



Support to the implementation of the judicial reform in Ukraine

REVIEW OF COUNCIL OF EUROPE STANDARDS RELATED TO THE LIABILITY OF JUDGES REGARDING UNLAWFUL JUDICIAL DECISIONS

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LIST OF ABBREVIATIONS

CCJE	Consultative Council of European Judges
CCU	Constitutional Court of Ukraine
CM	Committee of Ministers of the Council of Europe
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GET	GRECO Evaluation Team
GRECO	Group of States Against Corruption

I. INTRODUCTION

The CoE Justice and Legal Co-operation Department of the Directorate General of Human Rights and Rule of Law in the scope of the Project “Support to the implementation of the judicial reform in Ukraine” (further - Project) engaged the international consultant Judge Đuro Sessa, who is the former President of the CCJE, a member of the CCJE Bureau and the President of the Supreme Court of Croatia, to prepare a review of the CoE standards related to the liability of judges regarding unlawful judicial decisions. The text of the review was further modified by the CoE to provide for a more precise formulation of the European standards related to the issue of the unlawful judicial decisions.

The need to have such a review emerged after the CCU found Article 375 of the Criminal Code of Ukraine to be unconstitutional¹. Article 375 of the Criminal Code defines criminal liability of judges for unlawful judicial decisions.

It is obvious that judges cannot be exempt from any form of responsibility. However, responsibility of judges goes hand in hand with judicial independence and there must be a balance between responsibility and independence.

In this respect it is of crucial importance for any legal system based on the principles of the rule of law to determine the basis and the extent of the responsibility of judges, regardless if it is disciplinary, civil or criminal responsibility, without weakening the judicial independence and impartiality of judges. Finding the fair balance between the requirements of independence and responsibility is a major challenge for all states which want to develop a modern democratic society.

Article 375 of the Criminal Code of Ukraine states as follows:

“Delivery of a knowingly unjust sentence, decision ruling or resolution by a judge (or judges)

1. Delivery of a knowingly unjust sentence, decision ruling or resolution by a judge (or judges)
shall be punishable by restraint of liberty for a term up to five years, or imprisonment for a term of two to five years.”

The CCU in its Decision no. 7-p/2020 of 11 June 2020 concluded:

“2.6. The efficient exercise of the right to judicial protection depends on many factors of the judicial system and judicial proceedings, in particular on ensuring the guarantees of independence of judges in the administration of justice. Independence and inviolability of a judge are guaranteed by the Constitution and laws of Ukraine; any influence on a judge is prohibited; while administering justice, a judge is independent and governed by the rule of law (parts one, two of Article 126, part one of Article 129 of the Fundamental Law of Ukraine).”

The CCU stressed that “stipulation at the constitutional level of the provision, according to which justice in Ukraine is administered exclusively by courts and the provision on the independence of judges create the most important guarantee of observance of the

¹ See the decision of the CCU No. 7-p/2020, <http://www.ccu.gov.ua/docs/3127>

constitutional human and citizen's rights and freedoms" and "is aimed at creating an effective mechanism for the implementation of tasks entrusted to the judicial power, which consist, first of all, in protecting human and citizen's rights and freedoms, ensuring the rule of law and constitutional order in the state" (paragraph 4 of clause 3.1 of the reasoning part of the Decision of December 4, 2018, No. 11-r/2018).

CoE Recommendation CM/Rec(2010) 12, referring to Article 6 of the ECHR, states that "the purpose of independence of the judiciary is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence"(see § 3 of the Appendix to Recommendation).

The possibility of the establishment of criminal liability for the issuance of a "knowingly unjust" court decision creates risks and opportunities to influence judges due to the vagueness and inconsistency of the disposition of Article 375 of the Criminal Code of Ukraine.

The CCU considers that based on the principle of independence of judges guaranteed by the Constitution of Ukraine, the disputed provisions of the Criminal Code, which define acts that are crimes the subject of a commission of which is a judge, should be formulated by the legislator in such a way so that a state body or any official are not able to use them as a means of influencing a judge and interfering with the administration of justice.

Given the above, the CCU found that Article 375 of the Criminal Code of Ukraine contradicts the principle of the rule of law, notably elements, such as legal certainty, and that it is not consistent with the principles of independence of judges, and the binding nature of judicial decisions, and therefore contradicts part one of Article 8, parts one and two of Article 126, and part one, paragraph 9 of part two of Article 129 of the Constitution of Ukraine.

Having established the inconsistency of Article 375 of the Criminal Code with the Constitution of Ukraine (unconstitutionality), the CCU considers it appropriate to postpone the loss of effect of this Article after six months from the date of adoption of the CCU Decision on its unconstitutionality.

In connection with the above, the Verkhovna Rada of Ukraine shall bring the normative regulation established by Article 375 of the Criminal Code, which is declared unconstitutional, into compliance with the Constitution of Ukraine, as well as with this Decision.

