

# **AUTHORITY OF THE HIGH COUNCIL OF JUSTICE OF UKRAINE AND OF THE SIMILAR BODIES OF EUROPEAN STATES: COMPARATIVE ANALYZES**

**Volodymyr Shcherbakov, Scientific Institute of Public Law  
Mykhailo Smokovych, I. Malynovskyi Institute of Law of the National  
University of Ostroh Academy  
Yuliia Dorokhina, Educational & Scientific Humanitarian Institute of V.I.  
Vernadsky Taurida National University  
Nataliia Zadyraka, Institute of Law of Taras Shevchenko National University  
of Kyiv  
Dmytro Ishchuk, Zhytomyr Polytechnic State University**

## **ABSTRACT**

*Description: The purpose of the article is to examine the authority of the High Council of Justice of Ukraine and to compare it with the authority of the similar bodies of some States (France, Portugal and Poland).*

*The Subject of the Study: The subject of the study is the authority of the High Council of Justice of Ukraine and the authority of the similar bodies of some European States.*

*Methodology: Research methods are chosen based on the object, subject and purpose of the study. The study used general scientific and special methods of legal science. Among them are: method of the philosophy of law, historical and legal method; civilization method; comparative and legal method; legal and dogmatic method; the method of formal legal logic.*

*The Results of the Study: The results of the study showed that the tasks and powers of the High Council of Justice of Ukraine meet European standards as a whole, but the experience of similar bodies in Europe is measured by more than a decade, and therefore there are still some aspects of their activities that need further study and elaboration.*

*Practical Implications: It is concluded that there is a need to establish special inspections under the High Council of Justice, whose main task is to inspect the activities of courts and judges and to identify their needs and shortcomings.*

*Value/Originality: It is the first study in Ukraine dedicated to the comparative analyses of the powers of the High Council of Justice in Ukraine and of the similar bodies of some European States.*

**Keywords:** Judiciary, Independence, Qualified, Foreign Experience, Authority.

## **INTRODUCTION**

Institution of the High Council of Justice has long and successfully been operating in many European countries (France, Germany, Spain, Portugal, Hungary, Bulgaria and Poland).

The main task of this body is to form highly qualified judiciary capable of delivering quality and professional justice.

The need to establish such a public authority was mentioned, for the first time, in Recommendation No. R (94) 12 to Member States on the Independence, Efficiency and Role of Judges (Committee of Ministers of the Council of Europe, 1994). Paragraph 2 (c) of this Recommendation states that:

*“The body empowered to decide on the election and career of judges should be independent of government and administrative bodies. The provisions such as overseeing that its members are appointed by the judiciary and that the body decides on its own rules and procedures should be introduced in order to guarantee the independence of this body”.*

This rule was further developed in the European Charter on the Statute for Judges (Council of Europe, 1998), which, in particular, emphasized that:

*“... for any decision relating to the preparation, selection, appointment, promotion or termination of office of a judge, the Law provides for the intervention of a body independent of the executive and the legislature, in which at least half are judges elected by the same judges in a manner that guarantees the widest representation of judges”*

Opinion no.10 (2007) of the Consultative Council of European Judges on the Council for the Judiciary at the service of society (Consultative Council of European Judges, 2007) and Recommendation CM/Rec (2010) 12 on judges: independence, efficiency and responsibilities (Committee of Ministers of the Council of Europe, 2017), which noted the important role of the Council of Justice in protecting the independence of the judiciary and judges, and defined the structure, powers, tasks and key principles of this body were further adopted.

The first body in Ukrainian history, which embodied the institutional independence of judges, was the High Council of Justice, which, in accordance with Article 1 of the Law of Ukraine *“On the High Judicial Council”* (Law of Ukraine, 1998), was a collegial, permanent, independent body, responsible for the formation of an independent, highly professional judiciary capable of delivering quality, honest and impartial justice on a professional basis, as well as for deciding on violations of requirements on incompatibility by judges and prosecutors, as well as bringing them to disciplinary responsibility within their competence”. However, due to the high politicization and limited nature of its powers, it lost the opportunity to ensure the independence of judges (Korchevna & Korolenko, 2019).

