

3711

CONCLUSION

on the results of the independent anti-corruption expertise

Name of the legislative act	Draft Law on Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and some laws of Ukraine on the activities of the Supreme Court and judicial authorities
Registration date	3711 of 22.06.2020
Subject of the right of legislative initiative	President of Ukraine Zelenskyi Volodymyr Oleksandrovykh
Main committee	Legal Policy Committee
Conclusion and recommendations	Negative - Contains corruption factors

Brief description of the draft law

Draft law №3711 proposes to exclude from the Law of Ukraine "On the Judiciary and the Status of Judges" the provision on establishing the maximum number of judges of the Supreme Court.

The draft law defines a new procedure for the formation and composition of the High Qualification Commission of Judges of Ukraine (HQCJ). It proposes to exclude Article 28-1 of the Law of Ukraine "On the High Council of Justice", which deals with the establishment and operation of the Commission on Integrity and Ethics with no alternative.

Corruption factors

It is proposed in the draft law to give wide unjustified **discretion** to appoint members of the judiciary to the **unreformed** High Council of Justice (HCJ), while dishonest members of the HCJ remain in office.

1. **HCJ gets more power and discretion in the selection of judges.** Full control over the selection and qualification evaluation of all judges - HCJ will approve the entire methodology and evaluation of judges. In particular, it will approve the documents of the HQCJ, which will be used for the selection and qualification assessment of judges:

Part 6, Article 73 *The procedure for passing the selection examination and the method of assessing its results shall be approved by the High Council of Justice upon recommendation of the High Qualification Commission of Judges of Ukraine.*

Part 2, Article 77 *The procedure for special training of candidates for the position of a judge shall be approved by the High Qualification Commission of Judges of Ukraine on the recommendation of the National School of Judges of Ukraine and subject to an agreement of the High Council of Justice.*

Part 5, Article 78 *The procedure for passing the qualifying examination and the method of assessing candidates shall be approved by the High Council of Justice upon recommendation of the High Qualification Commission of Judges of Ukraine.*

Part 2, Article 79 *Regulations on holding a competition to fill a vacant position of a judge shall be approved by the High Council of Justice upon recommendation of the High Qualification Commission of Judges of Ukraine.*

Part 5, Article 83 *The procedure and methodology of qualification assessment, indicators of compliance with the criteria of qualification assessment and the means of their establishment shall be approved by the High Council of Justice upon recommendation of the High Qualification Commission of Judges of Ukraine.*

Part 2, Article 85 *The procedure for conducting the examination and the method of verifying its results shall be approved by the High Council of Justice upon recommendation of the High Qualification Commission of Judges of Ukraine.*

The practice of discretion given to the unreformed HCJ is not positive. The process of selection of nominees to the HQCJ selection commission from international and foreign organizations was blocked partly because of [additional requirements](#) to such nominees set by the bylaw of HCJ (against the Law).

2. HCJ gets full control over the competition to fill the vacancies in the High Qualification Commission of Judges (HQCJ) - **HCJ will be able to undermine the role of international experts via the Commissioner for Human Rights of the Verkhovna Rada of Ukraine.**

According to the draft proposals, the competition for the position in the HQCJ will be conducted by a Competition Commission, which will include 3 judges, elected by the Council of Judges, and 3 international experts, selected by the HCJ from the candidates proposed by international partners. Due to the rather short deadlines for the submission of candidates, the HCJ will be able to block the appointment of international experts. Instead, it will be able to appoint to the Competition Commission persons chosen by the Commissioner for Human Rights, who may be influenced by unscrupulous judges.

In particular, parts 3-4 of Article 95-1 stipulate that *the competition commission shall consist of:*

- 1) *three judges or retired judges nominated by the Council of Judges of Ukraine;*
- 2) *three international experts appointed by the High Council of Justice on the basis of proposals from international and foreign organizations that provide international technical assistance to Ukraine or carry out their activities in the field of justice and/or the judiciary, and/or work in the field of preventing and combating corruption.*

2.1 The 1st risks of proposed regulation is a very wide scope of organization that can be seen as those that have right to propose a nominee. Even current provisions of previous law was not clear for HCJ.

2.2 The 2nd risk is collision. If the bodies responsible for the formation of the commission did not nominate persons to the commission within the term specified by this Law or proposed insufficient number of persons to form the competent commission, **such candidates shall be nominated by the Verkhovna Rada Commissioner for Human Rights within fifteen days.**

From one hand it's a positive move to avoid situations when the Council of Judges of Ukraine fail to propose their candidates and try to slow down the process.