Given the above and guided by Articles 147, 150, 151, 152, 153 of the Constitution of Ukraine, based on Articles 7, 32, 35, 65, 66, 74, 84, 88, 89, 91, 92, 94, 97 of the Law of Ukraine "On The Constitutional Court Of Ukraine" the CCU decided:

1. To declare Article 375 of the Criminal Code of Ukraine as such that does not conform to the Constitution of Ukraine (is unconstitutional).
2. Article 375 of the Criminal Code of Ukraine, declared unconstitutional, shall lose its effect from the date of adoption of this CCU Decision.

This review will provide a compilation of CoE standards related to criminal responsibility and independence of judges and issues related to aspects of judges' accountability.

The standards are divided into those of general nature, designated opinions on the matter from the Venice Commission and GRECO and relevant judgments of the ECtHR.

II. COUNCIL OF EUROPE STANDARDS – General documents

II.1. Council of Europe Recommendation CM/Rec(2010) 12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities²

“Chapter II – External independence

15. Judgments should be reasoned and pronounced publicly. Judges should not otherwise be obliged to justify the reasons for their judgments.

16. Decisions of judges should not be subject to any revision other than appellate or re-opening proceedings, as provided for by law.

Chapter III – Internal independence

22. The principle of judicial independence means the independence of each individual judge in the exercise of adjudicating functions. In their decision-making judges should be independent and impartial 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. Hierarchical judicial organisation should not undermine individual independence.

23. Superior courts should not address instructions to judges about the way they should decide individual cases, except in preliminary rulings or when deciding on legal remedies according to the law.

Chapter VII – Duties and responsibilities

Liability and disciplinary proceedings

“66. The 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.

67. Only the state may seek to establish the civil liability of a judge through court action in the event that it has had to award compensation.

68. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice.³

69. Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such 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. Disciplinary sanctions should be proportionate.

70. Judges should not be personally accountable where their decision is overruled or modified on appeal.

² Adopted by the CM on 17 November 2010 at the 1098th meeting of the Ministers' Deputies

³ Highlighted by the international consultant Judge Sessa

71. When not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen.”

II.2. CM Decision, 1369th meeting (DH) March 2020 – H46-38 Oleksandr Volkov group v. Ukraine⁴

3. [The Deputies ... as regards the general measures] stressed that the irremovability of judges is a key element of judicial independence and, while noting the pending proceedings before the Constitutional Court on the constitutionality of the provisions of Law No. 193-IX underlined that these proceedings provide an important opportunity to have a full examination of the law's compatibility with the Convention; noted also the pending proceedings concerning the constitutionality of Article 375 of the Criminal Code and expressed the hope that these proceedings would be concluded expeditiously so as to have the benefit of the Constitutional Court's analysis to guide future reform work;

6. [The Deputies ... as regards the general measures] urged the authorities to undertake a comprehensive revision of the criminal law provisions relating to liability of judges and stressed the importance of ensuring that criminal sanctions are applied only in case of malice or if the fault was otherwise clearly intentional and to accompany this revision with a strengthening of procedural guarantees and a review of investigatory practices; noted in this context the continuous threat posed to judicial independence by the vague wording of Article 375 of the Criminal Code and stressed the need to revise or abrogate this provision.

II.3. CM Decision, 1355th meeting (DH) 23-25 September 2019 – H46-27 Oleksandr Volkov group v. Ukraine⁵

6. [The Deputies ... as regards the general measures] expressed concern regarding the potential threat to judicial independence of the overuse by prosecutors of criminal investigations under Article 375 of the Criminal Code which criminalises the delivery of a knowingly unfair judicial decision; urged the authorities to consider measures to eliminate any potential undue influence and pressure on judges in line with the recommendations of the Group of States Against Corruption (GRECO) in that regard.

II.4. CCJE's Magna Carta for Judges (Fundamental Principles)⁶

“19. In each State, the statute or the fundamental charter applicable to judges shall define the misconduct which may lead to disciplinary sanctions as well as the disciplinary procedure.

⁴ [http://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2020\)1369/H46-38E](http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2020)1369/H46-38E)

⁵ [http://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2019\)1355/H46-27E](http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2019)1355/H46-27E)

⁶ On the occasion of its 10th anniversary, the CCJE adopted, during its 11th plenary meeting (Strasbourg, 17-19 November 2010), a Magna Carta of Judges (Fundamental Principles) summarising and codifying the main conclusions of the Opinions that it already adopted. Each of those 12 Opinions, brought to the attention of the CM, contains additional considerations on the topics addressed in this document (see www.coe.int/ccje)

20. Judges shall be criminally liable in ordinary law for offences committed outside their judicial office. Criminal liability shall not be imposed on judges for unintentional failings in the exercise of their functions.

21. The remedy for judicial errors should lie in an appropriate system of appeals. Any remedy for other failings in the administration of justice lies only against the state.

22. It is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of wilful default."

II.5. CCJE Opinions

II.5.1. Opinion No. 3 of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality

"a. Criminal liability

53. Nevertheless, while current practice does not therefore entirely exclude criminal liability on the part of judges for unintentional failings in the exercise of their functions, the CCJE does not regard the introduction of such liability as either generally acceptable or to be encouraged. A judge should not have to operate under the threat of a financial penalty, still less imprisonment, the presence of which may, however sub-consciously, affect his judgment.