The High Council of Justice of Ukraine is a body formed as a result of the reform of the High Judicial Council of Ukraine. Such a transformation took place given the need to transform the judiciary in Ukraine as a whole in order to bring it closer to European requirements and standards. Since the institution of the High Council of Justice is relatively new in the system of public authorities of Ukraine, many issues related to it remain insufficiently studied. Therefore, in the framework of this article, we will consider the powers vested in the High Council of Justice in Ukraine and compare them with the functions performed by similar bodies in some European countries.

## MATERIALS AND METHODS

The methodological basis for the study is a set of general and special methods and means of scientific research. The method of the philosophy of law made it possible to reveal the nature of the independence of professional judges and its social significance. Historical and legal method made it possible to trace the development of legislation regulating the issue of the judiciary independence. The civilization method was used in the study of the causes and conditions that contribute to the legal and organizational improvement of the concept of judiciary independence. The application of comparative and legal method contributed to the study of the powers of the bodies, which ensure the independence of courts and judges in Ukraine and in some European countries (subsections 3.1). Legal and dogmatic method was applied to examine the regulatory basis for ensuring the authority of the bodies, which secure the independence of courts and judges in Ukraine and in some European countries. The method of formal legal logic was used for the formulation of a number of proposals for current legislation of Ukraine regulating the issue under consideration.

The study is based on the international, foreign and domestic legal acts, which ensure the independence of courts and judges in Ukraine and in some European countries as well as reinforce the authority of the High Council of Justice of Ukraine and the powers of the similar bodies of some European States, and the works of Ukrainian and foreign scientists, who have studied the issue under consideration.

## RESULTS AND DISCUSSION

According to the Law of Ukraine “*On the High Council of Justice*” (Law of Ukraine, 2016), the High Council of Justice is a collegial, independent constitutional body of State power and judicial governance, which operates in Ukraine on a permanent basis to ensure the independence of the judiciary and accountability before society, formation of a virtuous and highly professional judiciary, compliance with the Constitution and laws of Ukraine, as well as professional ethics in the activities of judges and prosecutors.

The powers of the High Council of Justice are listed in Art. 131 of the Constitution of Ukraine and Art. 3 of the abovementioned Law. The main ones are:

1. To submit a proposal for the appointment of a judge to the position;
2. To make decisions regarding violations of requirements on incompatibility by a judge or prosecutor;
3. To consider appeals against decisions of the relevant body on bringing a judge or a prosecutor to disciplinary responsibility;
4. To make a decision on dismissal of a judge;
5. To give consent to the arrest of a judge or his (her) detention;
6. To make a decision on temporary suspension of a judge from justice;
7. To take measures to ensure the independence of judges;
8. To decide on the transfer of a judge from one court to another;
9. To decide on the termination of the resignation of a judge;
10. To approve the number of judges in court;
11. To approve the procedure for passing selection tests and the method of assessing their results, the procedure for passing the qualifying exam and the method of assessing candidates, the provisions on the competition for the vacant position of judge, the procedure and methodology of qualifying assessment, the procedure for forming and maintaining a judge’s file, etc.

The first country to establish a prototype of a supreme judicial body was France. Thus, in 1883, the Superior Council of Magistracy of France-constitutional body that has administrative functions in relation to magistracy was formed. Since then, the powers of the Superior Council of Magistracy have changed significantly several times, as well as the principles and procedure for forming its composition, but its tasks remained constant: ensuring functional independence and discipline of magistrates (Nazarov, 2005).

