already mentioned above in the Report) that the procedural status of being a party to court proceedings cannot limit the right of a person, established by law, to lodge applications to a public prosecutor or an investigator that an offence under Article 375 of the Criminal Code has been committed.

However, a manifestly ill-founded notice of the committing of a crime results in criminal liability under Article 383 of the Criminal Code. Qualification of such unlawful actions is within the competence of law enforcement agencies.

With due regard to the above-mentioned, the High Council of Justice verifies the judges' notifications and assesses them in conjunction with the circumstances referred to by the judges in order to ensure that individuals are able to exercise their rights, as enshrined in law, and not abuse them by attempting to influence the court.

The High Council of Justice adopted a number of decisions in 2019, after having analysed notifications of judges referring to circumstances related to obstruction of the functioning of courts and arrived at the conclusion that there were grounds to take measures to ensure judicial independence and the authority of justice.

The effective launching of the Judicial Protection Service along with effective procedural remedies can ensure the resolution of this problem.

In 2019, The High Council of Justice considered a number of notifications from judges about the physical pressure on them or members of their families, damage to property of judges and courts, and established, after consideration, a direct connection between such actions and the discharge of the professional duties of judges and pointed out that such cases containing elements of criminal offences should be appropriately investigated by law enforcement agencies and the offenders should be brought to justice under the law.

In addition to this, in the same year, the High Council of Justice reviewed a number of cases related to forgery of court decisions and other judicial documents and, after consideration, decided to take measures to ensure judicial independence and the authority of justice, since the forgery of court decisions and other judicial documents undoubtedly compromises the authority of justice and undermines public trust in the judiciary. Law enforcement agencies should also deal appropriately with such cases.

4. THE NEED FOR THE EFFECTIVE PERFORMANCE OF LAW ENFORCEMENT AGENCIES TO COUNTER INTERFERENCE THE DISCHARGING OF JUDGES' DUTIES IN THE ADMINISTRATION OF JUSTICE

Judges have an obligation under Article 48(4) of the Law of Ukraine "On the judiciary and the status of judges" to inform, in addition to the High Council of Justice, the Prosecutor General of cases of interference in the discharge of their duties in the administration of justice.

However, this provision can become an effective safeguard of judicial independence only if relevant authorities take appropriate measures within their competence to investigate cases of alleged interference in the performance of judges' duties and adequately respond to such interference[41].

Persons guilty of offences against judges must be brought to justice under the law.

Being aware of impunity for illegal actions aimed at interfering in the discharge of a judge's duties in the administration of justice results in similar offences in the future, which makes it impossible to administer justice in some cases.

Of all criminal proceedings related to decisions approved by the High Council of Justice in 2019 with regard to judicial independence and the authority of the judiciary, the Council has been informed of only one criminal proceeding which has been entered in the relevant Unified register following a notification from a judge of interference in his or her performance (containing elements of the criminal offence cited under Article 377(1) of the Criminal Code) and referred later on to the court with the indictment.

According to the Office of the Prosecutor General, 10,310 crimes were registered in 2019 under section XVIII of the Special Part of the Criminal Code of Ukraine (crimes against justice)[42].

According to the State Judicial Administration of Ukraine, courts of appeal did not review criminal cases under Articles 375 and 376 of the Criminal Code in 2019 and nobody was convicted for such crimes by court decisions that have entered into force. Two cases have been considered under Article 375 of the Criminal Code and one case with regard to one individual under Article 376 of the same Code.

Notwithstanding numerous notifications from judges on interference in the discharge of their duties in the administration of justice, the number of cases referred to courts with indictments is insignificant. This demonstrates that Article 376 of the Criminal Code is applied ineffectively to safeguard the independence and safety of judges.

[41] The decision of the High Council of Justice of 31 January 2019 No. 292/0/15-19.

[42] The response letter from the Office of the Prosecutor General, signed by V. Kasko, First Deputy Prosecutor General, of 31 January 2020 No. 09/4-30 Ref. No. 20.