5°) Conclusions on liability

75. As regards criminal liability, the CCJE considers that:

- i) judges should be criminally liable in ordinary law for offences committed outside their judicial office;
- ii) criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions."

II.5.2 Opinion No. 18 (2015)"The position of the judiciary and its relation with the other powers of state in a modern democracy"

"(c) "Punitive accountability"

33. As the CCJE has discussed previously, all judicial actions must be in accordance with the applicable principles of professional conduct, established disciplinary rules and – within conditions which preserve judicial independence and impartiality – the criminal law. Principles of professional conduct will be separate from their enforcement through disciplinary systems. Given the importance of ethics and integrity for the public's confidence in the judiciary, judges must behave with integrity both in their official functions and in their private lives and will be accountable for their conduct if it is outside accepted norms. Sometimes the conduct of individual judges is too aberrant for mere explanation to suffice.

The corollary of society granting such extensive powers and trust to judges is that there must be some means of holding judges responsible, and even removing them from office, in cases of misbehaviour so gross as to justify such a course. This is particularly so in cases of judicial corruption, which fundamentally undermine public confidence in judicial impartiality and independence. In other cases of judicial misconduct, criminal, civil, or disciplinary liability will be appropriate, depending on the nature of the misconduct.

VIII: Summary of principal points

6. The judiciary (like the other two powers of state) provides a public service. Therefore, the judiciary, like the other powers, has the responsibility of demonstrating to the other powers of the state and to society at large the use to which its power, authority and independence have been put. This can be called “accountability” (paragraphs 20 - 22). This “accountability” takes several forms.

7. First, there is the appeal system. The appeal system is, in principle, the only way by which a judicial decision can be reversed or modified after it has been handed down and the only way by which judges acting in good faith can be held accountable for their decisions. The CCJE has called this “judicial accountability” (paragraphs 23, 26).

8. Secondly, judges are made accountable by working in a transparent fashion, by having open hearings and by giving reasoned judgments, engaging with the public and the other powers of state. The CCJE has called this form of accountability “explanatory accountability” (paragraphs 27-32).

9. Thirdly, if a judge has engaged in improper actions of a sufficiently serious nature, he or she must be held accountable in a robust way, e.g. through the application of disciplinary procedures and, if appropriate, the criminal law. The CCJE has called this “punitive accountability”. Care must be taken, in all cases, to preserve judicial independence (paragraphs 33 and 37).”

II.5.3. Opinion No.20 (2017) “The role of courts with respect to uniform application of the law”

“e. The consequences for judges for not following the established case law

39. Legal knowledge, including that of the case law, is an aspect of judicial competence and diligence; nevertheless, a judge acting in a good faith, who consciously departs from the settled case law and provides reasons for doing so, should not be discouraged from triggering a change in the case law. Such departure from the case law should not result in disciplinary sanctions or affect the evaluation of the judge’s work.”

III. Venice Commission

III.1. Amicus Curiae Brief for the Constitutional Court of Moldova on the Criminal liability of judges⁷

"It must be noted, however, that judicial independence is not a prerogative or privilege granted in the judge's own interest, but is a fundamental principle, an essential element of any democratic state, a pre-condition of the rule of law and the fundamental guarantee of a fair trial. [...] Decisions which remove basic safeguards of judicial independence are unacceptable even when disguised and can breach Article 6.1 ECHR."

"A balance needs to be struck between immunity as a means to protect the judge against undue pressure and abuse from state powers or individuals (immunity), on the one hand, and the fact that a judge is not above the law (accountability), on the other. The Venice Commission has consistently pointed out that judges should not be granted general immunity, but functional immunity for acts performed in the exercise of their judicial functions. This is because, in principle, a judge should only benefit from immunity in the exercise of his or her lawful functions. If he or she commits a criminal offense in the exercise of his or her office, he or she should have no immunity from criminal liability"

"Another type of liability that applies to judges is disciplinary liability. It has different constitutive elements from criminal liability and applies a different standard of proof, however, it should be pointed out that criminal and disciplinary liability are not mutually exclusive. Disciplinary sanctions may still be appropriate in case of a criminal acquittal. Also, the fact that criminal proceedings have not been initiated due to the failure of establishing criminal guilt or the facts in a criminal case, does not mean that no disciplinary breach was committed by the judge concerned, precisely because of the different nature of both liabilities. If the misconduct of a judge is capable of undermining public confidence in the judiciary, it is in the public interest to institute disciplinary proceedings against that judge. Criminal proceedings, however, do not consider the particular disciplinary aspect of the misconduct, but criminal guilt.²² In any event, it is important that both types of liability be used sparingly in order not to cause a chilling effect on the judiciary."

"Individual liability for judges solely based upon the outcome of a complaint to the European Court of Human Rights, "interferes with judges' professional freedom to interpret the law, to assess facts and to weigh evidence in individual cases, as recognised by European standards. According to these standards, erroneous decisions should be challenged through the appeals process and not by holding the judges individually liable, unless the error is due to malice or gross negligence by the judge."

