

THE HIGH COUNCIL OF JUSTICE AND RELEVANT FOREIGN AUTHORITIES IN THE PROCESS OF APPOINTING JUDGES

Serhii Khaliuk

Ph.D., Associate Professor, National Academy of Internal Affairs, Ukraine

e-mail: skhaliuk@ukr.net, orcid.org/0000-0003-1338-5117

Summary

The article is devoted to defining the role and place of the High Council of Justice and relevant foreign agencies amidst forming the judiciary. In Ukraine, considerable attention is paid to determining the status of the High Council of Justice. This is because fundamentals of the judiciary's independence in terms of its formation and functioning, which directly relate judicial selection, their appointment, and dismissal, are laid with consideration to international instruments and specific foreign experience. The European community proposes to introduce into the legal framework a model of the judiciary's organization through establishing appropriate bodies endowed with institutional and operational independence towards other branches of government. In addition, a determining tool for ensuring the independence of the High Council of Justice and the relevant judicial councils in foreign countries is the statutory consolidation of their legal status: either in the constitution or in the specific law. Ukraine has embarked on the path of strengthening the High Council of Justice as a body having constitutional status in the post-Soviet period. This period is characterized by a legal arrangement of institutional principles of judicial power and the legal status of its holders, consolidation of guarantees of their independence, and the autonomy of judges.

Keywords: judiciary, constitutional status, judicial councils, classification features, European integration.

DOI: <https://doi.org/10.23856/4915>

1. Introduction

According to the updated current legislation of Ukraine on the judiciary and the status of judges, the High Council of Justice has become the only body authorized to make decisions on the appointment and dismissal of judges, their transfer to other courts, apply disciplinary measures against judges and prosecutors, and deal with other personnel issues. In view of the above, the study of particularities of the functioning of the High Council of Justice as a reformed body of judicial governance is a particularly relevant topic today. In R. Z. Holobutovsky's opinion, "at present, the authorities of the High Council of Justice as an entity with considerable powers of courts' staffing are poorly studied in scientific literature. We believe that the beforementioned is caused by the fact that this judicial body operates on a new principle." (*Holobutovs'ky, 2019: 110*). Therefore, the author considers it expedient to discuss separate powers on the formation of the judiciary, which are delegated to the High Council of Justice and the relevant bodies of foreign countries.

2. International legal standards for the formation of the judiciary

In general, the legal preconditions of the powers of the High Council of Justice related to the formation of the judiciary are specified in international acts (including recommendations) and the specific national legislation. In the context of the issue under consideration, the author dwells on some of them. In particular, it is worth referring to the Recommendation CM/Rec (2010) 12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 at the 1098th meeting of the Ministers' Deputies. In addition, they contain the basic principles of the independent functioning of the judiciary and focused on ensuring and strengthening the independence of judges as holders of judicial power. As for the selection and promotion of judges, there should be a government agency independent of the executive and legislative branches that renders appropriate decisions. To guarantee the autonomy of such a body, at least half of its members must be judges elected by judges themselves (para. 46). It is also emphasized that when constitutional or other legal provisions stipulate that the head of state, government or legislative authorities decide on the selection and promotion of judges, an independent and competent body, which mainly consists of judges (without prejudice to the rules applicable to judicial councils), should be empowered to give recommendations or set out its views which must be practically implemented by the relevant appointing authority (*Committee of Ministers of the Council of Europe, 2010*). Moreover, the European Networks of Councils for the Judiciary (ENCJ) puts forward the following scope of the judicial councils: appointment and promotion of judges; training of judges and candidates for judges; judicial discipline; judicial ethics; complaints against the judiciary; official activity of the judicial system; court management; financing of the judicial system; legislative proposals relating to courts and the judicial system (*European Networks of Councils for the Judiciary, 2014*).

3. National peculiarities of the appointment of judges to posts

According to Article 131 of the Constitution of Ukraine, the High Council of Justice shall submit a motion to the President of Ukraine to appoint a judge to the post based on the recommendation of the High Qualifications Commission of Judges of Ukraine together with the personal file (dossier) of the candidate for judicial office. Subsequent to the results of the preliminary consideration, the rapporteur draws up a conclusion about the possibility of appointing a judge and submits it for the consideration of the High Council of Justice. At the session of the High Council of Justice, a candidate for judicial office is considered after the report of a member of the High Council of Justice, who is appointed as the rapporteur in the case. A candidate for judicial office, in respect of whom the issue of submitting a motion for the appointment of a judge to the post is being discussed, is invited at the session of the High Council of Justice. The non-appearance of a candidate for judicial office at the session, regardless of the reasons, does not preclude considering the issue in his absence. The decision on a candidate for judicial office is reached at the session of the High Council of Justice. A session of the bench of the High Council of Justice, at which the issue of submitting an application to appoint a judge is discussed, is valid if at least fourteen members of the High Council of Justice are present. The decision to submit a motion to the President of Ukraine to appoint a judge shall be deemed adopted if at least fourteen members of the High Council of Justice have supported it. If less than fourteen members of the High Council of Justice voted for the submission of a motion to the President of Ukraine to

appoint a judge, it is regarded as the High Council of Justice has decided not to submit a motion to the President of Ukraine to appoint a judge (*High Council of Justice, 2017*).

