

THE INDEPENDENT AND MERIT-BASED JUDICIAL SELECTION SYSTEM IN UKRAINE. INTRODUCTION TO THE 2023 REFORM OF THE CONSTITUTIONAL COURT OF UKRAINE

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Annotation. Since 2014, Ukraine has implemented judicial reform to address systemic issues such as corruption, nepotism, and a lack of transparency within the judiciary. A pivotal moment in this transformation occurred with the 2016 constitutional amendments, which established competitive selection procedures for judicial appointments, including those to the Constitutional Court of Ukraine. These initiatives prioritize evaluating candidates' professional competence and ethical standards by establishing the Advisory Group of Experts and other relevant bodies such as the Ethics Council, Selection Commission, etc – comprising both Ukrainian and international representatives – tasked with conducting impartial, politically independent assessments. Including international experts enhances the transparency and fairness of the selection process, mitigating the influence of patronage and ensuring that judicial appointments are based on merit. This reform initiative is a critical component of Ukraine's broader strategy to align its judicial system with European Union standards, thereby fostering greater accountability and transparency in the legal framework.

Key words: Judiciary, Constitutional Court, judges, fair and merit-based selection, international experts, Advisory Group of Experts, reforms, professional integrity.

1. Introduction.

Systemic issues, including corruption, nepotism, and a lack of transparency for many years, plagued the Ukrainian judicial system. Ukraine has embarked on comprehensive reforms for the last decade to transform its judiciary. These reforms, though varying in their levels of success, have laid the groundwork for significant changes in both the judiciary's culture and the processes for vetting candidates for the highest judicial governance positions. One crucial aspect of these reforms has been the introduction of competitive selection principles for judges, including those of the Constitutional Court of Ukraine.

The 2016 amendments to the Constitution of Ukraine were pivotal in this reform process. These changes mandated competitive selection processes for Constitutional Court judges, emphasizing the importance of assessing candidates' moral qualities and professional competence. A key component of this new framework was establishing intermediate (assisting) bodies tasked with evaluating candidates' professional and moral qualities – the Advisory Group of Experts. This body, comprising Ukrainian representatives and international experts, was separated from political actors (appointing bodies), such as the Parliament of Ukraine, the President of Ukraine, and the Congress of Judges of Ukraine, play technical roles ensuring that only candidates who have successfully passed a rigorous competitive selection process are considered for high judicial positions.

The inclusion of international experts in these selection processes serves to enhance transparency and fairness. Their impartiality helps counteract any potential biases or undue influence arising from internal connections or personal relationships within the Ukrainian legal community. This impartial

assessment is crucial in breaking the cycle of patronage and ensuring that the most qualified candidates are selected based on merit rather than personal connections.

Ukraine's experience with these reforms underscores their importance in creating a more transparent and accountable judiciary. The principles and mechanisms established through these reforms have broader implications for the selection of judges and justice-related senior management positions across all levels of the judiciary of Ukraine, enshrined in the Ukraine integration process with the European Union.

2. Analysis of scientific publications.

The theoretical basis for the study is the scientific works of such scientists and practitioners as: Sir Anthony Hooper, Dr. Tilman Hoppe, Jonathan Soeharno, Oksana Hryshyk, Valentyna Kravtchyk, Roman Smakyk, Rostislav Matviev, Jeffrey M. Sharman, which directly relate to the researched issue or are partially devoted to the consideration of important conceptual problems of integrity and competency as inherent characteristics of the good public officials, especially in judiciary.

3. The purpose of the work.

The scientific article discusses the merit-based independent judicial selection system implemented in Ukraine in 2023 as part of the reform of the Constitutional Court. It highlights the potential impact of this system on Ukraine's judiciary, emphasizing its role in ensuring the integrity and competence of high-level bureaucrats and judges within the national legal system.

4. Presenting main material.

Article 148 of the Constitution of Ukraine establishes that the President, the Verkhovna Rada (Parliament), and the Congress of Judges appoint six judges to the Constitutional Court of Ukraine. At the same time, candidates for the position of judge of the Constitutional Court of Ukraine are selected on a competitive basis in accordance with the procedure established by law.

For this purpose, amendments were made to the Law of Ukraine "On the Constitutional Court of Ukraine" (hereinafter – the Law), which initiated the creation of an Advisory Group of Experts, consisting of one member each delegated by the Parliament, President, and Council of Judges, as well as three international members delegated by the EU Delegation to Ukraine, the US Embassy, and the Venice Commission of the Council of Europe.