"Therefore, the mere interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil, criminal or disciplinary liability, even in case of ordinary negligence. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Civil (or criminal) liability may limit

⁷ [CDL-AD\(2017\)002. Amicus Curiae Brief for the Constitutional Court of Moldova on the Criminal liability of judges.](#)

the discretion of an individual judge to interpret and apply the law. Therefore, the liability of judges should not be extended to judges' legal interpretation in the adjudication process. Only failures performed intentionally, with deliberate abuse or, arguably, with repeated, serious or gross negligence should give rise to disciplinary actions and penalties, criminal responsibility or civil liability."

"Criminal liability in the exercise of a judicial function should be reserved for the most serious cases and not be applied to unintentional failings. If judges were to be held criminally liable for unintentional mistakes in the exercise of their judicial function, this might endanger both the impartiality and the independence of judges. The impartiality of judges will be at risk, as the threat of sanctions may subconsciously affect his or her judgment. The independence of judges will be at risk, since criminal liability for unintentional mistakes would make the judiciary vulnerable to interference in the judicial function by the executive."

"Criminal liability of a judge and the outcome of an appeals process are two separate issues, which should not be mixed.⁵¹ The Venice Commission has consistently taken the view that the fact that a judge has been overruled by higher courts does not necessarily mean that the judge has not acted in a competent or professional manner."

"V. Conclusion

51. In an *amicus curiae* brief, the Venice Commission provides the Constitutional Court with European standards and practice on the questions raised in the request so as to facilitate the Court's consideration of the issue(s) at hand. It is, however, for the Constitutional Court to determine the final interpretation of national laws and the Constitution of the country concerned.

52. The questions addressed to the Venice Commission for this *amicus curiae* brief by the Constitutional Court of the Republic of Moldova with respect to Article 307 of the Criminal Code of the Republic of Moldova, are:

- (1) Is it possible for a judge to incur criminal liability for his or her interpretation of the law, ascertainment of facts or assessment of evidence while reviewing a case brought before him or her?*
- (2) Is it possible for the quashing by a higher court of a decision of a lower court to serve as a ground for determining the illegality of that decision and*
- (3) Does the challenged provision secure the independence and impartiality of judges in a state governed by the rule of law?*

53. The answer to these questions may be summarised as follows:

Important as the freedom of judges in the exercise of their judicial function may be, this does not mean that judges are not accountable. A balance must be struck between their immunity as a means to protect them against undue pressure and abuse from other state powers or individuals (functional immunity) and the fact that a judge is not above the law (accountability);

- while judges may be subject to criminal liability for the interpretation of a law, the ascertainment of facts or the assessment of evidence, such liability should only be possible in cases of malice and, arguably, gross negligence;

- judges should not be held liable for judicial mistakes that do not involve bad faith and for differences in the interpretation of the law. The principal remedy for such mistakes is the appellate procedure;

- criminal and disciplinary liability are not mutually exclusive: disciplinary sanctions may still be appropriate in case of a criminal acquittal; also, the fact that criminal proceedings have not been initiated due to the failure to establish criminal guilt or the facts in a criminal case, does not mean that there was no disciplinary breach by the judge concerned, precisely because of the different nature of these liabilities;

- if a judge's misconduct is capable of undermining public confidence in the judiciary, it is in the public interest to institute disciplinary proceedings against that judge. Criminal proceedings, however, do not consider the particular disciplinary aspect of the misconduct, but criminal guilt;

In conclusion: only failures performed intentionally, with deliberate abuse or, arguably, with repeated, serious or gross negligence should give rise to disciplinary actions and penalties, criminal responsibility or civil liability.

54. Finally, criminal liability of judges may be compatible with the principle of the independence of judges, but only pursuant to the law. The law in question must not be in conflict with the overriding principle of the independence of judges. This is a question that the Constitutional Court will have to pronounce itself upon.

III.2. Report on the Independence of the Judicial System Part I: The Independence of Judges⁸

“Para.61

“It is indisputable that judges have to be protected against undue external influence. To this end they should enjoy functional – but only functional – immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes).”

III.3. Opinion on the Draft Amendments to the Constitutional Law on the Status of Judges of Kyrgyzstan⁹

Para 24

“It is reasonable to grant immunity from civil suit to a judge acting in good faith in the performance of his or her duty. But, it should not be extended to a corrupt or fraudulent act carried out by a judge.”

⁸ [CDL-AD\(2010\)004, Report on the Independence of the Judicial System Part I: The Independence of Judges](#),

⁹ [CDL-AD\(2008\)039, Opinion on the Draft Amendments to the Constitutional Law on the Status of Judges of Kyrgyzstan](#),

III.4. Opinion on Draft amendments to Laws on the Judiciary of Serbia¹⁰

Para 18-19, and 22

"[...] It is not uncommon for violations of the rights and freedoms guaranteed by the European Convention on Human Rights and/or the national Constitution to occur as a result of the application and/or interpretation of the law. It is also not unusual for the European Court of Human Rights [...] to reach different conclusions in defining the scope and content of a right (including procedural rights) or of a legal provision. [...] Should the judge be liable if s/he 'wilfully' did not follow the standards established by any of these international organisations? The argument could be made that where the international case-law is well-established, the judge should be expected to follow it. However, the fact that a judge has wilfully chosen not to follow the established standards should not in itself become a ground for personal liability. It is of great importance that issues pertaining to the personal liability of judges be determined by national courts, but this should only be allowed on the basis of criteria and procedures that are clearly defined by the law."

