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ПРЕДСТАВНИЦТВО ГРОМАДСЬКОСТІ В КОМІСІЯХ З ДОБОРУ КАДРІВ ДЛЯ СУДОВОЇ ВЛАДИ: ПОРІВНЯЛЬНИЙ АНАЛІЗ

Анотація. *У статті розглядаються окремі питання формування комісій з відбору суддів, які є надзвичайно актуальними для України з огляду на перманентний пошук оптимальних рішень, здатних покращити незадовільну ситуацію з українським правосуддям. Основною метою дослідження є розкриття важливості ролі громадянського суспільства в процесах відбору суддів та розуміння переваг участі громадськості у відборі суддів з точки зору законодавчої практики різних демократичних країн, зокрема, Нідерландів, Великої Британії, Данії, Литви та США. У статті також розглядається професійна різноманітність осіб, які залучаються до складу комісій з відбору суддів, дискутується важливість або неважливість їх обов'язкового відношення до юридичної професії як основного критерію для входження до таких комісій та досліджуються деякі поширені підходи, які використовуються в країнах Європи та окремих штатах США щодо забезпечення балансу між представниками суддівської спільноти, представниками юридичних професій та представниками з неюридичної сфери у формуванні комісій з відбору суддів.*

Окрему увагу приділено різним аспектам формування суддівського корпусу в США згідно з концепцією, запропонованою суддею Верховного суду США Сандрою Дей О'Коннор у «плані О'Коннор». Основними висновками, сформульованими за результатами аналізу, є те, що в європейських країнах та у значній кількості штатів США зберігаються тенденції активного входження представників громадськості до складу відбіркових комісій суддів, що є важливою передумовою формування незалежного, професійного та відповідального корпусу суддів. Результати дослідження можуть стати корисною науковою основою для подальшого розвитку підходів до удосконалення діяльності інституцій, які займаються формуванням професійної суддівської спільноти на основі тісної співпраці з громадськістю, а також стимулювати розвиток ідей посилення демократичного правління в органах судової влади

Ключові слова: *відбір суддів, комісії з відбору суддів, оцінка діяльності суддів, участь громадськості у формуванні суддівського корпусу, план О'Коннор*

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PUBLIC REPRESENTATION IN COMMISSIONS TO SELECT MEMBERS OF THE JUDICIARY: COMPARATIVE ANALYSIS

Abstract. *This article examines specific issues of the formation of commissions for the selection of judges, which are extremely actual for Ukraine in view of the permanent search for optimal solutions capable of improving the unsatisfactory situation with Ukrainian justice. The main purpose of the research is to reveal the importance of the role of civil society in the processes of selecting judges and to understand the benefits of public participation in selecting processes from the point of view of the legislative practices of various democratic countries, particularly the Netherlands, Great Britain, Denmark, Lithuania and the United States. The article also examines the professional diversity of persons who are involved in the selection commissions*

of judges, discusses the importance or irrelevance of their mandatory involvement to the legal profession as the main criterion for joining such commissions, and analyses some common approaches, observed in European countries and certain states of the US, to ensure a balance between representatives of the judicial community, other legal professions and laypersons in the formation of commissions for the selection of judges. Special attention is paid to various aspects of the formation of the judiciary in the US according to the concept proposed by the justice of the Supreme Court of the US Sandra Day O'Connor in the «O'Connor plan». The main conclusions drawn from the results of the research are that in European countries and in a significant number of US states, the trends of active participation of public representatives in the selection commissions of judges are maintained, which is an important prerequisite for the formation of an independent, professional and responsible corps of judges. The results of the study can become a useful scientific basis for the further development of approaches to improving the activities of institutions engaged in the formation of a professional judicial community based on close cooperation with the public, as well as stimulate the development of ideas for strengthening democratic governance in judicial authorities

Keywords: *selection of judges, commissions for the selection of judges, evaluation of judicial activity, public participation in the formation of the judiciary, O'Connor plan*

INTRODUCTION

The issue of effective interaction between the judiciary and society has been on the agenda in many countries for decades. The issue is of particular interest for countries that are trying to build their state system on democratic principles, because the formation of a fair society is the basis for building a strong state. Ukraine is not an exception to these processes. As a young democracy, it tries to keep up with European and global trends in building a fair society, paying attention to the creation and development of relevant institutions. Effective judicial institutions play a key role in the practical provision of justice in the state. This situation explains the traditionally increased interest in the processes of the formation of professional judicial power and in the formation of judicial institutions that select judges.

