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Forming the Constitutional Judiciary in Ukraine – The Problem of Appointing Judges²

Keywords: Constitution of Ukraine, Constitutional Court, political changes

Słowa kluczowe: Konstytucja Ukrainy, sąd konstytucyjny, przemiany ustrojowe

Abstract

The author of this paper describes the history and presence of the Constitutional Court of Ukraine from the perspective of principles forming its composition. The aim is to provide a diagnosis of the past and present state of the independence of the Constitutional Court of Ukraine from political influence. The author concludes that stabilization of the Ukrainian constitutional judiciary has not yet taken place, and the development of its shape has a very dynamic course. In her opinion, a political agreement on the clarification of principles for the appointment of judges will be crucial for the success of the ongoing process.

Streszczenie

Proces kształtowania sądownictwa konstytucyjnego w Ukrainie – problem powoływania sędziów

Autor artykułu przedstawia historię i teraźniejszość Sądu Konstytucyjnego Ukrainy z perspektywy zasad kształtowania jego składu osobowego. Celem opracowania jest pos-

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² The analysis presented in this article concerns the legal regulations in force on August 20, 2021.

tanowanie diagnozy co do przeszłego i aktualnego stanu niezależności Sądu Konstytucyjnego Ukrainy od wpływów politycznych. Autor dochodzi do wniosku, iż stabilizacja ukraińskiego sądownictwa konstytucyjnego jeszcze nie nastąpiła, a wypracowywanie jego kształtu ma bardzo dynamiczny przebieg. Jego zdaniem dla powodzenia tego trwającego procesu zasadnicze znaczenie będzie miało porozumienie polityczne w sprawie doprecyzowania zasad wyboru sędziów.



I.

The idea of creating an independent constitutionality review body was first formulated in Ukrainian legal science in 1920, when Lviv University professor Stanislaw Dniestrzansky, in his original draft of the Constitution of the Western Ukrainian People's Republic, included provisions on the institution of constitutionality review similar to the solutions found in the constitutional laws of Austria and Czechoslovakia at that time³. Of course, due to political realities, the establishment and development of constitutional courts in Ukraine, as in other countries of Central and Eastern Europe, could not occur until the beginning of the political transformation at the end of the 20th century⁴. Just as in several other countries in this part of Europe, the constitutional judiciary in Ukraine has been evolving in a manner that cannot always be viewed positively (most recently in Poland as well⁵). The issue that poses the greatest problem is to ensure the independence of constitutional courts from political influence. According to some representatives of Ukrainian doctrine⁶, it was not solved in

³ P. Steciuk, *Sąd Konstytucyjny w systemie organów władzy państwowej Ukrainy*, [in:] *Studia z prawa konstytucyjnego. Księga jubileuszowa dedykowana Prof. zw. dr. hab. Wiesławowi Skrzydle*, eds. J. Połuszny, J. Buczkowski, K. Eckhardt, Przemyśl-Rzeszów 2009, p. 315.

⁴ M. Granat, *Sądowa kontrola konstytucyjności prawa w państwach Europy Środkowej i Wschodniej*, Warsaw 2003; A.M. Ludwikowska, *Sądownictwo konstytucyjne w Europie Środkowo-Wschodniej w okresie przekształceń demokratycznych. Studium porównawcze*, Toruń 1997; D. Rousseau, *Sądownictwo konstytucyjne w Europie*, Warsaw 1999, pp. 24–28.

⁵ W. Sadurski, *Polski kryzys konstytucyjny*, Łódź 2020, pp. 94–147.

⁶ S.W. Petkow, *Zakon Ukrainy "Pro Konstytucyjnyj Sud Ukrainy" naukowo-praktycznyj komentar*, Kyiv 2018, p. 3.

2017 when, following the constitutional changes reforming the judiciary, a new law on the Constitutional Court was passed⁷.

II.

The first real attempt to introduce constitutionality control in Ukraine took place in 1989. On October 27 of that year, the Verkhovna Rada passed a law on amending the Constitution of the Ukrainian Soviet Socialist Republic, which provided for the creation of a new body – the Constitutional Supervision Committee of the Ukrainian SSR. It was to be elected by the Verkhovna Rada for a ten-year term from among specialists in law and politics. The Committee was never created⁸.