At the final stage of appointing judges to posts, the President of Ukraine issues the relevant decree. At the same time, such a decree must be issued no later than thirty days from the date of approval of the motion of the High Council of Justice. Yu.O. Kostkina expresses her view in this regard. She emphasizes that the legislator did not specify the consequences of the evasion of the President of Ukraine from issuing the decree within 30 days established by the legislation of Ukraine, and no sanctions were imposed for failure to fulfill his duty. Therefore, in case of abuse by the head of state, the process of appointing a judge may be delayed that will negatively affect the operation of the judiciary. Thus, it is necessary to develop a response mechanism if the head of the state has not signed a decree appointing a candidate for judicial office (*Kostkina, 2016*). Consequently, it is proposed to resolve the above issues by amending legislation to establish the procedure for finding the decision to appoint a judge to post without the signature of the President of Ukraine effective. (*Holobutovsky, 2019: 112*).

4. Foreign experience in appointing judges to posts

Referring to the foreign experience of judicial councils in terms of powers related to the formation of the judiciary, the author marks that the powers to appoint magistrates (judges, prosecutors) and their promotion, as well as disciplinary powers, are the basic powers of the above Councils. In particular, a motion for the appointment of magistrates is a widespread component of the procedure for post appointment. It is this procedural component (submission of a motion for appointment) that is important in staffing the judicial system of a country and, first of all, needs protecting against bias and any external pressure. It has already been noted that one of the reasons for the formation of judicial councils is the need to introduce a submission procedure for the appointment of magistrates (their appointment and promotion), which ensures an appropriate degree of independence of the country's judiciary.

The authority of the High Council of Justice of Ukraine to submit a motion to appoint a judge is not unique. Judicial councils of many countries have the same or similar powers – Belgium, Bulgaria, Hungary, Spain, Italy, the Netherlands, Poland, Portugal, Romania, and France. Among these countries, there are those where judicial councils have been established to demonstrate the historical gap with the preceding authoritarian political regime, as well as those which already have long-present democratic systems and require further strengthening of guarantees of judicial independence.

At the same time, one can point to the availability of the opposite example, which is characterized by the lack of this power in judicial councils. Under such conditions, the bodies empowered to nominate for magistrates' posts or express their opinion on candidates put forward by the body, which proposes magistrates for posts, may act concurrently. Thus, in Denmark, the Minister of Justice is authorized to recommend judges for appointments based on the conclusions of the Judicial Appointments Council. A similar procedure exists in Sweden, where the Nomination Committee performs equivalent functions. Moreover, the Commission is not entitled to appoint to higher judicial positions (all members of the Swedish Supreme Court are elected by the government). In Ireland, the government also elects a judge from a list of candidates nominated by the Judicial Appointments Advisory Board (*Solovyov, 2016*).

However, the above-mentioned bodies endowed with powers specific to judicial councils are not such due to their legal status.

The scope of powers of judicial councils also varies and depends on national law. In some countries, the powers of judicial councils extend exclusively to courts (Moldova, Poland,

Slovenia) (*Holovatyy, 1996*), in others – to courts and prosecutor's office (Belgium, Italy, Spain, Romania) (*Sukharev, 2003: 667*), and in some – to courts, prosecutors, and investigators (Bulgaria) (*Okunkov, 2001*). In addition, Portugal has two Councils of the constitutional level: one has jurisdiction to deal with judges and the other – with prosecutors. At the same time, the Councils usually have a similar scope of powers in relation to both categories of magistrates.

Another aspect of the personnel powers of judicial councils is their distribution among individual participants in the procedure for submitting motions for the appointment of magistrates. This is also important, as the High Council of Justice of Ukraine is not the sole subject submitting applications for the appointment of judges. The High Council of Justice approves the decisions to submit a motion to the President of Ukraine to appoint a judge based on the results of consideration of the recommendation of the High Qualification Commission of Judges of Ukraine. Therefore, in some cases, judicial councils are vested with exclusive competence in the selection of magistrates – Spain, Italy, Portugal (for magistrates from a list of judges). For example, in Italy, the selection of candidates for magistrates is performed by the High Council for the Judiciary and must be agreed with the Minister of Justice only in relation to chiefs of courts. However, in practice, the Council insists on its candidate in case of disagreement (*The Councils of Justice in Europe*).

Otherwise, they share the powers with other bodies but retain the main role in this context – Belgium, Bulgaria, Romania, Portugal (in relation to magistrates from a list of prosecutors). In some cases, judicial councils share their powers with the executive branch and (or) with chiefs of courts, but under terms that allow them to retain a decisive role. For example, in Hungary, the powers to submit motions mainly belong to the State Judicial Council, but some individual powers are exercised by court chiefs. The Minister of Justice has no authority over the appointment of magistrates, and the President of the Republic performs formal functions on their appointment (except for the President of the Supreme Court, who is appointed by parliament on the proposal of the President) and is not considered as an executive representative.