Since the independence of Ukraine, several attempts have been made by Ukrainian parliamentarians to reform judicial legislation (1992, 1994, 2010, 2016). These reforms were supposed to improve the quality of the Ukrainian judiciary, in particular by improving the procedures for selecting judges. Steps were repeatedly taken to create transparent and effective institutions that would ensure the formation of a high-quality judicial corps, carry out a transparent selection of candidates for the positions of judges and impartially evaluate the activities of current judges. For these reasons, relevant selection institutions were significantly changed. Thus, the selection commissions of judges that operated in each territorial unit of Ukraine until 2010 were replaced by one nationwide body, the High Qualification Commission of Judges of Ukraine, which was empowered to select judges throughout the territory of Ukraine and for all judicial positions. In turn, to form the optimal and non-partisan composition of the Commission, the number of judicial and non-judicial members was repeatedly revised. The reforms of 2015–2016 provided for the involvement of representatives of the public, in particular

the Public Integrity Council, in the work of the High Qualification Commission of Judges of Ukraine to better take into account the position of society during the selection of judges. The Commission still largely consists of professional judges and lawyers, however.

As practice has shown, the reforms have not always been effective. To some extent, this is due to too much attention being paid to the idea of achieving maximum independence of the judiciary from other branches of government. However, the proposed «excessive independence» of the judicial system brought more risks and threats than positive results. Over time, it created a «closed» judicial system that was out of reach for even minimal reasonable control by the executive power.

Along with this, progress in the issues of freeing the judiciary from the influence of other branches of government, combined with the lack of control over the activities of judges by the public (including the processes of selection of candidates for the position of judges) created a threatening situation: firstly, the existing problem of the significant «detachment» of the judicial power from society was aggravated; secondly, the level of distrust in the judicial power continued to grow; and thirdly, the problem of the imperfect Ukrainian justice system was preserved.

Because of the outlined reasons and taking into account the special importance of the issue of control over the judicial power by the society, this article examines questions regarding the forms and methods of involving the public in the procedures related to the formation of the judicial body. Examples are taken of the practices of those European countries that have chosen democratic models of the organization of judicial power, rather than those countries that use models of a more «closed» judicial system. In particular, the article examines the experience of European countries that, firstly, use special commissions for the selection of judges and, secondly, prefer the formation of commissions with mixed compositions. The mixed composition of the selection commission of judges means a commission that includes not only judges and specialists from the judicial system, but also specialists from the extrajudicial sphere (laypersons). Moreover, the article analyses the experience in the US of forming the composition of institutions that carry out the selection of candidates for the position of judges.

Furthermore, the article examines issues that allow one to understand the current level of involvement of representatives of Ukrainian society in the processes of forming the judiciary in Ukraine. In addition, it analyses the experience of public control of the judiciary, which existed in Ukraine's recent past, before its independence. The state of Ukraine is considered the main beneficiary of the research, because all proposals relate to the further reforms of Ukrainian legislation. Such an approach makes it possible to draw logical conclusions regarding the necessary forms and methods of increasing the role of the public in the processes of democratization of the judiciary in Ukraine. It also helps to search for appropriate alternatives for the organization of the composition of selection commissions, which will be beneficial both for Ukraine and for other young democratic states facing similar problems of building an effective judiciary.

1. MATERIALS AND METHODS

A comparative study is conducted and optimal solutions are sought regarding the formation of the composition of public institutions that select candidates for the position of judges. To this end, this article examines the norms of Ukrainian legislation, the provisions of the regulatory acts of European countries such as the Netherlands, Great Britain, Denmark and Lithuania and certain provisions of US regulations. Moreover, official resources of government and judicial bodies and institutions of certain US federal states and European countries are used as sources of information and materials for comparing approaches to the formation of commissions for the selection of judges. In addition to the legislative framework, the article examines the works of British, American and other authors who address the problems of forming the judiciary in their countries.

Before analysing the international experience of staffing commissions for the selection of judges, it is advisable to assess the possibility of application of such experience in Ukraine. First, it is necessary to understand the role assigned to Ukrainian society by the country's legislation in matters of judicial power formation. According to the Constitution of Ukraine, «the bearer of sovereignty and the only source of power in Ukraine is the people» [1, art. 5]. Moreover, the Constitution stipulates that «the people exercise power directly and through state authorities and local self-government bodies» [1, art.5]. Ukrainian legislation contains the prerequisites for the introduction of instruments of accountability of state authorities to Ukrainian society.