In 1990, the Verkhovna Rada of the Ukrainian SSR adopted the Declaration on Ukrainian Sovereignty⁹, which stated that: “The Ukrainian SSR shall ensure the supremacy of the Constitution and laws on its territory”. The body entrusted with this task was to be the Constitutional Court of Ukraine, according to Art. 112 of the amended Constitution, consisting of 25 members elected by the Verkhovna Rada for ten years¹⁰.

After independence, these provisions were amended by the law on amendments to the first paragraph of Art. 112 of the Constitution¹¹ and further developed by the law on the Constitutional Court¹² passed in July 1992, which remained in force until 1996. According to its provisions, the Court consisted of 15 judges (including the Chairman and two deputy chairmen) elected by secret ballot by the Verkhovna Rada for ten years. And this time, the constitutionality review body did not start functioning. The Verkhovna Rada elected only the Chairman of the Court, attempts to elect its deputy chairman and other judges ended in failure¹³.

⁷ Zakon Ukrainy wid 13.07.2017 Pro Konstytucyjnyj Sud Ukrainy (WWR 2017, No. 35, p. 376 as amended).

⁸ *Konstytucyjne prawo Ukrainy. Akademicznyj kurs*, vol. 2, ed. Ju.S. Szemszuczenko, Kyiv 2008, p. 465.

⁹ Widomosti Werchownoji Rady URSR (hereinafter: WWR USSR), 1990, no. 31, p. 429.

¹⁰ WWR USSR 1990, No. 45, p. 606.

¹¹ Widomosti Werchownoji Rady Ukrainy (hereinafter: WWR), 1992, No. 33, p. 473.

¹² WWR 1992, No. 33, p. 471.

¹³ W.L. Fedorenko, *Konstytucyjne prawo Ukrainy*, Kyiv 2016, pp. 475–476.

On June 8, 1995, the Verkhovna Rada approved a document entitled: “Constitutional agreement on the basic principles of organization and functioning of state power and local self-government in Ukraine concluded between the Verkhovna Rada and the President of Ukraine for the period until the adoption of a new constitution of Ukraine, based on the law “On state power and local self-government of Ukraine” adopted on May 18, 1995. Article 38 of the Agreement stipulates that judges of the Constitutional Court will be appointed by the Verkhovna Rada and the President equally, and the Verkhovna Rada will choose the Chairman of the Court as a joint candidate of the Chairman of the Verkhovna Rada and the President. Despite the conclusion of the Agreement, the Constitutional Court has still not been appointed¹⁴.

The first sixteen judges of the Constitutional Court of Ukraine were sworn at the session of the Verkhovna Rada on October 18, 1996. This day was the first day of activity of the Constitutional Court of Ukraine¹⁵. It was preceded by the adoption of the Constitution of Ukraine¹⁶ on June 28, 1996, and a new law on the Constitutional Court of Ukraine¹⁷ on October 16. The solutions adopted then shaped the Constitutional Court of Ukraine for the next 20 years. Under the 1996 law (following Art. 148 of the Constitution), the Constitutional Court consisted of eighteen judges elected equally (six each) for nine years without the possibility of re-election by the President, the Verkhovna Rada, the congress of judges of Ukraine.

W.Ł. Fedorenko taking into account the years 1996–2016, distinguishes five periods in the activity of the Constitutional Court of Ukraine¹⁸.

The first includes the years 1996–1999. It was the period of formation of the authority of the Constitutional Court as the only professional body of “constitutional jurisdiction”, the arbiter between the bodies of divided power. During this period, the Court issued decisions that were of great importance for developing Ukrainian constitutionalism¹⁹. The judges of the first compo-

¹⁴ I. Kononczuk, *Istoryczni ta polityko-prawowi aspekty wynyknennia i rozwytki instytutu konstytucijnoho kontroli*, “Istoryko-prawowyj czasopys” 2017, No. 1 (9), p. 76.

¹⁵ *Konstytucyjne prawo*, op.cit., p. 468.

¹⁶ WWR 1996, No. 30, p. 141 as amended.

¹⁷ WWR 1996, No. 49, p. 272 as amended.

¹⁸ W.Ł. Fedorenko, op.cit., pp. 477–480.

¹⁹ For examples see *ibid.*, pp. 477–488.

sition of the Constitutional Court were leading representatives of Ukrainian constitutional law doctrine.