5. INTERFERENCE IN THE DISCHARGE OF JUDGES' DUTIES IN THE ADMINISTRATION OF JUSTICE BY LAWYERS

In 2019, the High Council of Justice considered a number of notifications from judges on interference in the discharge of their duties by lawyers. The High Council of Justice found in some cases that there were elements of interference by lawyers in the discharge of judges' duties in the administration of justice and undue pressure on them.

Moreover, the High Council of Justice repeatedly pointed out that the interference by a lawyer in the discharge of a judge's duties in the administration of justice could be grounds for disciplinary actions and criminal proceedings against such a lawyer.

The High Council of Justice, in accordance with the decisions taken in 2019, following the verifications of judges' notifications and upon the establishment of elements of interference in the discharge of a judge's duties in the administration of justice by lawyers, requested qualification and disciplinary bar commissions to take disciplinary action against the relevant lawyers. The Council also made information requests to the Office of the Prosecutor General regarding the detection and investigation of crimes in cases entered in the Unified register of pre-trial investigations on the basis of notifications of judges related to lawyers' actions.

The High Council of Justice established in some of its decisions that the lawyers' actions contained no interference in the discharge of a judge's duties in the administration of justice. In this context, the Council takes into account the right of a lawyer to provide his or her account of a trial in which he or she is a party.

The High Council of Justice established that when defence lawyers who were parties to court procedure requested the recusal of judges, such actions did not contradict the provisions of procedural law and were not indicative of attempts to affect or pressure court, however, such facts could be indicative of abuse of procedural rights.

Also, the High Council of Justice points out that, in line with the contents of Articles 33 and 36 of the Law of Ukraine "On the bar and practice of law", anyone informed of actions by a lawyer which possibly imply disciplinary liability, is entitled to lodge a complaint against such action with the qualification and disciplinary bar commissions, and so judges may also lodge disciplinary complaints against defence lawyers with the qualification and disciplinary bar commissions.

CONCLUSIONS

1. Important events happened in 2019 related to the launch of the High Anti-Corruption Court. The Court started functioning on 5 September 2019. However, it would be not possible to make definitive conclusions as to the effectiveness of the High Anti-Corruption Court until the end of the first year of its work.

2. The Law of Ukraine "On amendments to the Law of Ukraine "On the judiciary and status of judges" and certain laws of Ukraine regarding the functioning of judicial governance bodies" no. 193-IX dated 16 October 2019 entered into force at the end of 2019. This law received negative remarks from the justice system's authorities and professional legal organisations and was, for the most part, negatively received by the Venice Commission. Consequently, the Supreme Court submitted the constitution petition to the Constitutional Court of Ukraine requesting the Court to declare unconstitutional certain provisions of this law. The adoption of this Law disrupted the functioning of the High Qualification Commission of Judges.

3. The High Council of Justice is empowered to adopt measures to ensure judicial independence, and such powers are realised by providing advisory opinions, which are subject to mandatory consideration on issues regarding the establishment, restructuring, and dissolution of courts, the judiciary, and the status of judges. However, the Verkhovna Rada of Ukraine failed to consider in an appropriate manner the advisory opinions of the Council on the number of laws that seriously affected the judiciary and the status of judges, namely, draft laws No. 1031, No. 1066, No. 1008 (the Law of Ukraine No. 193-IX of 16 October 2019). The aforementioned proves the need to regulate by law the procedure for considering the opinions of the High Council of Justice by the Verkhovna Rada through amending its Rules of Procedure, otherwise, this tool would remain nothing more than words on paper, seriously affecting the independence of the judiciary.

4. The second half of 2019 was marked by unprecedented pressure on the judiciary. In particular, People's Deputies of Ukraine submitted to the consideration of the Verkhovna Rada draft laws aimed at establishing the liability of judges for court decisions (No. 2271), termination of the judges' powers in a manner not provided for in the Constitution (No. 1031) and amending disciplinary procedures, as well as the draft law violating the right of judges to defend themselves (No. 1008 or the Law No. 193-IX).