III.5. Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia"¹¹

Para 46-48

"Such criteria for the establishment of a disciplinary violation as the number of overturned decisions 'should be approached with a great degree of caution. It does not necessarily follow that because a judge has been overruled on a number of occasions that the judge has not acted in a competent or professional manner. It is however reasonable that a judge who had an unduly high number of cases overruled might have his or her competence called into question. Nevertheless, any final decision would have to be made on the basis of an actual assessment of the cases concerned and not on the basis of a simple counting of the numbers of cases which had been overruled.' 'In addition, a distinction might be drawn between decisions made on the basis of obvious errors, which any lawyer of reasonable competence should have avoided and decisions where the conclusion arrived at was a perfectly arguable one which nonetheless was overturned by a higher court.'

Independence of every judge is a precondition that must allow every judge and every panel of judges to make effort in order to change the practice – to adopt a different decision – if s/he thinks it appropriate in a particular case. Only stubborn resistance against an enhanced practice which leads to a repeated overturning in cases where there is a well-established and clear case-law should probably be counted as a blatant lack of professionalism. [...] The same criticism may be formulated regarding violation of rights so decided by the ECtHR. Judges should follow the European jurisprudence, but an erroneous decision should not necessarily result with their dismissal (see new Article CC, ss. 10, first part). Furthermore, the 'modification' of the lower court judgements may be relatively minor or reflect the discretionary power of the appellate court (for example, the appellate court may reduce sentence imposed by a lower court even though the lower court acted lawfully and within the authorised limits)."

¹⁰ [CDL-AD\(2013\)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, §§18-19 and 22](#)

¹¹ [CDL-AD\(2015\)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia"](#)

III.6. Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe¹²

Para 28

““It may go too far in giving the judge immunity for such matters as failure to give judgment at all or improper conduct such as giving a judgment as a result of an inducement or bribe, which would be dealt with in criminal and disciplinary proceedings.”

III.7. Opinion on the Concept paper on the reform of the High Judicial Council, Kazakhstan¹³

Para 84

„...it belongs to the national legislator to select indicators of the judge’s professionalism (or a mixture of them), provided that the chosen model does not penalize judges for the reasonable exercise of judicial discretion, even when their decisions are overturned on appeal. Simply put, a judge should have a right to err. “

IV. GRECO Fourth Evaluation Report on Ukraine¹⁴

“114. The GET wishes to draw attention to one specific threat on judges’ independence, namely the use by prosecutors of certain criminal offences – in particular, “Delivery of a knowingly unfair sentence, judgment, ruling or order by a judge” (article 375 CC) 37 – as a means of pressure against judges. In this connection, it refers to CoE standards which make it clear that “the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice.”³⁸ Even though article 375 CC is, according to the letter of the law, limited to “knowingly unfair” decisions, several of the GET’s interlocutors stated that this provision is abused by prosecutors against judges in order to influence their decision-making; in contrast, it seems that little use is made in practice of article 376 CC which prohibits interference with the activity of judicial authorities. According to a 2016 survey among judges, 5.5% of all judges (and 6.6% of trial court judges) indicated that they had been threatened by the prosecution about refusing to make the “necessary decision”; almost 3.0% pointed to the fact that allegations made against them or proceedings launched had been done so under article 375 CC; a similar number of respondents indicated that in their case other CC provisions had been applied.

115. The GET underscores how important it is that all necessary measures be taken to respect and protect the independence and impartiality of judges.⁴⁰ In the context described

¹² [CDL-AD\(2010\)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe.](#)

¹³ [CDL-AD\(2018\)032, Opinion on the Concept paper on the reform of the High Judicial Council, Kazakhstan](#)

¹⁴ <https://rm.coe.int/grecoeval4rep-2016-9-fourth-evaluation-round-corruption-prevention-in-/1680737207>

above, this might best be achieved by abolishing article 375 CC. Should the authorities nevertheless consider that such a provision is necessary in Ukraine, it would have to be made clearer in the law that it only criminalises the deliberate miscarriage of justice. Moreover, complementary measures need to be taken to prevent any possible misuse of this provision and of any other CC provisions which could be used against judges in connection with their decision-making. Such measures could include e.g. interpretative guidance in the explanatory report to the law or in specific guidelines for prosecutors, inclusion of the matter in training activities, stricter application by law enforcement authorities of article 376 CC on interference with the activity of judicial authorities, etc.

Consequently, GRECO recommends abolishing the criminal offence of “Delivery of a knowingly unfair sentence, judgment, ruling or order by a judge” (article 375 of the Criminal Code) and/or, at the least, otherwise ensuring that this and any other criminal offences criminalize only deliberate miscarriages of justice and are not misused by law enforcement agencies to exert undue influence and pressure on judges.”