The second period – 1999–2003 – saw the consolidation of the constitutional judiciary in Ukraine. The Constitutional Court enjoyed real high authority in political and legal circles and among ordinary citizens. During this period, it issued a ruling that virtually ruled out the death penalty in Ukraine²⁰.

The third period (late 2003–2010) is a time of weakening of the authority of the Constitutional Court. The first of decisive decisions was the judgment of December 25, 2003²¹, in which the Court allowed the then President of Ukraine to be elected for a third term. During the Orange Revolution of 2004, the permanent electoral process, the constitutional reforms of 2004–2006 and 2007–2009, and the continuing dispute between the various authorities and political forces, the Constitutional Court's efforts to protect the Constitution were increasingly ineffective. At the core of this state of affairs was the desire of various political forces to have the positions of judges taken over by persons favorable to them. In particular, the actions of the third President of Ukraine, Viktor Yushchenko, aimed at introducing the institution of dismissal of a Constitutional Court judge.

The fourth period of the development of the constitutional judiciary in Ukraine is 2010–2014, marked by the consolidation of the political dependence of the Constitutional Court and the partial “deprofessionalization” of its composition²². It began on April 6, 2010, with the issuance of a controversial ruling according to which individual people's deputies had the right to participate directly in forming the people's deputies' faction²³. However, the most important was the decision of September 30, 2010, in which the Constitutional Court of Ukraine declared the Law on amendments to the Constitution of Ukraine of December 8, 2004 to be unconstitutional²⁴. According to Art. 159 of the Constitution of Ukraine, the Verkhovna Rada shall consider a bill

²⁰ Ruling of December 29, No. 11-пн/1999.

²¹ No. 22-пн/2003.

²² W.Ł. Fedorenko, op.cit., p. 479.

²³ W.D. Czuba, *Konstytucyjno-prawowyj status koaliciji deputatskich frakcij Werchownej Radi Ukrainy: sutnisnyj i struturno-funkcionalnyj aspekty*, “Naukowyj wisnyk Užhorodského nacionalnoho uniwersytetu” 2016, No. 36, p. 77.

²⁴ *Konstytucyjnyj Sud Ukrainy. Riszennia. Wysnowky*. 2010, Knyha 10.-K., 2011., pp. 345–346.

on amendments to the Constitution, provided there is a decision of the Constitutional Court of Ukraine on the bill's compliance with the requirements of Art. 157 and 158 of the Constitution. The Constitutional Court ruled that this condition was not fulfilled in 2004 and thus revoked the political system of Ukraine to the period before the Orange Revolution.

The fifth period began immediately after the Revolution of Dignity in 2014. It was a time of political condemnation of those decisions of the Constitutional Court that favored the "usurpation of power" by the President in 2010–2013, a period of strengthening the independence of judges of the Constitutional Court with a partial renewal of its personnel composition. This process culminated in the adoption by the Verkhovna Rada on February 24, 2014, of a decision declaring that the judges of the Constitutional Court had violated their oath of office²⁵. The Parliament dismissed from the Court judges elected by it, but the judges appointed by the President and elected by the congress of judges remained in their positions²⁶.

The sixth period of development of the Constitutional Court began with the passing of the mentioned 2017 law²⁷.

III.

According to Art. 148 of the Constitution, judges continue to be appointed in equal numbers – six each – by the President, the Verkhovna Rada, and the Ukrainian congress of judges. The 2016 amendment changed the requirements on candidates for judges of the Constitutional Court (Art. 148 and 149), in particular: the requirement of seniority "in professional activity in the sphere of law" was increased from 10 to 15 years; the condition of residence in Ukraine for the last 20 years was abolished; new criteria were added for a candidate – "has high moral values and is a lawyer with a recognized level of competence"; the age limit for holding office was increased from 65 to 70 years.

Some guarantees of the independence of judges have also been changed. Previously, a judge of the Constitutional Court could not be arrested or de-

²⁵ WWR 2014, No. 12, p. 201.

²⁶ S.W. Petkow, *op.cit.*, p. 3.

²⁷ W.L. Fedorenko, *op.cit.*, p. 484.

tained without the consent of the Verkhovna Rada until a conviction was passed. After the amendment, such consent is granted by the Constitutional Court itself (it is not needed if a judge is detained during or immediately after committing a “serious or very serious” crime).