In Belgium, the High Council of Justice addresses proposals to the king on the appointment of magistrates, their transfer, and promotion. The king is officially entitled to reject a proposal, but in practice, refusals are extremely rare. In Romania, the powers of the Council are divided into the powers to propose candidates for magistrates to the President of the Republic and the powers to submit direct appointments of magistrates by the very Council. In the former case, the President of the Republic may disagree with the nominated person depending on the post under consideration.

In Bulgaria, the High Judicial Council nominates, transfers, and promotes magistrates on the proposal of court chiefs after the approval of the Ministry of Justice. It recommends the president of the country candidates for appointment to higher judicial positions. Although the president may immediately object to the proposed appointment, he has no right to reject the Council's second nominee (*Solov'yov, 2016*).

In some cases, judicial councils have limited competence in the selection of magistrates – the Netherlands, France. In particular, in France, the composition of the High Council of the Judiciary, which has powers related to judges, makes proposals for appointments of judges of the Court of Cassation, first chiefs of appellate courts, and chiefs of courts of high instance. Other judges are appointed based on the approval of the composition of the High Council of the Judiciary. The composition of the High Council the Judiciary, which have powers in relation to prosecutors, renders its opinion on the appointment of prosecutors. At the same time, this conclusion is not binding, and candidates are not agreed with it (the council).

In the Netherlands, the situation has some peculiarities because the judicial council in this country is particularly focused on arranging the work of judicial institutions. Accordingly, the

functions of recruiting magistrates and their promotion are performed jointly with the Council, by the courts, and the Ministry of Justice. The Council has only limited powers in this area, but it consists of two committees which take part in selecting novice judges. Court chiefs, in turn, play an essential role in nominating candidates for judicial posts. (Solov'yov, 2016).

4. Conclusions

Thus, generalizations of a foreign experience of the legal status of judicial councils in foreign countries prove their notable differences. An analysis of the powers of judicial councils to form the judiciary, which involve submitting candidates for posts (judges, prosecutors) and subsequent appointments, makes it possible to hold that national legal systems have a different approach to dealing with the relevant issue. Therefore, the common goal is to ensure the independence of the judiciary.

References

1. Holobutovs'kyy R.Z. (2019) *Vyshcha rada pravosuddya yak sub'yekt kadrovoho zabezpechennya sudiv* [The High Council of Justice as a subject of staffing of courts]. *Pravo i suspil'stvo*, 2, 110–113. [in Ukrainian].
2. Holovatyy S. (1996) *Konstytutsiyi novykh derzhav Yevropy ta Azii* [Constitutions of the new states of Europe and Asia]. Kyiv: Ukr. Pravn. Fundatsiya. Vyd-vo «Pravo». [in Ukrainian].
3. Kostkina YU.O. (2016) *Vzayemodiya vyshchoyi rady pravosuddya z orhanamy derzhavnoyi vlady, orhanamy suddivs'koho samovryaduvannya ta inshymy sub'yektamy prava* [Interaction of the High Council of Justice with public authorities, judicial self-government bodies and other subjects of law]. *Visnyk kryminal'noho sudochynstva*, 4, 139-146. [in Ukrainian].
4. *Les conseils de la justice en Europe*. URL: https://www.coe.int/t/dghl/cooperation/ccje/textes/CSMFrance-TR10_fr.pdf.
5. Okun'kov L.A. (2001) *Konstytutsyyi hosudarstv Evropy* [Constitutions of European states]. Moscow: Norma. [in Russian].
6. *Rehlament Vyshchoyi rady pravosuddya* [Rules of Procedure of the High Council of Justice]. (2017, January. 24). URL: http://www.vru.gov.ua/legislative_acts/28. [in Ukrainian].
7. *Rekomendatsiya CM/Rec (2010) 12 Komitetu Ministriv Rady Yevropy derzhavam-chlenam shchodo suddiv: nezalezhnist', efektyvnist' ta obov'yazky, ukhvaleno Komitetom Ministriv Rady Yevropy 17 lystopada 2010 r. na 1098 zasidanni zastupnykiv ministriv* [Recommendation CM/Rec (2010) 12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 at the 1098th meeting of the Ministers' Deputies]. (2010). URL: http://zakon2.rada.gov.ua/laws/show/994_a38. [in Ukrainian].
8. *Report on Independence and Accountability of the Judiciary, adopted e General Assembly of the ENCJ Rome 13 June 2014*. URL: https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_independence_accountability_adopted_version_sept_2014.pdf.
9. Solov'yov A.A. (2016) *Nezavisimost' sudeyskogo korpusa (opyt yevropeyskikh gosudarstv)* [Independence of the judiciary (experience of European states)]. *Vestnik Finansovogo universiteta*, 5, 133-140. [in Russian].
10. Sukharev A.YA. (2003) *Pravovye systemy stran myra: Éntsyklopedycheskyy spravochnyk* [Legal Systems of the World: An Encyclopedic Reference]. Moscow: Norma. [in Russian].