V. ECtHR Case Law

V.1. Gryaznov v. Russia, app no. 19673/03, 12/06/2012

“75. The Court notes that it has already found that certain privileges and immunities from civil liability are compatible with Article 6 § 1. Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by signatory States as part of the doctrine of parliamentary immunity (see *A. v. the United Kingdom*, cited above, § 83) or generally recognised rules of public international law on State immunity or on immunity of international organisations (see, on State immunity, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 56, ECHR 2001 XI, and *Fogarty v. the United Kingdom* [GC], no. 37112/97, § 36, ECHR 2001 XI (extracts), see also, on immunity of international organisation, *Waite and Kennedy v. Germany* [GC], no. 26083/94, §§ 50-74, ECHR 1999 I). At the same time, the Court has also found that it would not be consistent with the rule of law in a democratic society, or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims, or confer immunities from civil liability on large groups or categories of persons (see *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294 B, and *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 47, ECHR 2001-XI).

76. The Court further observes that immunity given to a judge from civil claims in damages has been earlier found to be a permissible restriction on the right of access to court, in the case of *Ernst and Others v. Belgium*. The Court took into account that judicial immunity was a long-established legal practice existing in some form in many member States. It pursued the legitimate aim of proper administration of justice. The Court however added that a material factor in determining whether such restriction was proportionate to the legitimate

aim was whether the applicants had available to them reasonable alternative means to protect their rights effectively. Although they could not sue a judge for damages, they were able to lodge a civil action against the State on the basis of the same facts. The essence of their right of access to court was not therefore impaired (see *Ernst and Others v. Belgium*, no. 33400/96, §§ 47-57, 15 July 2003)

77. By contrast to *Ernst and Others v. Belgium*, the applicant in the present case could lodge a civil claim for damages neither against the judge nor against the State. It remains to be ascertained whether this restriction was compatible with Article 6 § 1.

78. The Court takes note of the Constitutional Court's arguments justifying circumscribed liability of the judges and the State for damage caused by allegedly unlawful judicial decisions, and consequent immunity from civil actions (see paragraph 38 above). It accepts that such a restriction aims at preventing losing parties, who normally have an opportunity to take their complaints to an appeal court or to such other forum as may be prescribed by procedural rules, from attacking a final court decision in separate civil proceedings. It also permits judges to do their work in complete independence and free from fear that the exercise of their discretion and judgment may make them liable for damages. Finally, it permits judges to devote themselves entirely to their judicial duties without being constantly disrupted by civil actions lodged by losing parties. It therefore pursues a legitimate aim of proper administration of justice.

80. The Court notes that the immunity from civil claims for damage caused as part of the administration of justice is not of a blanket or non-rebutted nature. In particular, a civil action can be lodged in most serious cases where damage has been caused through unlawful conviction, unlawful prosecution, unlawful placement in custody or order not to leave the place of residence, unlawful administrative arrest or correctional work, irrespective of any fault on the part of judges or law-enforcement officials. A civil action for damages can also be lodged in cases where judicial acts have been done with malicious intent or corruptly and the judge's guilt has been established in a final criminal conviction. The limitation in question cannot be therefore regarded as an arbitrary removal of the courts' jurisdiction to determine a whole range of civil claims. "

V.2. Sergey Zubarev v. Russia, app. no. 5682/06, 05/02/2015

Para.32

"On that point, the Court observes that judicial immunity is a legal practice that exists in some form in many member States. It has been established for the benefit of the public, in whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences, while litigants can protect themselves from judicial errors by taking their complaints to an appeal court without resorting to suits for personal liability. Accordingly, the Court accepts that in the present case immunity from liability accorded to the judge in connection with her actions in a professional capacity as a presiding judge in a civil case may be regarded as having a legitimate aim namely pursuing the interests of the administration of justice.

V.3. Alparslan Altan v. Turkey, app. no. 12778/17, 16/04/2019

Para 102. And 103.

“The Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if it is to be successful in carrying out its duties (see *Baka v. Hungary* [GC], no. 20261/12, § 165, 23 June 2016, with further references). This consideration, set out in particular in cases concerning the right of judges to freedom of expression, is equally relevant in relation to the adoption of a measure affecting the right to liberty of a member of the judiciary. In particular, where domestic law has granted judicial protection to members of the judiciary in order to safeguard the independent exercise of their functions, it is essential that such arrangements should be properly complied with. Given the prominent place that the judiciary occupies among State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 196, 6 November 2018), the Court must be particularly attentive to the protection of members of the judiciary when reviewing the manner in which a detention order was implemented from the standpoint of the provisions of the Convention.

103. Where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty should be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law should be clearly defined and that the law itself should be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention, a standard which requires all law to be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Del Río Prada*, cited above, § 125; *Medvedyev and Others v. France*, no. 3394/03, § 80, 10 July 2008; *Creangă v. Romania* [GC], no. 29226/03, § 120, 23 February 2012; and *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 92, 15 December 2016).”

Para 112 and 113.

112. In the Court’s view, this amounts to an extensive interpretation of the concept of discovery in flagrante delicto, expanding the scope of that concept so that judges suspected of belonging to a criminal association are deprived of the judicial protection afforded by Turkish law to members of the judiciary, including the applicant, a judge serving on the Constitutional Court and hence entitled to such protection under Law no. 6216. As a result, in circumstances such as those of the present case, this interpretation negates the procedural safeguards which members of the judiciary are afforded in order to protect them from interference by the executive.”