The new Art. 149¹ sets forth the conditions for the expiration of the judge’s powers and dismissal. Expiration occurs automatically when the following circumstances occur: expiration of the term of office; reaching the age of seventy; loss of citizenship or acquisition of citizenship of another state; the validity of court decision declaring the judge disappeared without notice, his death, total or partial incapacitation; the validity of a court decision declaring the judge committed a crime; the judge’s death.

The grounds for revoking a judge from his office are inability to perform duties due to health; violation of the requirements for non-incompatibility with the functions of a judge; significant disciplinary offense, gross or systematic neglect of his duties in a manner incompatible with the status of a judge of the Court or with the position held; resignation from office by a judge of his own free will. Significantly, the decision to revoke a judge is taken by the Constitutional Court on its own by a majority of 2/3 of its constitutional composition.

One of the most frequently cited flaws of the Constitutional Court Act 2017 is that, contrary to the constitutional delegation, it does not sufficiently specify the procedure for selection of Constitutional Court judges “on a competitive basis”²⁸. It leaves this issue to the decision of the entities appointing the judges, although it was expected that a single joint selection board would be formed to evaluate candidates appointed by all three entities²⁹.

The Verkhovna Rada defined the procedure for appointing the judges of the Constitutional Court in its Rules of Procedure (Art. 208)³⁰, and the President, on August 17, 2021, signed Decree No. 365/2021 on the selection board for the position of a judge of the Constitutional Court of Ukraine for persons

²⁸ S.W. Petkow, *op.cit.*, p. 3.

²⁹ P. Steciuk, *Zakon Prokonstytucijnyj Sud Ukrainy: tretia sprob, [in:] Problemy implementaciji zmin do Konstytuciji Ukrainy szczodo pravosuddia ta statusu Konstytucijnoho Sudu Ukrainy*, ed. W.Musijaka, Kyiv 2017, pp. 130–131.

³⁰ *Zakon Ukrainy wid 10.02.2010 Pro Rehlament Werchownoji Rady Ukrainy*, WWR 2010, No. 14–15, No. 16–17, p. 133.

appointed by the President of Ukraine and established a selection board consisting of seven persons³¹.

At the same time, the so-called “constitutional crisis”³² outlined in Ukraine at the end of 2020 continues³³. It began with the decision of the Constitutional Court of October 27, 2020 on the constitutionality of certain provisions of the Law on Prevention of Corruption and the Criminal Code of Ukraine³⁴. This ruling was considered in the public discussion as a “de facto stoppage of the anti-corruption reform”³⁵. In response, President V. Zelenski submitted to the Verkhovna Rada a bill on restoring public confidence in the constitutional judiciary, which in Art. 2 provided the revocation of the entire composition of the Constitutional Court³⁶ (the bill was withdrawn on January 27).

Politically, the situation became even more complex when on December 29, 2020, President V. Zelenski signed a decree to suspend for two months the Chairman of the Constitutional Court of Ukraine, Oleksandr Tupytsky³⁷ (on February 28, he extended this period for another month³⁸) as a result of in-

³¹ <https://www.president.gov.ua/documents/3652021-39697> (20.08.2021).

³² Petro Steciuk retired judge of the Constitutional Court and scientific consultant on the Razumkov Center law believes that this is not a “constitutional crisis”, but a crisis in relations between the Office of the President and the Constitutional Court see *Konstytucijnoi kryzy w Ukraini nemaje, je kryza wnutrisznioderzawnoho uriaduwannia – suddia KS w widstawci Steciuk*, <https://zn.ua/ukr/POLITICS/konstitutsijnoi-kryzi-v-ukrajini-nemaje-je-kryza-vnutrisznioderzawnoho-urjaduwannja-suddja-ks-u-vidstavtsi-stetsjuk.html> (20.08.2021).

³³ See *Ukraine 2020–2021 Inflated expectations, unexpected challenges (Assessment)*. *Ukraine 2020: Inflated expectations, unexpected challenges. Inertial Motion. Forecasts 2021. Public Opinion on the Results of 2020*. Razumkov centre, Kyiv 2021, pp. 178–180.