Nowadays, the issue of legal status and powers of the Superior Council of Magistracy is regulated by the Constitution of the French Republic. In accordance with Art. 65 of the Constitution of the French Republic (Law of French Republic, 1958), the High Council of Magistracy consists of corps (chambers):

1. Authorized with respect to judges;
2. Authorized with respect to prosecutors.

The Superior Council of Magistracy in the country has the honorary status of the guarantor of independence of the judiciary and the symbol of the unity of the judiciary. It operates in the form of open plenary sessions chaired by the First President of the Court of Cassation and consists of 8 qualified members and six magistrates. The Superior Council of Magistracy makes decisions on issues related to judicial ethics and other issues related to the functioning of the justice system in the same format, if the Minister of Justice applies to it.

Each year, the Superior Council of Magistracy publishes a report on the activities in each of its areas, in particular, develops and publishes commitments on judicial and prosecutorial ethics.

The next stage of modernization of the Superior Council's institutions took place due to constitutional changes in 2008 and the adoption of the Organic Law in 2010, which changed the procedure of presiding over the French High Council, its composition, the procedure for appointing prosecutors.

Currently the French Superior Council of Magistracy now has the power, within its competence, to nominate candidates for judges of the Court of Cassation (First President, Presidents of Chambers, Councilors, Special Advisers, Temporary Counselors, and Assistants, who prepare the decisions, First Presidents of the Court of Appeal and Presidents of tribunals (courts of first instance). The Council has the authority to conduct inspections, study cases, conduct surveys, and can initiate or withdraw proposals. With regard to other appointments, the powers in this area belong to the Minister of Justice, and the High Council of Magistracy provides its own opinions on draft proposals, which, however, are not binding on the Minister of Justice.

Similarly, the Superior Council of Magistracy provides advisory opinions on the appointment of prosecutors by the Minister of Justice of the Republic.

This body is also empowered to consider reports received from the Minister of Justice on facts requiring disciplinary proceedings against magistrates, the first presidents of the appellate courts, presidents of higher appellate tribunals, prosecutors general at appellate courts or prosecutors at higher appellate tribunals.

The competence of the Superior Council of Magistracy in relation to judges is adoption of decisions on disciplinary liability, imposition of disciplinary sanctions; the Superior Council of Magistracy acts as a court and its decisions in this part can be appealed to the State Council.

The imposition of a disciplinary sanction on prosecutors belongs to the powers of the Minister of Justice, and his (her) decisions may be appealed only in respect of the excess of powers.

Besides, one of the innovations of the French Judiciary Reform of 2008 is the introduction of the possibility of the parties to proceedings to directly appeal to the Superior Council of Justice. There are three commissions that consider such appeals: two of them study claims against judges and one-against prosecutors. They consist of two magistrates and two non-magistrates, elected by the President, who is responsible for forming the judicial or prosecutorial corpus. Due to impartiality, these members cannot participate in the meetings of the section on disciplinary liability in cases of appealing to it. The appeal of the party to proceedings cannot call into question the judge's decision. Appeals to the Superior Council of Magistracy are limited if the disciplinary misconduct was committed by the magistrate in the course of performing his (her) duties and during the court proceedings that concerned him (her).

Each year, French Superior Council of Magistracy publishes a report on each area of its activities, in particular, develops and publishes obligations on judicial and prosecutorial ethics. Leskiv (2016) considers this experience of publicity of the reports of the Superior Council of Magistracy quite positive and emphasizes that it would be appropriate to give such authority to the High Council of Justice as the highest body of judicial self-government in order to summarize the problems arising in the course functioning of lower courts for their further solution.

It should be noted that special composition of the Superior Council of Magistracy of France (5 judges and one prosecutor, one member of the Council of State appointed by the Council of State, one lawyer, and six qualified persons who do not belong to Parliament, judiciary or systems of administrative justice (appointed by the President of the Republic, the President of the National Assembly and the President of the Senate) eliminates the possibility of abuse and makes this body completely independent of both the executive and legislative branches of government. Thus, no one has the right to indicate to the members of the Superior Council of Magistracy who exactly should be appointed a judge, and, therefore, any unqualified or inexperienced person can take such an important post up. Thus, this body effectively and competently performs its main function-selects decent candidates for the post of judge.

