

The key to judicial reform: what Venice Commission said about the reform of the High Council of Justice

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On May 5, the Venice Commission (VC) issued an [urgent opinion](#) on draft law [No.5068](#) on the reform of the country's main judicial body – the High Council of Justice (HCJ).

The next day, the EU Ambassador to Ukraine Matti Maasikas [stated](#) that the recommendations of the Venice Commission should be taken into account not only with regards to the HCJ reform but also on the High Qualifications Commission of Judges (HQCJ) and the National Anti-Corruption Bureau of Ukraine (NABU). Instead, the High Council of Justice itself [was outraged](#) that VC's experts did not defend them and did not make a decision on the unconstitutionality of the HCJ reform.

Ukraine has also committed to the International Monetary Fund to carry out effective HCJ reform. The Memorandum signed in June 2020 provides for the adoption of a new law on the integrity assessment of the future HCJ members by an independent commission with the participation of international experts. The new law should also provide for a one-time review of the current composition of the Council with the possibility of dismissal of those members who do not meet the criteria of integrity.

According to the Memorandum, Ukraine was to adopt such a law by October 2020, however, only in February 2021 the relevant draft law was registered with the Parliament. The President initiated it.

Volodymyr Zelenskyi's submission of the draft law was a reaction to the disappointing results of the IMF mission in Ukraine – no progress has been made in any of the reforms identified as the structural benchmarks.

Venice Commission's experts responded to the request to urgently evaluate the draft law and promptly prepared their opinion. They supported the presidential initiative to engage international experts in the evaluation of future HCJ members and recommended some changes to the draft law.

See below for the detailed analysis.

Body without responsibility

The High Council of Justice is the most powerful body that decides virtually everything in the judiciary: whom to appoint, dismiss, punish, promote, protect, or persecute.

Over the past few years, the HCJ members have made hundreds of arbitrary and illegal decisions. Instead of dismissing Maidan judges, the HCJ appointed them to the Supreme Court. Instead of defending Judge Larysa Golnyk, the HCJ punished her for posting on Facebook and made it impossible for Golnyk to participate in the competition for the High Anti-Corruption Court. Oleksandra Strukova, who illegally

pressured Judge Golnyk, was dismissed by the HCJ with millions of hryvnias in lifetime benefits.

The HCJ twice – in 2019, and later in 2020 – covered up the judges of the District Administrative Court of Kyiv (“OASK”), who are reasonably suspected of serious crimes. The HCJ did not even fire them, instead accused the NABU, which was conducting the investigation, of pressuring the court.

The HCJ members are personally responsible for each miscreant who remains to work in the system. Neither the President, nor the Verkhovna Rada, nor the Minister of Justice can dismiss a judge who violates human rights or takes bribes. This can only be done by the HCJ.

However, instead of dismissing such judges, the HCJ leaves them in office because the system needs obedient and controlled judges.

So it is not surprising that the IMF paid attention to the HCJ, realizing that without a qualitative reset of this body, the funds that Ukraine receives from international partners will continue to flow into the pockets of the oligarchs with a small margin left in the judges’ deposit boxes.

How to choose worthy members?

According to the amendments made to the Constitution in 2016, the procedure for forming the HCJ changed. Most council members are now appointed by judges.

Thus, out of 21 HCJ members, ten are elected from among the judges by the Congress of Judges. The Congresses of Lawyers, Prosecutors, Academia, the Parliament and the President each appoints two members. The HCJ also includes an ex-officio chairman of the Supreme Court.

An approach where the majority of the judicial council is made up of judges is a European standard that should guarantee the independence of judges. However, it should have been introduced after the judiciary was cleared of dishonest judges.

Such a cleansing in 2016 was not done quite deliberately, because every government needs dependent judges.

Therefore, the European standard in practice only guaranteed that it was not the judiciary that became independent, but judicial corruption.

In March this year, a regular Congress of Judges elected four new members of the HCJ. On the eve of the vote, the list of pre-agreed candidates was leaked into the media, but the judges were not stopped by the exposure, and they voted for three candidates from the list. A similar thing happened in 2018 – then the judges also voted for the candidates from the “list”.

The HCJ candidates do not pass integrity or professionalism tests; in fact, the only selection criterion is loyalty.

Draft law No.5068 changes this approach.

In particular, it is envisaged the establishment of a separate independent body – the Ethics Council, which should check the integrity of candidates for the HCJ and propose appointing authorities a list of pre-selected candidates who meet the criteria. The Ethics Council is also authorized to conduct a one-time assessment of the current HCJ members and to initiate the dismissal of unworthy members before the same appointing authorities.

Will the Ethics Council be able to separate the wheat from the chaff and ensure that only the most worthy candidates are considered by the appointing authorities? The effectiveness of the body depends on its composition.

According to the draft law, the Ethics Council should consist of three judicial representatives elected by the Council of Judges of Ukraine and three independent experts nominated by international organizations that assist Ukraine in judicial reform and the fight against corruption. Decisions are made by a majority vote, which means that without the vote of at least one judge, no candidate, even the most worthy one, can go further.

This is the fact that the experts of the VC drew attention to. They stressed that in situations where the votes are evenly distributed and it is not possible to reach an agreement on the candidate, the decision is still considered adopted if it is supported by at least two international experts.