5. One of the main current challenges which now confronts the judiciary is the shortage or even total absence of judges in the courts. Following the entry into force of Law No. 193-IX, the High Qualification Commission of Judges of Ukraine ceased to function, which stopped the selection, transfer, secondment, and appointment of judges. At the end of 2019, there was an absence of 2,044 judges. 10 courts failed to administer justice because of the total absence of judges at the end of 2019. The qualification assessment of judges was also suspended. Over 2,000 judges did not terminate qualification assessment procedures.

6. The search for the best ways to speed up the qualification assessment of judges, which began as far back as in 2015, remains crucial for the judicial system. At the same time, Law No. 193-IX partly addressed the issue of different levels of remuneration for those judges who passed the qualification evaluation and those who didn't, which had been raised in the Annual reports for 2017 and 2018 on ensuring judicial independence in Ukraine.

7. Insufficient financing of the judiciary remains a pressing issue, as already in the

first half of 2020, it will cause underfunding of court administrations and significantly reduce the salaries of its employees. The underfunding of the judicial system will delay the completion of the establishment of the Judicial Protection Service and prolong, in part, the introduction of the Unified judicial information and telecommunication system.

8. Entries of reports on crimes committed by judges under Article 375 of the Criminal Code (delivery of a deliberately wrongful sentence, judgment, order or ruling by a judge (or judges)) in the Unified register of pre-trial investigations, which quite often are used as a means of pressure on judges, remain an unresolved issue to be addressed by legislative amendments. The High Council of Justice stressed the need to amend the relevant legislation and to stipulate in Article 214 of the Criminal Procedure Code that the Prosecutor General (his/her deputies) should be the only officials entering reports on crimes under Article 375 of the Criminal Code in the Unified register of pre-trial investigations. At the same time, it would be appropriate to consider the exclusion of the above article from the Criminal Code, as the statistics do not prove its efficiency.

9. It should be mentioned that the Prosecutor General's Office continues to respond inappropriately to the reports of judges highlighting interference in the discharge of their duties, in particular, by law enforcement officials. This requires a constant response from the High Council of Justice, which should request that the Prosecutor General's Office expedite the investigation of such facts and ensure accountability under the law of those law enforcement officers who interfered with the discharge of a judge's duties in the administration of justice. However, no efficient procedure whatsoever for the disciplinary liability of public prosecutors has been yet re-established.

10. The cases of interference in the discharge of a judge's duties in the administration of justice by People's Deputies of Ukraine and local councillors, who are not parties to court procedures, have significantly decreased in number.

11. Regrettably, there are still instances of inappropriate behaviour of parties to court hearings. At the same time, the legislation in force entrusts presiding judges with powers to ensure compliance with the requirements of the procedural legislation and the maintenance of order during court sessions. To this end, judges are empowered to take measures against offenders, including pecuniary sanctions.

12. The High Council of Justice receives reports from judges on cases of attempts at extra-procedural influence; however, not all of them require a response. At the same time, the facts of threats, damage to the property of judges, etc. are always subject to a proper response from the Council. In such cases, as a rule, the High Council of Justice requests that law enforcement agencies investigate such crimes. Accelerating the establishment of the Judicial Protection Service would increase the protection of judges from wrongdoing.

13. Judges are public figures and may, therefore, be criticised as this stems from the right of other persons to express their arbitrary judgments on the administration of justice in the media and on social networks. However, statements containing direct threats or elements of persecution or aimed at undermining the authority of the judiciary are inadmissible in a democratic society. In each such case, the High Council of Justice responds to the relevant facts and reports to the law enforcement agencies or appeals to the public emphasising the inadmissibility of statements that undermine

the authority of the judiciary.

14. If any person lodges a disciplinary complaint against a judge or a party to judiciary proceeding applies to the High Council of Justice prior to the conclusion of a trial, this is not a pressure on judges unless such complaint is intended to induce a judge to conduct or fail to conduct certain procedures / approve certain decisions. If it is established that the obvious purpose of filing a complaint is to induce a judge to pass a certain judgment, the Disciplinary Chamber refuses to open a disciplinary case under the respective complaint.