Furthermore, the basic law of the state considers the Ukrainian people not only as a source of legislative and executive power, but also as a source of judicial power. After all, the cited constitutional provisions do not contain additional exceptions or limitations concerning the judiciary. Thus, the aforementioned legislative concept of «people's sovereignty» determines the existence of the legal right of the Ukrainian people to influence the judicial system. Therefore, the approach of involving the public in the formation of the judiciary, in particular through commissions for the selection of judges, has positive prospects in Ukraine.

The next questions to be clarified are as follows: How is the constitutional norm that defines the Ukrainian people as the source of legislative power, executive power and, most importantly, judicial power are implementing in practical life in Ukraine? Are there any contradictions between legislative prescriptions and life practice? Further analysis of Ukrainian legislation shows, first, that the concept of people's power declared by the Constitution of Ukraine is fully realized during the election of the Ukrainian parliament (i.e. the legislative branch of state power). Election procedures allow citizens to elect members of parliament [2, art.3]. Second, this concept is also implemented in the case of the election of the president of Ukraine at national elections, which is considered an institution that operates within the framework of the executive branch of state power. The concept of «people's rule» is also implemented when choosing the foundation of the executive branch of state power – the Government of Ukraine. In this

case, however, the right of the people to elect the government is realized in an indirect way – through the parliament (since the government is elected by a coalition of parliamentary factions) [1, art.83].

To a much lesser extent the concept of «people's rule» is realized in the Ukrainian people's ability to form the judicial branch of power, including electing judges and judicial institutions. This is particularly indicated by the legally prescribed procedure for appointing a judge. The procedure provides that, before the appointment of a candidate for the post of judge, such a candidate undergoes selection by the High Qualification Commission of Judges at the first stage and approval by the High Council of Justice at the second stage [3, art.3]. The third stage, namely the direct appointment to the position of a judge, is carried out by the head of state (i.e., the president of Ukraine) on the proposal of the High Council of Justice in the manner established by law [1, art. 128].

Thus, the parties involved in the decision-making are state bodies (High Qualification Commission of Judges, High Council of Justice) or relevant officials (president of Ukraine). As a constitutional source of power in the procedure for appointing a judge, however, the Ukrainian people are absent.

For additional confirmation of this conclusion, one can try to disagree with this point of view and, with certain reservations, assume that the popular expression and influence of the people on judicial power still exists and is implemented indirectly through the president of Ukraine as through the head of state elected by the people – in particular, through the decision of the president on the appointment of judges [1, art. 128].

Even in this case, however, the role of the administrative position of the president of Ukraine is largely nominal in this process. The president is not a truly effective state institution, which would be able not only to delay the appointment of an unwanted judge through bureaucratic red tape, but also to disagree with the proposal of the High Council of Justice and actually refuse to appoint a candidate. Such «helplessness» of the head of state is connected with the fact that the relevant powers of the president and the possibility to disagree with proposals of the High Council of Justice are not provided for in the legislation of Ukraine.

2. RESULTS AND DISCUSSION

The analysis of the constitutional provisions has shown that the legislation of Ukraine does not give the people of Ukraine a significant role in the formation of the judiciary, in particular in the procedures for the selection and appointment of judges. Based on recent historical experience, however, Ukrainian society can be considered ready for the introduction of a procedure for the popular election of judges, which operated when Ukraine was part of the Union of Soviet Socialist Republics. In the last decade of the Ukrainian Soviet Socialist Republic (Ukrainian SSR), before Ukraine gained independence, judges were elected by popular vote. Thus, the legislation of the

Ukrainian SSR, in particular the law of the Ukrainian SSR «On the Judicial System of Ukraine» [4, art.22] and the law of the Ukrainian SSR «On elections of district (city) people's courts of the Ukrainian SSR» provided for just such a procedure: «People's judges of district (city) people's courts of the Ukrainian SSR are elected by citizens of the district, city, district within the city on the basis of universal, equal and direct suffrage by secret ballot for a period of five years» [5, art.1].

In the absence of legislative prerequisites for civil society to exert a direct influence on the judiciary (through the exercise of direct suffrage in the election of judges), it is worth considering other forms of participation in the procedures for the democratization of the judiciary, which could serve as a substitute for a full-fledged procedure for the national election of judges. After all, «there must be a certain model of democratic control or parliamentary control regarding the appointment of judges» [6, par 4].