The Ukrainian authorities developed this model in close cooperation with the Venice Commission of the Council of Europe, which supported this mechanism in its conclusions as one that can ensure a fair and unbiased competition based on the experience and mistakes of all other competitive procedures involving international experts with decisive voting rights.

According to the law, the role of the Advisory Group is not only to ensure a fair and transparent selection of candidates for the positions of judges of the Constitutional Court of Ukraine, which is the only body of constitutional jurisdiction ensuring the supremacy of the Constitution of Ukraine, but also to assess the high moral qualities of the candidate for the position of judge of the Constitutional Court and to verify the level of competence of the candidate in the field of law.

The compliance of the candidate with the criterion of high moral qualities

In accordance with Part 25 of Article 10-2 of the Law, the Advisory Group assesses the moral qualities of candidates for the position of a judge of the Constitutional Court of Ukraine.

The criterion of "high moral qualities" is determined by the Advisory Group during the assessment by the indicators of independence, honesty, impartiality, diligence, incorruptibility, compliance with

ethical norms and demonstration of impeccable behavior in professional activities and personal life of the “integrity” component, as well as by the component of “legality of the sources of property origin”, “compliance of the standard of living of the candidate or his/her family members with the declared income”, and “compliance of the candidate’s lifestyle with his/her status”.

The criterion of “high moral qualities” is determined by the Advisory Group by the components:

– “Integrity”: the Advisory Group deems a Candidate to meet the component if s/he is independent, honest, impartial, incorruptible, diligent, adheres to ethical standards, and demonstrates impeccable behavior in professional activities and private life.

– “Legality of the sources of property origin”, “compliance of the standard of living of the candidate or his/her family members with the declared income”, and “compliance of the candidate’s lifestyle with his/her status”: the Advisory Group deems a Candidate to meet the if her/his sources of origin of the Candidate’s property are legal, the Candidate’s level of life or that of his/her family members corresponds to their declared and legal incomes, and the Candidate’s lifestyle corresponds to his/her status in case there are no reasonable doubts to the contrary.

A candidate may be considered compliant with the criterion of high moral qualities only if he or she is of good integrity and there are no reasonable doubts as to the legality of the sources of his or her property origin, compliance of the standard of living of the candidate or his/her family members with the declared income, and the compliance of the candidate’s lifestyle with his/her status. A candidate fails to meet this criterion if it is proved that s/he does not comply with it or there are reasonable doubts about his/her compliance.

The compliance of the candidate with the criterion of recognized level of competence in the field of law

In accordance with the Part 25 of Article 10-2 of the Law, the Advisory Group assesses the level of competence in the field of law of candidates for the position of a judge of the Constitutional Court of Ukraine. A candidate who has received an assessment of “comply” with the criterion of high moral qualities from the Advisory Group is passed for assessing her/his compliance with the criterion of competence in the field of law.

The Advisory Group determines the candidate’s possession of the necessary knowledge to perform the duties of a judge of the Constitutional Court of Ukraine by assessing the candidate’s knowledge in areas, such as Constitutional Law, Procedural Law, International Human Rights Law, Status of a judge of the Constitutional Court of Ukraine, Legal analysis and adjudication, Knowledge reflected in performance.

A candidate for the position of judge of the Constitutional Court of Ukraine is considered to meet the criterion of recognized level of competence in the field of law if the candidate possesses the necessary knowledge to perform the duties of a judge of the Constitutional Court of Ukraine. A candidate does not meet this criterion if there is evidence of non-compliance or reasonable doubts about compliance.

Examples of competition falling under the Advisory Group of Experts

It’s noteworthy to cite an example from the last biggest competition for positions on the Constitutional Court of Ukraine judges, which commenced in November 2023 to fill 5 vacant positions. Initially, 37 individuals applied for the competitive selection process under the updated procedure, involving two stages: an integrity and professional competence assessment.

Throughout the competition process, the Advisory Group directed nearly 100 requests to various governmental bodies, enterprises, and organizations concerning the 37 candidates to form a comprehensive understanding of their moral character. Consequently, over 1000 documents were collected and analyzed by separate teams of analysts within the Advisory Group’s Secretariat.