15. The High Council of Justice receives reports from judges who believe that recusals announced by lawyers are a method of pressure on courts. However, the High Council of Justice has repeatedly stated that the procedural conduct of lawyers can be assessed by weighing the balance between ensuring the procedure for the recusal of a judge and protecting the judge from interfering with the administration of justice. Therefore, the submission by lawyers of recusal motions does not contravene provisions of the procedural legislation and is not indicative of attempts to pressure or influence the court, and may only in certain cases indicate abuse of procedural rights.

16. An important aspect of ensuring the independence of judges and the judiciary is the prompt and effective investigation by law enforcement agencies of notifications of judges on interference in the discharge of their duties, which remains to some extent inefficient.

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

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

ANALYSIS
OF THE 2019 ANNUAL REPORT
OF THE HIGH COUNCIL OF JUSTICE
"ON ENSURING JUDICIAL INDEPENDENCE IN UKRAINE"

July 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 Judicial Independence in Ukraine"	**2019 HCJ Annual Report**
United States Agency for International Development	**USAID**

INTRODUCTION

1. The High Council of Justice 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" (the Project), 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, 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 European Court of Human Rights judgments and especially to the execution of the Volkov

[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.

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.

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.

[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).

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

[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.

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.

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

[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.

[11] See CM 2010/12, para. 36.

[12] See CM 2010/12, para. 14.

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 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.

[13] See Opinion 18, CCJE, para. 52.
[14] See Opinion 18, CCJE, para. 18 and para. 42.
[15] Ibid. para 53.

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].

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.

[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.

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.

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

[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.

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

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

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 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.

[23] See CM Recommendation (2010) 12, para. 38.
[24] Ibid., para. 5.
[25] Ibid., para. 9.
[26] Ibid., para. 70.
[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.

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 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 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].

[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. The key principles of judiciary independence endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[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).

[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).

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 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.

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[33] The judgement of the European Court of Human Rights of 6 September 2005 in the case *Salov v. Ukraine* (application no. 65518/01).

[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.

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

[38] Ibid., para. 170 and para. 199.

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 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.

[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.

[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.

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.

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,

[45] See Opinion No. 18, CCJE, para. 6

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).

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

OVERVIEW
OF THE 2019 ANNUAL REPORT
OF THE HIGH COUNCIL OF JUSTICE
"ON ENSURING JUDICIAL INDEPENDENCE IN UKRAINE"

Executive summary

June 2020

This overview is prepared within the framework of 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", funded by the Human Rights Trust Fund and implemented by the Justice and Legal Co-operation Department of the Council of Europe. The overview has been drafted by Iryna Kushnir, the founder and programme director of the NGO Ukrainian Institute for Human Rights.

This overview is based on the draft Annual Report of 2019 submitted by the High Council of Justice (HCJ) of Ukraine to identify problematic issues and provide an assessment of possible steps to take to resolve them. The Annual Report is the only official comprehensive document that should reflect the state of independence of judges in Ukraine. It is used to form public policy, plan necessary steps, and form a legal position by experts and organisations, including international organisations.

The report, which has been analysed, is the third comprehensive document developed by the HCJ in accordance with the provisions of clause 7 of part 1 of Article 73 of the Law of Ukraine "On the High Council of Justice". It consists of an introduction, conclusions, and two main parts with a review of important events, actions, and issues that influenced the state of judicial independence.

The expert's proposals were formulated by considering the current challenges for the judicial system, current legislation, and the content of the submitted draft report. The expert analysed the content of the report in the context of recent legislative changes and the information contained in it regarding:

- staffing of courts;
- safeguarding the work of newly formed courts;
- qualification assessment of judges;
- provision of resources as a factor in judiciary independence;
- execution of the judgements of the European Court of Human Rights regarding issues related to the independence and disinterestedness of the judiciary;
- cases of interference in the activities of a judge or court.

General issues

1. Given the status and importance of the report for the formation of state policy in the field of safeguarding the independence of the judiciary, it is evident that the process of its formation should constitute a platform for discussion, particularly regarding the state of affairs on relevant issues involving judicial self-government bodies, bodies and institutions of the justice system, and non-governmental organisations. The analysis of the Annual Report of 2019 indicates that it primarily reflects the vision of the HCJ on the state of independence of judges and actions taken by the HCJ. Accordingly, the expert draws attention to the need to involve in the formulation of the report all relevant entities that play a part in ensuring the independence of judges whose position is important for a comprehensive reflection of the state of affairs.