An interesting example to consider is the High Council of Magistracy of Portugal, which is an independent, autonomous body, funded by the State budget. Its status and powers are also determined by the Basic Law of the State.

Thus, in accordance with Art. 217 of the Constitution of the Portuguese Republic (Law of the Portuguese Republic, 1976) The High Council of Magistracy appoints, approves, transfers and promotes judges of courts of general jurisdiction, administrative and tax courts, as well as performs the function of disciplinary control over them.

The exclusive prerogative of the High Council of Magistracy is the imposition of disciplinary sanctions on judges. The Inspectorate at the High Council of Magistracy checks the efficiency and quality of judges' work in the first two years after their appointment. The disciplinary sanctions imposed on judges are the following: warnings (may be oral or written, with a note in the judge's file); fine (no salary is paid from 10 to 80 days); transfer to another court with loss of 60 days of work experience; short-term termination of official duties (from 29 to 45 days with loss of service and salary); long-term termination of office (from 1 to 2 years). Unjustified delays in the consideration of the case, tactless behavior of judges with prosecutors

and lawyers during the court hearing are among the misdemeanors for which disciplinary sanctions are most frequently imposed. A judge can appeal such a decision to the Supreme Court. In this case, the complaint is considered by three judges, including the Deputy Chairman of the Supreme Court. The Chairman, who is also the President of the High Council of Magistracy, does not take part in the consideration of these issues (Parishkura, 2010).

The experience of Portugal in conducting regular and extraordinary inspections of judges is also of a great interest. Thus, the High Council of Magistracy has an inspection consisting of 20 judges of appellate courts (inspectors can be judges of courts of the first instance who have at least 15 years of judicial experience as the exception), who are seconded to the Council for a certain period, receiving salaries at their primary work places. They are responsible for 20 different geographical regions of the country. One of them is the inspector-coordinator of the inspections.

The inspectorates provide the High Council of Magistracy with information on the work of judges and courts, primarily on the number of court proceedings, the quality of justice, the executive level and efficiency of court staff, the location of court services and the condition of premises for court officials. At the same time, they cannot influence the activity of judges or openly discuss the essence of court decisions. However, they should take measures that can improve the work of the courts and submit all materials related to the analysis of the processes conducted earlier to the judges, with the aim of improving the work of the courts, creating proper and equal working conditions for judges (Parishkura, 2010).

We believe that the High Council of Justice of Ukraine should also create a relevant service that would conduct inspections of the quality of judges' work. This type of control, in our opinion, is very effective, because it not only encourages judges to constantly improve their professional level and comply with substantive and procedural law, but also helps, so to speak, to see the mistakes and shortcomings of their work from the outside, and therefore, to avoid them in the future. In addition, the inspection collects information on the quality of judges' material support, the condition of the premises in which they work, in order to make their working conditions as comfortable as possible.

It is also worth attention that there has been a Judicial Training Center since 1979 in Portugal, the main task of which is the initial training of future judicial staff and their training. No person can become a judge without training at this Center. Curricula are developed by the Center along with the High Council of Magistracy. The Council also approves the procedure for attending classes by judges.

Appointment to the position of a judge after graduation is carried out by the High Council of Magistracy. Moreover, the presence of a candidate at a meeting of the Council is not required. When appointing judges, the High Council of Magistracy is guided by the ranking of the best students of the CPS, depending on which it decides who and what vacancy he (she) will hold.

The experience of the Republic of Poland deserves special attention. As a post-socialist State, it was able to become a full member of the EU and actually implemented the principle of autonomy of the judiciary. In Poland, the issue of ensuring the independence of judges is handled by the National Council of the Judiciary, which is a constitutional collegial body. The issue of the structure, functions and powers of the National Council of the Judiciary is regulated by the Constitution of the Republic of Poland and the Act on the National Council of the Judiciary of 12 May 2011.