113. The Court observes that judicial protection of this kind is granted to judges not for their own personal benefit but in order to safeguard the independent exercise of their functions (see paragraph 102 above). As the Government rightly pointed out, such protection does not mean impunity. Its purpose is to ensure that the judicial system in general and its members in particular are not subjected, while discharging their judicial functions, to unlawful restrictions by bodies outside the judiciary, or even by judges performing a supervisory or review function. In this connection, it is important to note that Turkish legislation does not prohibit the detention of a member of the Constitutional Court, provided that the safeguards enshrined in the Constitution and Law no. 6216 are observed. Indeed, judicial immunity may

be lifted by the Constitutional Court itself and prosecutions may be brought, and preventive measures ordered, such as pre-trial detention, in accordance with the procedure set out in sections 16 and 17 of that Law.

V.4. Parlov-Tkalcic v. Croatia, app. no. 24810/06, 22/03/2010

“86. The Court further reiterates that the concepts of independence and objective impartiality are closely linked (see, for example, *Findlay v. the United Kingdom*, 25 February 1997, § 73, Reports of Judgments and Decisions 1997-I) and that it is sometimes difficult to dissociate them (see, for example, *Bochan v. Ukraine*, no. 7577/02, § 68, 3 May 2007). As regards the issue of “independence”, the Court further reiterates that in order to establish whether a tribunal can be considered “independent” for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence (see, among many other authorities, *Findlay*, loc. cit.). However, judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within. This internal judicial independence requires that they be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court (see, by implication, *Daktaras v. Lithuania*, no. 42095/98, ECHR 2000-X; *Bochan*, cited above; and *Moiseyev v. Russia*, no. 62936/00, § 182, 9 October 2008). The absence of sufficient safeguards securing the independence of judges within the judiciary and, in particular, *vis-à-vis* their judicial superiors, may lead the Court to conclude that an applicant's doubts as to the (independence and) impartiality of a court may be said to have been objectively justified (see, for example, *Daktaras*, cited above, §§ 36 and 38; *Bochan*, cited above, § 74; and *Moiseyev*, cited above, § 184).”

V.5. Oleksandr Volkov v. Ukraine, app. no. 21722/11, 27/05/2013

The judgment does not directly deal with criminal accountability of judges but is significant broader than in the Ukrainian context because it establishes standards of quality of law to avoid arbitrary interventions from the authorities.

“169. The expression “in accordance with the law” requires, firstly, that the impugned measure should have some basis in domestic law. Secondly, it refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law (see, among other authorities, *Kopp v. Switzerland*, 25 March 1998, § 55, Reports 1998 II).

170. The phrase thus implies, *inter alia*, that domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention (see *C.G. and Others v. Bulgaria*, no. 1365/07, § 39, 24 April 2008). The law must, moreover, afford a degree of legal protection against arbitrary interference by the authorities. The existence of specific procedural safeguards is material in this context. What is required by way of safeguard will depend, to some extent at least, on the nature and extent of the interference in question (see *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 46, ECHR 2001-IX).”

VI. CONCLUDING REMARKS

It is most important to acknowledge that for the proper implementation of Article 6 of the ECHR, everybody has a right to a public hearing before an independent and impartial tribunal and that the principle of judicial independence prevails over the principle of the individual responsibility of judges in all aspects of this term, although the importance of judges' accountability must not be neglected by all means.

From the CoE standards it can be concluded that different CoE legal texts and bodies, such as the Venice Commission, GRECO, the CCJE and, last but not least, the ECtHR find that judges hold a special position when it comes to being held accountable as a result of measures they take in their capacity as judges. Judges should not as a main rule have to take into account what consequences a ruling might have for them personally. They should simply interpret and apply the law to the best of their ability.

Lack of constitutional protection and lack of functional immunity might also leave the path open for applying pressure on judges and make them decide in accordance with the wishes of powers outside the judiciary. According to the commonly accepted views, judges should therefore not be held accountable for their actions carried out in their professional functions by other means than an obligation to be impartial, give reasons and that their decisions are subject to judicial review through a system of appeal.

The Recommendation CM/Rec(2010)12 on judges states that: "the 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. Criminal sanctions should only be applied 'in cases of malice'." According to this Recommendation, a judge should only be held accountable if he/she acted with the intent to misapply the law for extraneous reasons.

Furthermore, as noted above, judges should not generally be protected from sanctions against misconduct and gross misbehaviour, such as corruption or misuse of power.

As stated by the CCJE, 'the corollary of the powers and the trust conferred by society upon judges is that there should be some means of holding judges responsible, and even in extreme cases removing them from office, in cases of misbehaviour so gross as to justify such a course'.

Such standards mostly refer to the extra-judicial activities of judges, or to their use of their power to follow extraneous goals. When it comes to their well-intended judicial acts, things are different; judges are, only to apply laws that they themselves are not responsible for. Consequently, they must be given sufficiently wide margins of interpretation, even if this amounts to misapplication of the law.