In particular, such participation can be achieved through representatives of civil society or representatives of the Ukrainian parliament in the composition or meetings of the bodies that carry out the selection of judges.

Furthermore, the opinion that «election of judges by the people is the highest form of implementation of democratic principles of state building» [7, p.253] should not be completely removed from the agenda. For Ukraine, which declares itself a democratic state, the spreading of democratic principles should remain a priority.

If the idea of direct elections of judges by the people is postponed, however, it is necessary to determine what formats of interaction will be effective for Ukraine in the near future. Usually, people's reception of legislation or adopting the most effective practices from around the world helps to find answers to certain complex issues of the development of social relations. Reception of successful foreign practice is seen as the most successful and least risky way to develop national legislation for young democracies. When choosing a suitable model for solving a problem, however, it is worth making adjustments that take into account the national context – in other words, to adapt flexibly to the specific conditions of a specific state.

As mentioned, this article takes examples from Europe and the experience of the US regarding the construction (at the level of institutions) of an effective system for the selection of judges. It is the experience of these countries that corresponds to the greatest extent to the views of the authors of the study, and it is their experience that confirms the possibility of a successful solution to the problems that Ukraine is facing. Among these problems are a lack of democratic control, an excessive judicial monopoly in appointing judges and a violation of the balance in relations in the «public – judiciary» format. Thus, it is worth examining the examples of the formation of commissions for the selection of judges in European countries and in the US.

1. Practical aspects of the formation of commissions for the selection of judges in European countries

1.1. Netherlands

The first example of the practice of European countries in the formation of institutions that participate in the selection of the judicial corps is that of the Netherlands. The situation in the Netherlands can be considered a good example of a reasonable balance of the interests of society, the judicial community and the executive branch of government in the procedures for selecting judges. First, according to sociological surveys in 2016, the level of public trust in the judiciary in the Netherlands was 69% [8]. This is an indicator that can positively characterize both the judicial institutions as a whole and the approaches to the organization of many aspects related to the functioning of courts in this country.

The National Commission for the Selection of Judges (Landelijke selectionscommissie rechters) (hereinafter, the National Commission) was established to organize the selection of candidates for the positions of judges. The composition of the National Commission consists of four members of the presidium and 20 selectors [9, art.5]. Selectors are people who represent the judicial and public community: 10 judges and 10 representatives of various social and professional spheres (state administration, business, education and science, the legal profession and the prosecutor's office) [10]. There is no strict framework regarding the professional affiliation of a public candidate for membership of the National Commission (except advocates and prosecutors, who have four seats in the National Commission). Thus, in 2018, the composition of the National Commission (with a few vacancies) was as follows: the chairman of the district court (deputy chairman of the National Commission); two senior judges of the district court (member-secretaries of the National Commission); nine judges of district courts in the appeal court or special judges; a lawyer; a pastor-theologian of the Protestant church; a film consultant and freelance director; an adviser on tax and legal issues; a prosecutor (district court level); the head of firefighters, security services and emergency services; a prosecutor (appellate court level); the head or secretary of the regional association of lawyers; and a teacher [11]. The ratio of judicial and civil representation in the National Commission is slightly weighted towards representatives of the judiciary. There are 12 of them in the commission, compared with nine other commission members. In the non-judicial part of the commission, seven people are representatives of civil society and two are representatives of the prosecutor's office, which is part of the executive branch of government.

The approach to forming the selection commission proposed in the Netherlands allows representatives from completely different fields to participate in the selection of judges. In our opinion, this approach significantly softens the exclusive influence of judges on the process of selecting future colleagues and therefore acts as an effective safeguard against the development of «judicial corporatism».

Moreover, the participation of representatives of different professions allows for a more objective assessment of not only the professional qualities, but also, no less important, the personal qualities (including morals) of the candidates. Among other procedural aspects of the appointment of judges in the Netherlands, the appointment of

a judge is made by royal decree (by the king and the Minister of Justice and Security). The appointment is made on the basis of objective criteria recommended by the courts, which are decisive in the appointment process [10]. Another feature of the status of judges in the Netherlands is that they are appointed for life [10].