Therefore, according to Article 186 of the Constitution (Law of the Republic of Poland, 1997), the main task of the National Council of the Judiciary is to guarantee the independence of courts and judges. To this end, the Council may apply to the Constitutional Tribunal for the constitutionality of normative acts related to the independence of the judiciary in the Republic directly or indirectly.

The competence of the Council, in accordance with paragraph 1 of Art. 3 The Act on the National Council of the Judiciary (National Council of the Judiciary, 2011), includes the following issues:

1. Examination and evaluation of the candidates for the position of judges of the Supreme Court, general courts, administrative and military courts, as well as for the position of trainee judges;
2. Making proposals to the President of the Republic of Poland on the appointment of judges of the Supreme Court, general courts, administrative and military courts and the appointment of trainee judges;
3. Approval of the principles of professional ethics of judges and trainee judges, as well as ensuring their observance;
4. Providing perspectives on the issues related to the judiciary, judges and trainee judges included in the agenda of the National Judicial Council by the President of the Republic of Poland, other state authorities or judicial self-government bodies;
5. Providing perspectives on draft laws concerning the judiciary and submitting relevant proposals;
6. Providing perspectives on the training program as part of the training process of judges, content, scope and methods of conducting entrance examinations for the candidates for the posts of judges;
7. Providing perspectives on the annual planning of training and professional education of judges, etc.

Besides, the National Council of the Judiciary of Poland performs other tasks, in particular (paragraph 2 of Article 3 of the Act):

1. Adopts resolutions on appeals to the Constitutional Tribunal to consider the constitutionality of regulations of the Republic of Poland related to the independence of courts and judges;
2. Examines applications for dismissal of judges;
3. Consider applications of retired judges on their return to the position, etc.

The National Council of the Judiciary of Poland may also decide on such actions as:

1. Visiting the court or its structural unit;
2. Performing court inspection;
3. Performing an inspection of the professional activity of a judge or trainee judge (Article 5 of the Act).

As we can see, the National Council of the Judiciary of Poland, as well as the High Council of Magistracy of Portugal, has the right to issue instructions to inspect the activities of courts and judges to determine the quality of trial proceedings, compliance with legislation, and to identify their needs and shortcomings. Undoubtedly, this function is very important, and therefore our State must borrow this positive experience from neighboring countries.

## CONCLUSION

One of the main indicators of a democratic, legal, social state is the independence and autonomy of the judiciary. The problem of judges' independence has always been and remains relevant for Ukraine; they tried to solve it at each stage of State formation by carrying out numerous reforms of the judicial system. An important step in this direction was the establishment of the High Judicial Council, which was succeeded by the High Council of Justice,

designed to uphold the independence of the judiciary, select highly qualified candidates for these important positions and address other judicial issues.

In general, the structure, tasks and powers of the newly created body meet European standards, but the experience of similar bodies in Europe is measured by more than a decade, and therefore there are still some aspects of their activities that need further study and elaboration. This article is devoted to their study.

In particular, it was determined that the Superior Council of Magistracy of France is the oldest constitutional body guaranteeing the independence of judges in Europe. Noteworthy is its special structure, which consists of two corps (chambers):

1. Authorized in relation to judge;
2. Authorized in relation to prosecutors.

The competence of the Superior Council of Magistracy in relation to judges is the adoption of resolutions on disciplinary liability, the imposition of disciplinary sanctions. The imposition of a disciplinary sanction on prosecutors belongs to the powers of the Minister of Justice, and his (her) decisions may be appealed only in respect of the excess of powers. In addition, one of the innovations is the introduction of the possibility of direct appeal to the High Council of Justice of the participants in the trial. There are three commissions that consider appeals. Two of them are studying appeals against judges and one-against prosecutors.

The experience of Portugal is also of great interest. There is an inspectorate under the High Council of Magistracy of this country, which on behalf of the Council is authorized to conduct regular and extraordinary inspections of judges and courts, during which information is collected on the number of trials conducted during the period covered by the inspection, the quality of justice, executive level and efficiency of the court staff, etc.