As far as the ECtHR is concerned, the judgments cited in this review are mostly dealing with the concept and scope of immunity of judges, civil responsibility of the state for the mistakes done by judges. In this connection, the ECtHR has stated: "In particular, where domestic law has granted judicial protection to members of the judiciary in order to safeguard the

independent exercise of their functions, it is essential that such arrangements should be properly complied with" (see judgment "Altan vs Turkey" above). It means that judges should enjoy a high level of protection to judge freely and without fear of retribution. However, this would exclude intentional acts and acts of a judge which could be defined as actions of gross negligence.

Moreover, the principle of legal certainty and foreseeability dictates that it is of outmost importance that any legal solution which will in particular or in more general manner enforce criminal liability of judges should give understandable and clear definition of intent (criminal intent) and gross negligence as the only situations where judges could be found personally accountable according to CoE standards.

The CoE has been for decades aware of these problems and how different solutions the member States take to address the need to establish a fair balance between judicial independence, impartiality and accountability of judges. The member States are sometimes led by populist demands and hostile (justified or not) public attitude to judges and the member States sometimes offer solutions where the proper balance between independence and accountability is at stake.

In situations of criminal intent and gross negligence when judges can or could be found individually responsible, it is also important to stress that law is not and will never be an exact science, especially in the globalised world where judges have to apply domestic and concurring international rules. In such environment the society must accept that the process of interpretation of laws is not only unavoidable, but it is necessary.

For the above-mentioned reasons, it is important to deal with criminal responsibility of judges with great caution. There is no doubt that severe abuses of judges caused or motivated by corruption must be sanctioned severely, but it is also important for lawmakers to be aware that "wrong" decisions are not necessarily the consequence of corruption or some other unlawful motivation of the judge.

To conclude, it is not in line with CoE standards to have a special provision on criminal responsibility as it is now defined by the Criminal Code of Ukraine or as it is proposed in the law-drafting process before the Verkhovna Rada.

APPENDIX: Summary of most important and significant standards

- “16. Decisions of judges should not be subject to any revision other than appellate or re-opening proceedings, as provided for by law.

- 68. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice.”¹⁵

-“20.Judges shall be criminally liable in ordinary law for offences committed outside their judicial office. Criminal liability shall not be imposed on judges for unintentional failings in the exercise of their functions.”¹⁶

-“5°) Conclusions on liability

75. As regards criminal liability, the CCJE considers that:

i) judges should be criminally liable in ordinary law for offences committed outside their judicial office;

ii) criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions.”¹⁷

-9.“Thirdly, if a judge has engaged in improper actions of a sufficiently serious nature, he or she must be held accountable in a robust way, e.g. through the application of disciplinary procedures and, if appropriate, the criminal law. The CCJE has called this “punitive accountability”. Care must be taken, in all cases, to preserve judicial independence (paragraphs 33 and 37)”.¹⁸

-“39. Legal knowledge, including that of the case law, is an aspect of judicial competence and diligence; nevertheless, a judge acting in a good faith, who consciously departs from the settled case law and provides reasons for doing so, should not be discouraged from triggering a change in the case law. Such departure from the case law should not result in disciplinary sanctions or affect the evaluation of the judge’s work.”¹⁹

-“” In conclusion: only failures performed intentionally, with deliberate abuse or, arguably, with repeated, serious or gross negligence should give rise to disciplinary actions and penalties, criminal responsibility or civil liability.

54. Finally, criminal liability of judges may be compatible with the principle of the independence of judges, but only pursuant to the law. The law in question must not be in conflict with the overriding principle of the independence of judges. This is a question that the Constitutional Court will have to pronounce itself upon..”²⁰

¹⁵ Recommendation CM 2010(12)

¹⁶ CCJE's Magna Carta for Judges

¹⁷ CCJE Opinion No.3

¹⁸ CCJE Opinion No.18- Conclusions

¹⁹ CCJE Opinion No 20.

²⁰ Venice Commission- Amicus Curiae Brief for the Constitutional Court of Moldova on the Criminal liability of judges.

-“ It is of great importance that issues pertaining to the personal liability of judges be determined by national courts, but this should only be allowed on the basis of criteria and procedures that are clearly defined by the law.”²¹

-“The Court took into account that judicial immunity was a long established legal practice existing in some form in many member States. It pursued the legitimate aim of proper administration of justice. The Court however added that a material factor in determining whether such restriction was proportionate to the legitimate aim was whether the applicants had available to them reasonable alternative means to protect their rights effectively”²²

-“. In particular, where domestic law has granted judicial protection to members of the judiciary in order to safeguard the independent exercise of their functions, it is essential that such arrangements should be properly complied with. Given the prominent place that the judiciary occupies among State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see Ramos Nunes de Carvalho e Sá v. Portugal [GC], nos. 55391/13 and 2 others, § 196, 6 November 2018), the Court must be particularly attentive to the protection of members of the judiciary...”²³

²¹ Venice Commission, Opinion on Draft amendments to Laws on the Judiciary of Serbia

²² ECtHR- Gryaznov v. Russia

²³ ECtHR- Alparslan Altan v. Turkey