1.2. Great Britain

In Great Britain, where the level of public trust in the judiciary was 63% in 2016, [8] a special body, the Judicial Appointments Commission, was also formed for the purpose of organizing the selection of judges [12]. The Commission has been operating since 2006. It selects candidates for judgeships in England and Wales and for some tribunals. Tribunals are administrative courts that consider disputes between citizens, organizations and public administration bodies in the administrative and legal sphere, and which have powers at the national level [13].

It should be noted that the process of introducing the Judicial Appointments Commission in Great Britain was accompanied by complex negotiations between the government and society. This was due to certain historical and cultural aspects. Great Britain is known for its archaism and its honouring of old traditions. The existing traditional constitutional view of the judiciary was that judges were considered servants of the «royal crown». As a result, appointments to judicial positions, in particular to the highest positions of judicial bodies, were made in most cases directly by the Queen on the recommendation of the Prime Minister or the Lord Chancellor or on the authority of the Queen by the Prime Minister or the Lord Chancellor [14, p. 73]. During the appointment, the professional experience of the candidate and the recommendations characterizing them as a «balanced person with a standing and sound temperament» were taken into account. Modernity, however, demanded a review and democratization of judicial appointment processes, which were apparently overwhelmed by British traditionalism. Until 1994, the characterization of the candidate as a «balanced person with a standing temperament» was essentially the only formal requirement for nomination to judicial positions in Great Britain. In 1994, the Lord Chancellor announced that the common requirements for candidates (in addition to administrative and legal skills) would be expanded by some new criteria. The candidate must meet such criteria as «fairness, humanity, courtesy, integrity, honesty, good communication skills, community experience and contacts» [14, p. 80].

The subsequent evolution of British law continued with debates about the need to reduce government influence over the judiciary [15, p. 570]. As part of this process, at various stages, various solutions were proposed to increase judicial independence. One of these decisions solutions was the introduction of the government position of commissioner for judicial appointment, which existed before the Judicial Appointments Commission in its current form. The final act of all discussions regarding the reduction of government influence on the judicial system was the adoption of the Constitutional Reform Act in 2005 [16].

This law proposed the creation of an auxiliary body for the selection of judges, which became the Commission mentioned above. An additional measure to increase the independence of the judiciary was the introduction of the Judicial Appointment and Conduct Ombudsman, whose role included the consideration of complaints regarding situations that arose in connection with the appointment and conduct of judges [14, p. 83].

The Judicial Appointments Commission consisted of 15 members, including its chairman. All members of the Commission were appointed to positions through open competition, with the exception of three members of the courts, who are elected by the Council of Judges or the Council of Tribunals. In addition to representatives of the judiciary, the Commission for the Appointment of Judges included lawyers, public representatives and judges who did not have legal qualifications [17]. In particular, of 15 members of the Commission: six must be members of the courts (including two judges from the tribunal); two must be professional legal members (each of them must have an appropriate legal qualification, but must not have the same qualifications as each other); five must be representatives of the public; one must be a judge without legal qualifications [18]. Thus, the composition of the Commission is also diverse and is not limited to representatives of the judiciary. The representative part of non-judicial members of the Commission is larger than that of the Netherlands: six judges compared to nine representatives from the non-judicial system. Such a composition can be considered more democratic and more balanced, since it better represents the balance between representatives of the judicial branch of power, representatives of the public and representatives of the professional environment. This was the goal of the constitutional reform in 2005. For Great Britain, it became an important step in the direction of strengthening the desire to officially enshrine the independence of judges in legislation. In addition, the reform led to strengthening the accountability of the judiciary and ensuring greater public trust [19].

1.3. Denmark

The next example of the European experience of the functioning of institutions for the selection of judges, which also demonstrates no less successful than in previous countries, the experience of combining the efforts of representatives of the public and the judicial community in matters of selecting a professional corps of judges, is the example of Denmark. In Denmark, the level of public trust in the judiciary in 2016 was 82% % [8]. Denmark's experience is also based on the fact that the initial selection of candidates for the position of judges is carried out by a separate independent body, which is the Judicial Appointments Council [20, p.2]. It consists of six members who differ in their professional affiliation, serving as an example of representative pluralism. In particular, the council includes: one Supreme Court judge, one appeal court judge, one district court judge, one lawyer, and two public representatives representatives [21]. Judges who are candidates for the position of members of the Judicial Appointments Council are appointed by the Minister of

Justice on the recommendation of the Supreme Court, the High Courts and the Association of Danish Judges. A lawyer, who is also a candidate for the Judicial Appointments Council, is appointed by the Minister of Justice on the recommendation of the Council of the Danish Society of Advocates and Lawyers. In turn, two representatives from the public are appointed by the Minister of Justice on the recommendation of the local self-government bodies of Denmark, associations and organizations in the interests of 98 Danish municipalities and the Danish Association for Adult Education. The members of the Judicial Appointments Council members are appointed for a four-year term and do not have the right to be re-elected [22, p.2].