This is the revolutionary position from a body that has consistently defended the idea of the self-government of judges.

We can find an explanation to this position in the opinion of the VC: the dishonesty of the members of the High Council of Justice threatens the independence of the entire judiciary. Consequently, decisive and effective steps are needed, and the dependent and obliging system is not capable of fulfilling.

That is why we need international experts who will not follow the instructions of judicial clans. This is only a temporary involvement of international experts, and this is also emphasized by VC: we need them only in order to form a bona fide HCJ, which will be able to qualitatively upgrade the judicial system.

In addition, the experts drew attention to the way the Ethical Council is formed. According to the text of the draft law, the composition of the Council is approved by the head of the HCJ, who must also be assessed for integrity in the future or even dismissed.

Under such circumstances, there is a risk that the HCJ head will use his authority to delay the appointment of all or some members of the Council, and therefore this power should be transferred to another entity, such as the head of the Supreme Court or the High Anti-Corruption Court.

The VC also stressed that only those judges or retired judges who have successfully passed the qualification assessment, have not committed disciplinary offences and crimes and have no problems with declaring assets can be members of the Ethics Council from the Council of Judges.

Although, given that the High Qualifications Commission of Judges has previously successfully re-approved hundreds of unworthy judges despite the negative findings of the Public Integrity Council, the qualification criterion can hardly guarantee that judges of the Ethics Council will not coordinate their votes with the judicial mafia.

HCJ cleaning

If the current members of the HCJ were worthy and acted honestly and openly, there would not be a talk about the reform or changes in the selection procedure. Thus, along with the new rules of selection of HCJ members, an effective way of cleansing the body should be envisaged.

Draft law No.5068 provides for a one-time assessment of the integrity of current HCJ members. If the Ethics Council decides that a HCJ member violates integrity criteria or has behaved unethically, it may initiate the dismissal of such an HCJ member before the appointing authorities.

From the moment of approval of the conclusion of the Ethics Council until the decision of the appointing authority, the member of the HCJ must be suspended from their duties.

However, after voting for “clan lists” at Congresses, one should not expect judges to support even one dismissal. The same can be said about lawyers who defiantly violated the Constitution in February 2019 by re-appointing Oleksiy Malovatsky and Pavlo Hrechivsky as members of the HCJ, although the Constitution explicitly prohibits this.

Therefore, it is unlikely that the model proposed by the draft law will lead to a real cleansing of the HCJ.

The VC seems to be ignoring the problem: in conclusion, we see full support for the model provided by the draft law. Of course, experts agree that we have a huge problem with the integrity of the HCJ members, and emphasize that the criticality of the situation requires extraordinary measures.

The experts even support the temporary suspension of a member of the HCJ, whose integrity is questioned by the Ethics Council, but they are not moving further.

The problem can be solved if the Ethics Council itself is empowered to decide on the dismissal of the HCJ members, without involving the appointing authorities. This is the model supported by judicial experts and civic organizations.

The Constitution does not in any way regulate the procedure for dismissal of the HCJ members, nor does it say that appointing authorities should be involved in the dismissal procedure in any way. Thus, the dismissal of dishonest HCJ members by the decision of the independent Ethics Council does not contradict the Constitution, no matter how much the opponents of this idea try to prove it. It is enough to fix such a procedure by the law.

Finally, the Venice Commission makes a valuable recommendation that must be heeded: both HCJ candidates and its current members should have the right to challenge the Ethics Council's decision in court.

The scandalous District Administrative Court of Kyiv cannot be such a court in any case.

According to the VC's experts, the law should stipulate that appeals against decisions on the appointment or dismissal of HCJ members should be considered by the Supreme Court.

Overcoming resistance

The Venice Commission stressed: "the issue of HCJ integrity needs to be addressed urgently." This means that the parliament must immediately proceed to adopt draft law No.5068.

The Legal Policy Committee, which is responsible for drafting the text of the draft law, should take into account the recommendations of the Venice Commission, especially regarding the decisive vote of international experts within the Ethics Council.

Despite the fact that the Venice Commission has left the procedure of dismissal of current HCJ members to the discretion of the Parliament, civic experts continue to insist that such a mechanism should be effective, i.e. as an extraordinary measure, such powers should be given to the Ethics Council. The constitutionality of this approach is justified above.

It is obvious that the current judges will be fiercely opposed to the draft law on the HCJ reform.

They will especially oppose the provisions on the crucial role of international experts in the process of dismissal of dishonest HCJ members and selection of candidates for vacant positions. That is why the main task of society now is public pressure on MPs to finalize the draft law in accordance with the recommendations of the Venice Commission.

It is equally important that the recommendations of the Venice Commission are taken into account in draft law No. 3711-d on the formation of the High Qualifications Commission of Judges, which is now in the final stages of consideration in the Parliament. The international experts who will be involved in the selection of members of the HQCJ must have a decisive voice in the process so that the judges in the competition commission cannot block worthy candidates and nominate proteges of the judges' clans.

After a clear and unambiguous statement by the EU Ambassador, one should not expect the participation of international partners in the process if MPs ignore the conclusion of the VC.

We hope that the MPs will listen to the recommendations of the Venice Commission, the position of the expert community and key international partners. After all, quality judicial reform and a fair trial are needed not by experts and diplomats, but by all of us.

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