

Improving the legal framework of the Public Integrity Council

An idea to engage civil society to the qualification assessment of judges in Ukraine is not new.

The Venice Commission underscored multiple times that judicial councils (judicial governance bodies) should not become the judicial "self-governance" bodies. The Venice Commission in its Opinion on the judicial reform in Moldova ([CDL-AD\(2020\)015-e](#)) underlines that "...in order to avoid judicial corporatism and politicization, there is a need to monitor the judiciary through non-judicial members of the judicial council...**Corporatism should be balanced by the participation of other legal professions, "users" of the judiciary**, i.e., attorneys, prosecutors, notary, academics, and civil society."

The European Network of Councils for the Judiciary (ENCJ) in its [report](#) "Non-judicial Members in Judicial Governance" states that "the proportion of non-judicial members should vary between 1/3 and 50%, or such proportion as will ensure that the participation of non-judicial members to Judicial Councils' activities is effective, meaning that it can contribute considerably to their decision-making process."

At the same time, the ENCJ in its report "Councils for the Judiciary 2010-2011"¹ emphasizes that "...the most successful models appear to be those with representation from a combination of members elected and/or appointed from the ranks of legal, academic or civil society, with broad powers sufficient to promote both judicial independence and accountability."

Such models are incorporated in the practice of the European Union countries and Council of Europe member states. For instance, in Lithuania, the Selection Commission of Candidates to Judicial Office [consists](#) of members, where representatives of civil society comprise the majority (4 out of 7), and the journalist heads the Commission.

However, the model of functioning of the Public Integrity Council (hereinafter – the PIC) as an independent body is unique.

Since 2016, the Constitution of Ukraine sets a demand for ensuring the integrity of judges. At the same time, neither the integrity criteria nor the adequate mechanisms for its assessment existed. As a consequence, the idea of establishing the PIC as an independent body, which can develop and incorporate these standards, appeared at that time.

Considering the extremely low level of trust of citizens to the judiciary and the high level of trust to the civic sector, it was planned that the PIC would become a "veto" mechanism of the society for the career of a judge.

In case the civil society experts had doubts about the integrity of a judge, this judge should be dismissed from their office. At the same time, the judicial corps, supported by the civil society, should gain the trust of the citizens. Such a model should become a lawful and civilized alternative to the "trash bin lustration" and other less civilized ways of how people multiple times tried to influence untrustworthy judges.

¹ COUNCILS FOR THE JUDICIARY – Report 2010-2011

On the basis of international standards (primarily Bangalore principles of Judicial Conduct), the PIC developed the assessment methods and criteria. Using these methods and criteria, the PIC analyzed approximately 3000 judges and judicial candidates including the judicial candidates to the Supreme Court as well as adopted and passed to the High Qualification Commission of Judges (HQCJ) hundreds of opinions on the judicial candidates, who did not meet the criteria of integrity and professional ethics.

However, this did not lead to the effective cleansing of the judicial corps. The key reason was that the legislator significantly limited the authority of the PIC and in fact, narrowed its functions to solely advisory instead of the "veto" function as it had been planned. The final decision on judicial candidates was made by the HQCJ and the High Council of Justice (HCJ), which consisted mainly of judges selected by their peers.

The HQCJ and the HCJ ignored the majority of negative opinions of the PIC and the information, which was provided to them. In those cases, when the facts, laid out in the PIC's opinions and publicly available information, were analyzed by the above-listed bodies, it, usually, did not lead to the dismissal of a judge or denial for appointing the judicial candidates even in the most obvious and high profile cases. At the same time, the HQCJ, in fact, did not perform its duty to provide reasons for denial of the PIC's opinion. Usually, the HQCJ only briefly described the facts, outlined in the PIC's opinions as well as described the opinion of a judge (or judicial candidate), who denied the information, provided in PIC's opinions and concluded with the phrases like "Commission did not find enough grounds to assess the integrity of a judge in 0 points". Therefore, in most cases, the HQCJ despite clear legal requirements did not conduct the independent analysis and assessment of the information, provided in PIC's opinions.

As a result, at least 44 untrustworthy judges were [appointed](#) to the Supreme Court. In the result of the qualification assessment, approximately 1 percent of judges were [dismissed](#).