The representative balance of the Judicial Appointments Council, as we can see from the above information, is presented takes in the form of three judicial positions and three persons from the non-judicial system. It is also a good example of balancing the interests of different professional groups and the public. It allows effective external public control over the procedure for selecting judges.

Danish judges are formally appointed by the king (or queen) on the recommendation of the Minister of Justice. However, the recommendations of the Minister of Justice, in turn, are formed on the basis of the proposal of the Judicial Appointments Council [23, p.2]. It is important to note that both the king (queen) and the Minister of Justice in this case play a more ceremonial role (that is very similar to the role of the president in Ukraine). In particular, the Minister of Justice has never rejected candidates proposed by the Judicial Appointments Council [22, p. 1].

1.4. Lithuania

Although the level of public trust in the judiciary in Luthuania in 2016 was lower than in the European countries above and amounted to 34% % [8], the country is of interest because it has a common historical past with Ukraine. Like Ukraine, Lithuania was one of the republics of the USSR, and thus faced similar challenges in building an effective judicial system after gaining independence.

Lithuania also has a special body for the selection of judges, in particular for the appointment to the position of a judge for the first time and for the transfer of a judge to a higher judicial position. This body is formed by the President of the Republic of Lithuania and is called the Selection Commission of Candidates to Judicial Offices [24, art. 55^1]. The term of office of the Commission is three years.

The Commission is composed of seven members. Three members are acting judges, and the other four are representatives of the public [24, art. 55^1]. As of 2018, the Commission was composed of: a judge of the Supreme Court; a judge of the Court of Appeal, the head of the regional administrative court; a psychologist/ or consultant on personnel management issues (he was appointed as the chairman of the Commission); a teacher (political science) at Mykolas Romeris University; a retired judge; a member of the selection commission of prosecutors; and the head of the online media association

(journalist) [11]. Thus, the balance of representation of persons from the judiciary and persons from the extrajudicial system is in favour of the latter.

Given that decisions are made by a majority vote of all members of the Commission, the dominant role in deciding which of the candidates to recommend to the President of the Republic of Lithuania for appointment to the position of judge belongs to the public. According to the international experts (Georg Stava, Vilma Van Bentham, and Reda Moliene), who in 2018 prepared the report «Selection and evaluation of judges in Ukraine» as part of the special expert mission of the EU project «PRAVO-Justice», «such a system ensures a balance between a purely legal approach and the experience of other professions, as well as the public's perception of the role of a judge and requirements for judges» [25, p. 53]. Moreover, according to the legislation, the president is not bound by the recommendations of the Commission [24, art. 55^1]. This approach differs from the Ukrainian practice.

Section 1 has described the experience of certain European countries in balancing the interests of the judicial community, the public, and other interested parties (for example, representatives of the executive power) during the formation of the corps of judges.

2. Practical aspects of the formation of commissions for the selection of judges in the US

The experience of the US is of considerable interest in studying approaches and practices regarding the organization of the selection of candidates for the position of judge and the procedure for the formation of selection commissions.

In the US, there are different approaches to the staffing of courts. A feature of the American judicial system is its two-level system. There are federal-level courts that consider cases of national importance and are governed by federal legislation, and there are local courts at the state level that resolve disputes of a local (within the state) nature and are governed by state law. In particular, we talk about the procedure for selecting judges applies at the state level. Depending on the level of the court, the procedure for electing and appointing judges also changes. Special collegial bodies for the selection of judges – nomination commissions – are a popular tool. For example, the selection of candidates for the positions of judges of last resort courts in half of the US states is carried out by special nomination commissions of judges [26]. Similar nomination commissions in some states also select judges for local courts of first instance. The tasks and functions of nomination commissions in a number of US states are similar to the previously mentioned bodies operating in European countries.

An important characteristic of the state nomination commissions is that they try to implement the idea of pluralism of opinions and diversity of professions at the expense of a wide representation of members from outside the court. As a rule, nomination commissions are formed from representatives of the judicial system, representatives of the legislature or government, representatives of the public and representatives of the professional advocacy environment [27, p. 10].