But the current law stipulates that in order for the Competition Commission consisting of 6 members to make a decision, such decision must be supported by 3 international experts, which gives them the opportunity to veto unscrupulous candidates. The draft proposed by the President reduces this number to 2 or even to 1: part 11 of Article 95-1 "*The decision of the commission is adopted if the majority of all members of the commission voted for it, provided that ~~two~~ persons from among those who voted for this decision are international experts or persons appointed on the basis of proposals of the Verkhovna Rada Commissioner for Human Rights*".

In case when Verkhovna Rada Commissioner for Human Rights propose their nominees instead of Council of Judges, only 1 out of 4 vote of international expert needed to rule a decision. Taking into account that the scope of such foreign organisations is expanded, it would enough only 1 external candidate to legitimate the decision. And, de-facto, it cancels the mechanism of vetoing the unscrupulous candidates to the HQCJ.

There is additional risk of manipulation by the HCJ that we have already seen earlier when HCJ [claimed](#) that international organizations did not nominated their candidates, despite the fact that they had [done](#) it. So, we have no guaranties that in this case, HCJ will not use the same manipulation. In result national and international (independent) proportion from 3/3 may be turned into 6/0.

3. HCJ gets an additional opportunity to put pressure on HQCJ - HCJ will be able to suspend members of HQCJ for an indefinite period.

Part 4, Article 96 – *If the facts are revealed that may result in dismissal of a member of the High Qualification Commission of Judges of Ukraine on the grounds specified in paragraphs 3 - 6 of part one of this article, the High Council of Justice shall make a decision to verify such facts. Such verification may not last more than one month.*

From the date of the decision to start verifying these facts, such a member of the Commission shall be removed from office and his powers shall be suspended until the decision is made by the High Council of Justice.

Although the term for verification is defined, the term during which the decision of the HCJ should be made is not defined, which creates an opportunity to abuse this rule in practice and, accordingly, to suspend members of the HQCJ for an indefinite period.

4. HCJ gets the opportunity to **influence judges of the Supreme Court** transferred from the old Supreme Court of Ukraine - HCJ will determine the "features" of the qualification assessment of such judges.

1. Thus, in particular, Part 7 of Section XII "Final and Transitional Provisions" states that *judges of the Supreme Court of Ukraine are assigned to the staff of the Supreme Court in the Court of Cassation of the jurisdiction corresponding to the jurisdiction of the Judicial Chamber of the Supreme Court of Ukraine in which the judge administered justice and are subject to the qualification assessment within one year from the date of such assignment. Details of the procedure and methodology of qualification assessment of such judges, indicators of compliance with qualification assessment criteria and means of their establishment shall be approved by the High Council of Justice upon recommendation of the High Qualification Commission of Judges of Ukraine.*

If as a result of such an assessment a judge assigned to the staff of the Supreme Court is found unsuitable to fill a position based on the criteria of competence, professional ethics or integrity or the refusal of such a judge to undergo such an assessment is grounds for dismissal of a judge.

The risk of such provision is that unassessed judges may rule decisions during the whole year (even in the corruption cases). Judges would be on the hook of HCJ as a qualification assessment (according to the HCJ rules) that could be set at any time especially during hearings of “sensitive” cases. So it may ruin judiciary independence guaranteed to each judge.

The above proposals create a wide discretion for the High Council of Justice (HCJ) in the formation of the judiciary, which in accordance with the Methodology of anti-corruption expertise, approved by the Order of the Ministry of Justice of Ukraine of 24.04.2017 № 1395/5, is a corruption factor.

5. Value concepts as a corruption factor.

Part 2, Article 95-1: "Members of the competition commission may be persons who have an impeccable business reputation, high professional and moral qualities, of high public esteem, meet the criteria of integrity and professional ethics, are lawyers with a recognized level of competence." These concepts are not clearly defined legally, which creates an opportunity to abuse this rule in practice.

6. The draft law abolishes the Commission on Integrity and Ethics, which was going to be established to ensure transparency and accountability of members of the High Council of Justice and members of the High Qualification Commission of Judges of Ukraine and do not propose any alternative instead of it.

**Head of ILI
Tetiana Khutor**