After conducting interviews with candidates to assess their integrity, 4 individuals withdrew their candidacies, presumably anticipating unfavorable outcomes from the Advisory Group’s evaluation.

Ultimately, after the first stage of the competitive selection process, only 25 candidates remained. The Advisory Group recognized only 8 of them as complying with the criterion of high moral qualities, advancing them to the next stage of the selection process: assessing their professional competencies. Subsequently, based on the evaluation of professional competencies, the Advisory Group found evidence of compliance for only 5 out of the 8 candidates with the recognized level of competence in the field of law.

Experience with similar bodies

Returning to the history of the introduction and evolution of this independent mechanism, it is worth noting that it was first applied in Ukraine in practice in 2018, with the establishment of the High Anti-Corruption Court of Ukraine as a permanently operating specialized court within the Ukrainian judicial system. A Public Council of International Experts, consisting of 6 exclusively international experts, was created for this competition. The international community recognized this competition as an example of an honest and real competitive procedure, which took place based on competitiveness and a genuine struggle for values, achievements, and professional knowledge.

Subsequently, in 2021, the Parliament began a new stage of judicial reform, which envisaged the creation of an Ethics Council, empowered to conduct a one-time assessment of current members of the High Council of Justice (the constitutional body ensuring the independence and stability of the functioning of the Ukrainian judicial system), as well as to select new members of the High Council of Justice who meet the criteria of professional competence, professional ethics, and integrity.

Parallely, in 2021, a Selection Commission for the selection of members of the High Qualifications Commission of Judges of Ukraine was established, which provided for the formation of a new composition of the High Qualifications Commission of Judges based on the criteria of integrity and professional competence.

Similarly, this mechanism found wide application beyond the borders of the Ukrainian judicial system, where, in particular, on similar principles, in 2022, a competition commission was formed for the selection of the head of the National Anti-Corruption Bureau of Ukraine, and in 2023, a competitive selection process with the decisive role of international experts in the selection of the Head of the National Agency for the Prevention of Corruption took place.

All the mentioned competitive procedures were recognized as independent and fair, and there were mainly no remarks about their integrity and the winners from external experts and civil society. At the same time, the uniqueness of the competition for the position of judge of the Constitutional Court of Ukraine lies in the fact that this procedure covered not only the issue of integrity as a component of the professional ethics of candidates but also the issue of an independent assessment of their professional abilities, competencies, which are sufficient to acquire the high status of a judge of the Constitutional Court.

5. Conclusions.

The checking of integrity, which encompasses the high moral qualities of candidates and evaluation of professional competence, particularly in law, stands as a prerequisite and a validation for running for the highest position in the Ukrainian judiciary system. Also, it is a necessary component of the competitive selection of judges of the Constitutional Court, ensuring impartiality, professionalism, and the quality of constitutional justice. It provides and strengthens the ability to effectively defend the Constitution, guarantee the rule of law, protect human rights, and maintain the democratic form of the legal state.

The presence of international experts in new competition commissions allows impartial deliberation of candidates for positions at various levels. External members of competition commissions lack any internal affiliation or personal acquaintances with candidates. They do not occasionally run into them at law conferences, take professional legal workshops, or have the same schools. In this way, the participation of external experts in independent competition commissions helps to break the chain of patronage and

unconscious prejudice towards specific candidates. Such biases may occur not due to actual corruption or bribes but to sympathy or friendly or professional relationships between Ukrainian members of competition commissions and applicants, driven by their professional work outside of participation in competition commissions. Such sympathies may unconsciously influence the objectivity of decision-making and the full implementation of the principles of competitive selection, the essence of which is the choice of honest, most professional persons with good intentions, i.e., the best applicants.

Therefore, the Ukrainian practice evidences that those commissions may be instrumental in the establishment of an independent body for the selection of not only Constitutional Court judges but also other judges and the highest personnel of the judiciary, for example, members of the High Council of Justice (through the Ethics Council) or members of the High Qualification Commission of Judges of Ukraine (through the Selection Commission), or judges of the High Anti-Corruption Court of Ukraine (through the Public Council of International Experts).

Overall, these findings reflect the extremely high quality of the competitive process, which was thorough and remarkable professionalism for both Ukrainian and international members. Owing to its peculiar methodology and experience developed over the last six years, this mechanism is promising for use in competitive selection processes for judicial system employees in the EU nations.

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