The expert also noted that the report of 2019 took into account the previous proposals made by the experts, in particular, a separate section is provided on Ukraine's implementation of the judgements of the European Court of Human Rights regarding

issues of independence and disinterestedness of the judiciary. This is a positive development in the formation of the report.

2. To ensure discussion of the report at the highest political levels, it is essential that the Annual Report is presented to the Parliament. Based on the results of the hearings, the Parliament should decide on actions that must be taken to resolve problematic issues. Accordingly, it seems equally necessary to amend the Law of Ukraine "On the High Council of Justice" and the Regulations of the Verkhovna Rada of Ukraine. Prior to making the amendments, it is also recommended that all necessary steps are taken to ensure that relevant issues are addressed to the Parliament by initiating the HCJ parliamentary hearings or discussions at the meeting of the relevant parliamentary committee.

On legislative changes

3. It is noted that the Annual Report justifiably pays much attention to the relevant legislative amendments that were adopted, in particular, by Law of Ukraine No. 193 and provides evidence of their unconstitutionality and non-compliance with international standards. However, since the Judgement of the Constitutional Court of Ukraine No. 4-p/2020 was adopted at the beginning of the year regarding these changes, it would be advisable to include information on it in the report. Given the state of the legislation and the actual lack of dialogue between the HCJ and Parliament, attention is drawn to the need to effectively use the possibilities of appealing controversial provisions of laws containing risks to the state of independence of judges in the Constitutional Court of Ukraine. For example:

- to appeal the disputed provisions of Laws No. 193, 263 and 117;
- to consider the introduction of an interpretation of the provisions of the Constitution, namely clause 7 of part 1 of Article 131 of the Constitutional Court of Ukraine in the context of whether this provision can be construed as imposing a duty on Parliament to take into account the advisory proceedings of the HCJ regarding draft laws on the independence of judges, and whether violations of this obligation by the Parliament may be considered a violation of the procedure for the consideration and adoption of the draft law, which may lead to its recognition as unconstitutional;
- it is advisable to consider the possibility of applying to the Constitutional Court of Ukraine with a constitutional claim on the unconstitutionality of the provisions of the Law of Ukraine "On the State Budget of Ukraine for 2020", given the inadequate critical funding of the judiciary. The urgent consideration of such a claim by the Constitutional Court may have a significant impact on the formation of interaction with Parliament, both in the budget for 2020 and in relation to future budgets.

4. Analysis of the report indicates a lack of proper dialogue between the HCJ and the Parliament. It seems that this situation is part of the general problem of a lack of trust in the court and the judicial system as a whole. In order to overcome this issue, it is advisable to form a common strategy for all judicial authorities to increase confidence in the court and to take steps for its implementation. The development of such a strategy per se by the judicial authorities that identifies problems and highlights actions to solve

them will be a positive signal for the population, and will also become a guide for judges and court employees regarding the steps that should be taken in their daily work. In addition, it is recommended that consideration is given to involving representatives of civil society, whose professional activities are related to the independence of judges, in the discussion of problematic issues. In view of this, it would be highly advisable to explore the possibility of establishing a non-profit or scientific advisory board at the HCJ.

5. Given the mass media's powerful impact on the formation of public opinion, it would be beneficial to develop a common communication strategy between the judiciary and mass media in order to strengthen confidence in the authorities. To monitor the state of affairs regarding trust in the court and identify shortfalls that have a negative effect, it would also be practical to carry out monitoring campaigns as widely as possible with the support of international organisations, and with minimal use of HCJ resources.

Regarding court staffing

6. The situation with the competition for vacant judges' positions in 2019 as described in the report demonstrates the lack of coordinated work by the judiciary resulting in the non-appointment of 467 candidates for the position of judge. Given the above, it is obvious that the relevant authorities need to co-operate more closely and, in case of disputes, the court must resolve them without delay.