The activity of the nomination commissions and the functioning of the system of selection and evaluation of judges in different states are regulated at different legislative levels (constitution, law, bylaw). In particular, a considerable number of states (24 in 2009) have provisions in their constitutions that determine the need for evaluation of candidates for the position of judges [28, p.1–4]. This approach corresponds to the principles of the European Charter on the Status of Judges, which requires the settlement of provisions regulating the status of judges to be carried out at the level of national constitutions [29, in point (1.2)].

At the same time, legislative provisions establishing procedures for evaluating the performance of judges are enshrined (according to 2014 data) only in the constitution of the state of Arizona [27, p.10].

Such a difference in the procedures for appointing candidates for the positions of judges and evaluating the performance of acting judges could be explained by the federal nature of state power in the states of the US and by the peculiarities of the evolution of American legislation. From the history of the formation of institutions that carried out the selection of judges, it is known that the activity of the nomination commissions of judges, as a special body for the selection of judges, was introduced in the US with the implementation of the provisions of the so-called Missouri Plan. The Missouri Plan was adopted in the state of Missouri in 1940 and introduced the principles of the selection of candidates for judicial positions on the basis of merit (merit selection). This document was a compromise between the approaches to the appointment of judges that existed before. Before the introduction of the Missouri Plan, judges were appointed on the basis of political affiliation, – that is, on the candidate's affiliation with a certain political force, which nominated its candidate for the position of judge [30, p. 369]. The goal of the Missouri Plan was to reduce the political component in the procedure for appointing judges. The new approach provided that the selection of candidates for the positions of judges is carried out primarily on the basis of an assessment of their professional qualities and merits by an independent commission, without taking into account the candidate's political affiliation.

Over time, the Missouri Plan became a common practice in the US. Since its introduction in Missouri, it has served as a national model for the selection of judges and has been adopted in more than 30 other states [26].

Furthermore, the activity of other types of selection commissions – in particular, those that evaluate the work of acting judges – began to be implemented much later. For example, relevant changes were made to the Arizona state constitution in 1992 [31]. In any case, the approach that involves using two independent institutions – the commission for evaluating candidates for the post of judge and the commission for evaluating the performance of judges – to form an effective and professional judicial corps has proven to be effective in many US states [27, p. 9].

The concept of double evaluation – at the stage of selecting candidates for the post of judge and during the performance of the judge's duties – was developed by a former

member of the US Supreme Court, Justice Sandra D. O'Connor and the Institute for the Advancement of the American Legal System (IAALS), which formed a new comprehensive approach to organizing the selection of judges, which became known under the name the O'Connor Plan [27, p. 1].

The O'Connor Plan consisted of four stages in the selection of judges. At its core, it contained the basic ideas of the Missouri Plan, and expanded and supplemented the general procedure for the formation of the judicial corps with new organizational aspects. In the first stage, judicial nominating commissions were formed. The second stage provided for the appointment of a candidate selected by the nomination commission for the position of judge by the decision of the state governor or another official (gubernatorial appointment). The third stage provided for periodic evaluation of judges' activities (judicial performance evaluation). The final fourth stage provided for the holding of elections among the residents of the relevant administrative-territorial unit for the possibility of continuing the stay of certain acting judges in their positions (retention elections).

This is the general structure of the O'Connor plan. It proposes to use additional external control at each stage to ensure an increase in the level of accountability of judges to society.

Let us examine in more detail the basic principles used to form the composition of nomination commissions. According to the O'Connor plan, nomination commissions are formed using six principles.

The first principle defines the general requirements regarding the legislative level at which it is necessary to regulate the activities of nomination commissions. It is proposed that such regulation occur at the level of the state constitution. The purpose of this requirement is that the constitutional basis for regulating these relations will guarantee the stability of the process.

The second principle states that the nomination commissions of judges are formed on the basis of proposals received from various bodies. The aim is to avoid the possibility of creating «professional monopolies» and a «closed society». In other words, a nomination commission should not be formed only on the basis of proposals from one institution or from one professional community. Otherwise, there is a high probability of loss of objectivity in the further activities of such a nomination commission.

The third principle stipulates that the majority in the nomination commission of judges should not be lawyers, but citizens who have different (different from lawyers) professional educations and personal experiences. This approach is also aimed at reducing the role of any one professional community in the selection of judges and at increasing the role of independent representatives of the commissions, who in a broad sense could be considered representatives of the public.