³⁴ *Riszennia Konstytucijnoho Sudu Ukrainy z 27 zowtnia 2020 roku No. 13-p/2020 u sprawi za konstytucijnym podanniam 47 narodnych deputatiw Ukrainy szczodo widpowidnosti Konstytuciji Ukrainy (konstytucijnosti) okremych položen Zakonu Ukrainy “Pro zapobihannia korupcji”, “Kryminalnoho kodeksu Ukrainy” 2020, No. 13*, http://www.ccu.gov.ua/sites/default/files/docs/13_p_2020.pdf (20.08.2021).

³⁵ T. Otowska, *KSU proty borot’by z korupcijeju: Zelenśkyj prosyt’ Wenecijsku komisiju nadaty wysnowok szczodo kryzy* <https://www.unian.ua/politics/ksu-proti-borotbi-z-korupciyew-zelenskiy-prosit-veneciysku-komisiyu-nadati-visnovok-novini-ukrajina-11233157.html> (20.08.2021).

³⁶ For draft text, see http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70282 (20.08.2021).

³⁷ No. 607/2020 <https://www.president.gov.ua/documents/6072020-36197> (20.08.2021).

³⁸ No. 79/2021 <https://zakon.rada.gov.ua/laws/show/79/2021#Text> (20.08.2021).

formation provided by the Prosecutor General on suspicion of influencing a witness through bribery and giving false testimony. Subsequently, W. Zelenski, by the decree of March 27 on certain issues of ensuring the national security of Ukraine³⁹, revoked the decrees of President V. Yanukovich on the appointment of O. Tupycki and O. Kasminin as judges of the Constitutional Court. Both appealed this decision to the Verkhovna Rada. As a result, the Verkhovna Rada overruled the decree of President Zelenskiy in the first instance⁴⁰ (on the 16th of August, the Verkhovna Rada received an appeal against this decision⁴¹).

At the same time, a law on the constitutional procedure is being drafted. Initially, its draft also left the issue of conducting competitions for the position of Constitutional Court judge to the discretion of the entities appointing judges and did not provide for a single selection board common to all candidates. It has met with criticism from the Venice Commission, which in its opinion, adopted at the plenary session of March 19–20, 2021, recommended the establishment of such a commission with the participation of foreign experts⁴².

In June, the Verkhovna Rada committee considering a draft law on constitutional procedure supported amendments of deputy Yaroslav Yurchyshyn to establish a single selection board. They were included in the text of the draft for the second reading⁴³, which had not yet been carried out at the time of publishing. According to the current wording of the draft, the President, the Verkhovna Rada, and the Ukrainian Congress of judges could appoint to the position of a judge of the Constitutional Court only a person having a positive recommendation of the same, single selection board.

The Verkhovna Rada would appoint the first seven-member selection board within three months of the law's entry into force. Four candidates would be nominated by retired Constitutional Court judges who served in office between 1996 and 2006, the other three by "international organizations with

³⁹ No. 124/2021, <https://zakon.rada.gov.ua/laws/show/124/2021#Text> (20.08.2021).

⁴⁰ <https://www.ukrinform.ua/rubric-society/3280690-u-verhovnomu-sudi-rozasnili-svoe-risenna-za-pozovom-tupickogo.html> (20.08.2021).

⁴¹ <https://www.ukrinform.ua/rubric-politics/3299011-ponovlenna-tupickogo-oskarzili-u-verhovnomu-sudi.html> (20.08.2021).

⁴² <https://rm.coe.int/opinion-constitutional-procedures/1680a1e084> (20.08.2021).

⁴³ https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70729 (20.08.2021).

which Ukraine cooperates in the rule of law, justice, prevention and combatting corruption”.

IV.

The Ukrainian constitutional judiciary has not yet been stabilized, and its formation process is still very dynamic. It seems that the clarification of principles for the appointment of judges will be of fundamental importance for the success of the ongoing process. It is the opinion of the Venice Commission. At the beginning of March 2021, the Venice Commission Chairman, while taking part in an all-Ukrainian forum “Ukraine 30 – development of the judiciary”, called for amendments to the law on the Constitutional Court of Ukraine to allow international experts to participate in the assessment of candidates for judges⁴⁴.

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⁴⁴ <https://www.unn.com.ua/uk/news/1918961-golova-venetsianki-zaklikav-radu-ukhvyliti-zakoni-yaki-dozvoljat-uchast-mizhnarodnikh-ekspertiv-u-dobori-suddiv-ksu> (20.08.2021).

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