Regarding the execution of the judgements of the European Court of Human Rights

7. In terms of the execution of the judgements of the European Court of Human Rights, it seems necessary to draw attention to the fact that the situation with the implementation of this judgement requires maximum attention with regard to the risks to new appeals by the applicants, as in the case of "Kulykov and Others v. Ukraine", in the event of prolonged failure to take individual steps to execute this judgement. In addition, it is important to start monitoring the new claims that judges send to the European Court of Human Rights regarding communication with the Government of Ukraine in order to identify potential new problems and possibly take measures to prevent them.

Regarding cases of interference in the activities of a judge or court

8. The report indicates a problem with the lack of efficiency of the submission institution of HCJ in responding to submissions reporting cases of interference in the activities of a judge or court. After analysis of the legislation and the information presented in the report and taking into account the dynamics of the changes compared to last year, the following is advised:

- Introduce monitoring of the efficiency and effectiveness of the response to the submission of HCJ by the relevant entities;

-Take steps to draw up an administrative offence report on the failure to provide

a response on the HCJ's submission in accordance with Articles 188-32 of the Code of Ukraine on Administrative Offences. In addition, it is recommended that such an administrative offence been seen as failure to comply with the legal requirement specified in the HCJ submission on the identification and prosecution of persons who have performed actions or failed to act, thus violating the independence of judges or undermining the authority of justice. At the same time, it is advisable to allow authorised employees of the HCJ to draw up reports;

- Strengthen the functional ability of the HCJ to respond effectively to cases of interference in the activities of a judge by allowing the HCJ to impose fines on officials whose actions constitute interference or contact the Supreme Court to verify the fact of interference and then penalise such actions.

9. In order to strengthen control over the activities of law enforcement agencies based on the complaints of judges about interference in their duties, it is recommended that the HCJ constantly monitors and controls the actions taken by law enforcement agencies in criminal proceedings with reference to complaints by judges. It is important to consider developing a mandatory special training course for prosecutors with the support of the General Prosecutor's Office of Ukraine to reveal problematic issues concerning the action (inaction) of prosecution authorities that negatively affect the independence of the court (judges) and focus on actions that are unacceptable and are considered to be interference in judicial activities.

10. In order to solve the issue of the lack of meaningful steps to combat the influence on officials of public authorities (public persons, journalists) who deliberately allow public statements that undermine the credibility of the court and make groundless attacks on the judiciary, it is advisable to consider the possibility of amending the Code of Ukraine on Administrative Offences regarding the prediction of an administrative offence in the form of public disrespect towards the court on the part of government officials and the provision of the right to HCJ employees to draw up administrative offence reports in case of the committing of this offence.

11. To improve the quality of information coverage by journalists, it would be useful for the HCJ to cooperate with educational institutions where journalists are trained as part of special training courses for journalists on media coverage of the work of judges and the court.

12. The report needs to be supplemented in terms of outlining the specific steps the HCJ must take in the event of establishing interference in a judge's activity and court outcomes.

13. The large-scale HCJ practice on ensuring the independence of judges requires collation that will improve its accessibility to interested parties. To prevent cases of submission of unreasonable claims by judges, as well as failure to submit appropriate claims, it is advisable to generalise the practice according to the relevant claims of the judges and develop recommendations for judges on what kinds of behaviour do constitute interference and those that don't to form appropriate criteria; and to carry out an information campaign aimed at judges to promote the reporting of interference and

compliance with the duty of notification. It is also advisable to consider the possibility of creating short explanations (using technical tools) for judges and distributing them amongst judges or uploading these explanations as videos to the HCJ website, or to include these issues in the list of compulsory topics that are covered by the National School of Judges during training for judges.

14. Besides, given that the HCJ has already formed a certain system of work and has delegated much of this work to employees within the body, it would be advisable to consider the possibility of carrying out an internal institutional audit of the efficiency of the implementation of the assigned tasks. The objective of this audit is to analyse the level of performance of tasks taking into account the number of employees, the distribution of the workload between structural units, and the number and nature of tasks in order to provide recommendations on technical or organisational steps that could influence the improvement of overall performance.