Similar inspections are carried out by the National Council of the Judiciary of Poland, the main purpose of which is to inspect the professional activities of a judge or trainee judge. This type of control, in our opinion, is very effective, and therefore our State should borrow this positive experience from neighboring countries.

In addition, the experience of Portugal in training future judges and training of active ones in special training center, the curricula of which are developed by the center along with the High Council of Magistracy, is noteworthy. The Council also approves the procedure for attending classes by judges.

## REFERENCES

- Committee of Ministers of the Council of Europe. (1994). *Recommendation no. R (94) 12 of the Committee of Ministers to Member States on the independence, efficiency and role of judges*. Retrieved October 01, 2020 from [https://www.barobirlik.org.tr/dosyalar/duyurular/hsykkanteklifi/recR\(94\)12e.pdf](https://www.barobirlik.org.tr/dosyalar/duyurular/hsykkanteklifi/recR(94)12e.pdf)
- Committee of Ministers of the Council of Europe. (2010). Recommendation CM / Rec (2010) 12 on judges: independence, efficiency and responsibilities, adopted on November 17, 2010. Retrieved October 01, 2020 from <https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d>
- Consultative Council of European Judges. (2007). *Opinion no.10 (2007) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, adopted by the CCJE at its 8th meeting (Strasbourg, 21–23 November 2007)*. Retrieved October 01, 2020 from <https://rm.coe.int/168074779b>



- Council of Europe. (1998). European Charter on the statute for judges and Explanatory Memorandum. Retrieved October 01, 2020 from <https://rm.coe.int/16807473ef>
- Korchevna, L.O., & Korolenko, I.M. (2019). Creation of the high council of justice of Ukraine in the context of strengthening the independence of Judicial Power. *Bulletin of Odessa National University: Series Jurisprudence*, 24(2), 49-57.
- Law of French Republic. (1958). *Constitution of the French republic of October 04*. Retrieved October 01, 2020 from [https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank\\_mm/anglais/constiution\\_anglais\\_oct2009.pdf](https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf)
- Law of the Portuguese Republic. (1976). *The constitution of the Portuguese Republic of 1976 with Amendments through 2005*. Retrieved October 01, 2020 from [https://www.constituteproject.org/constitution/Portugal\\_2005.pdf](https://www.constituteproject.org/constitution/Portugal_2005.pdf)
- Law of the Republic of Poland. (1997). *The constitution of the republic of Poland of April 02*. Retrieved October 01, 2020 from <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>
- Law of Ukraine. (1998). *On the high judicial council of January 15, no. 22/98-VR*. Retrieved October 01, 2020 from <https://zakon.rada.gov.ua/laws/show/22/98-%D0%B2%D1%80#Text>
- Law of Ukraine. (2016). *On the high council of justice of December 21, no. 1798-VIII*. Retrieved October 01, 2020 from <https://zakon.rada.gov.ua/laws/show/1798-19#Text>
- Leskiv, S. (2016). *Legal status of judicial self-government of Ukraine in the context of ensuring the professional rights of judges*. Published PhD Dissertation. Lviv University of Business and Law.
- National Council of the Judiciary. (2011). *Act on the national council of the judiciary of May 12*. Retrieved from [https://www.legislationline.org/download/id/6755/file/Poland\\_Act\\_on\\_National\\_Council\\_Judiciary\\_2016\\_en.pdf](https://www.legislationline.org/download/id/6755/file/Poland_Act_on_National_Council_Judiciary_2016_en.pdf)
- Nazarov, I. (2005). *Legal status of the high judicial council*. Published PhD Dissertation. Yaroslav the Wise National Law Academy.
- Parishkura, V. (2010). Cooperation between the high council of justice and the high council of magistracy of Portugal. *Bulletin of the High Council of Justice*, 3(1), 114–121.