Another problem, which the PIC faced in its work, was the lack of resources. The PIC is not the civic council in its classical connotation and in fact, it conducts the authority of qualification assessment of judges, delegated by the state. It is obvious that it is impossible to do such an amount of work (thousands of judges and judicial candidates and the workload of 500 dossiers per month) on a voluntary basis and without proper financial and material support.

Many problems were also caused by the uncertainty of the legal status of the PIC, the scope of its duties and responsibilities. The Law of Ukraine "On the Judiciary and the Status of Judges" contains only one Article 87, which regulates the work of the PIC (whereas the separate part of the Law regulates the work of the HQCJ). The work of the HCJ is regulated by the separate law. This leaves unregulated many issues concerning the work of the PIC – starting with the most important aspects of its legal status to the issues of gaining full access to the judicial dossiers.

In order to ensure that the PIC can perform its functions in a qualitative and timely manner and the participation of the civil society in judicial governance in Ukraine complies

with international standards and recommendations of international organizations, the following legislative amendments should be adopted.

1. Granting the PIC with real authority, which would allow significant influence on the career of a judge

There are several models of how this can be done.

1. To increase the threshold for overruling the opinion of the PIC by the HQCJ (to 11 necessary votes out of 12 members or 15 out of 16 necessary votes of the HQCJ members or if all HQCJ members vote in favour of such a decision). This model envisages that in order to overrule the PIC's opinion the unanimous or nearly unanimous consent of the HQCJ is required. This will make it much harder to ignore the facts outlined in the PIC's opinion. However, it will keep certain tension in the relationships between the PIC as the civil society body and the HQCJ as mainly judicial one. Although, if the adequate mechanism of selection, the trustworthy HQCJ members is ensured, such tension should not be intense.
2. To delegate to the PIC the authority to select the part of the scores for the selection procedures or procedures of qualification assessment of judges. If the PIC gives 0 points to a judge of a judicial candidate, it means the disqualification of the latter of the competition.
3. To include the part of the PIC's members to the HQCJ composition with the same rights as other HQCJ members. This model envisages that at least 50 per cent of the HQCJ composition should comprise of PIC's members to ensure the necessary balance between the "judicial" and the "civil society" parts. Also, it is crucial to preserve the current model for selecting members, nominated by civil society, independent from politicians or judicial corps. In this case civil society organizations, which comply with the high standards, can delegate their representatives by themselves.

2. Determining the status of the PIC, its rights and responsibilities

Depending on the selected model of participation of civil society in the judicial governance, it is necessary to regulate on the legislative level the status of the respective body (PIC).

In case, the PIC will exist as an independent body, it seems reasonable to include into the legislation a provision, which envisages that the PIC performs the qualification assessment of judges as part of the duties, delegated by the state. The legislation should also include the provisions to regulate the legal status of the PIC (to determine whether or not the PIC is the legal entity) and determine whether it can be a reporter in court hearings.

In addition, in order to ensure the comprehensive and sustainable performance of its duties as well as to ensure the integrity of the judicial corps, the PIC should be granted with the following rights:

- to determine and approve the criteria of the qualification assessment of judicial integrity as well as the methodology of the assessment;

- to grant the PIC with the full access to the judicial dossiers, including personal data of judges;
- to grant the PIC with the right to submit requests, complaints and appeals to the state bodies, including disciplinary complaints to the HCJ and to be the plaintiff in the disciplinary cases. In addition, it is necessary to envisage the mandatory responsibility of state bodies to provide answers to the requests and adopt the respective decisions;
- to participate in the HCJ sessions on reviewing the appointments of judges as well as the disciplinary sessions of the HCJ etc.;
- to delegate its representatives to the Selection Commission of the HQCJ and HCJ.

Aside from this, the legislative technique should be improved. In case the legal status of the PIC as an independent body is preserved it is necessary to include the chapter into the Law of Ukraine “On the Judiciary and the Status of Judges” to regulate its work.

3. Financial, technical and material support of the PIC

In case the legal status of the PIC as an independent body is preserved, it is necessary to envisage the following expenditures from the state budget to ensure the proper work of the PIC.

Such expenditures should include:

- expenditures for the premises;
- support of the secretariat, the composition of which is determined by the PIC;
- adequate remuneration for the members of the PIC and its secretariat;
- technical and material support (hardware, stationery etc.)

It is important to envisage on the legislative level the possibility for the PIC to attract funding from international organizations to ensure the proper performance of its duties.