In practice, however, it is not always possible to strictly follow the recommendations regarding the numerical superiority of the public component in the nomination commission of judges. Thus, variations in the composition of such commissions arise

in different states. Instead, in general, the stated goals of reasonable representational parity are aimed at in many states.

For example, in the state of Alaska, there is an Alaska Judicial Council to screen judicial candidates and nominate the most qualified. The Council consists of seven members, three of whom are attorneys appointed by the Alaska Bar Association. The other three members of the Council cannot be attorneys or lawyers, ; they are citizens who are appointed by the governor of the state after approval by a majority of representatives of the relevant state legislative body (Alaska State Legislature). The seventh member is the chairman of the State Supreme Court [32]. The balance between professional representatives and other public representatives is generally observed. However, the principle of superiority of the public component over the judicial part of the commission members and the part representing the professional legal environment is not fully implemented in this state.

Another example is the state of Colorado. This state also has nominating commissions for the selection and preparation of appropriate recommendations for candidates for the positions of district court judges. These commissions consist of 7 seven members, who are represented by specialists in legal areas (3 three persons) and representatives from the non-legal sphere (4 four persons). Thus, in these commissions, the numerical advantage belongs to representatives of non-legal specialties, which aligns with the concept of the superiority of the public component in the composition of commissions. It is interesting that there are no strict requirements regarding the inclusion of representatives from the judiciary in the nomination commissions.

It is also worth noting that according to the O'Connor plan, the nomination commissions of judges should be formed by taking into account not only professional diversity, but also the political, ideological and demographic balance. The racial, gender, and geographic diversity of commission members should also be encouraged. A similar approach of equal rights and equal opportunities should also be used in Ukraine.

The fourth principle enshrined in the O'Connor plan provides for the mandatory training of commission members before starting their duties. This approach is extremely rational, because the activity of the commission has its own regulations, while appropriate training and education reduce the potential for errors in the work of new members.This practice can also be adopted in the Ukrainian, in particular, in the work of the Public Integrity Council. Although the Council is an independent auxiliary body of the High Qualification Commission of Judges of Ukraine, its members can also undergo appropriate training and become acquainted with the peculiarities of the work of the High Qualification Commission of Judges of Ukraine.

The fifth principle of the O'Connor plan contains requirements for availability of information about the work of the nomination commission while maintaining the necessary level of confidentiality.

The sixth and final principle provides for the change of commission members. According to this principle, the rotation takes place partially, so that the new members

of the commission can receive help from the part of the commission that has not been changed. This ensures stability in the work of the nomination committee and helps new members to familiarize themselves with the selection procedures more quickly.

The O'Connor plan, in its entirety, is applied in only seven states (Arizona, Colorado, New Mexico, Utah, Alaska, Missouri and Tennessee) [27, p. 9]. Along with this, the O'Connor plan confirms its effectiveness.

To further emphasize the role played by the public in the procedures for selecting judges in the US and to compare the work of the two aforementioned commissions (the commission for selecting candidates for the positions of judges and the commission for evaluating the performance of judges), it is advisable to briefly illustrate the features of the staffing of the bodies that evaluate the performance of current judges and help to maintain a professional corps of judges.We are talking about evaluation commissions for acting judges and their the principles of multilateral representation. These commissions, as noted above, are also part of the O'Connor plan and are used in some US states.

For example, in the state of Arizona, the Commission on Judicial Performance Review functions to evaluates the performance of acting judges. The Commission was created in accordance with the provisions of the Arizona's Constitution to conduct periodic inspections of judges. It normally consists of 34 persons, most of whom are members of the public, while the others are lawyers and judges. In particular, at the time of the research (end of 2021), the quantitative composition of the commission Commission was 32 people. The balance between the judicial community, the legal community and the public environment was as follows: seven members were judges of appeal courts and courts of first instance, five were lawyers and 20 were representatives of the public [31]. As a tool of public control, the Judicial Review Commission helps to successfully implement the functions of staffing the judicial corps accountable to society.

Thus, a significant number of states in the US try to exercise public control over the activities of judges. The American judge William Duffey in his materials for the international summit «Justice: Protection of Democracy», analysed the issue of interaction between the government and society, and noted that, of the three branches of government, only two are subordinate to society; while the third – the judicial branch – is not accountable to the public [33]. On the other hand, as this research has shown, such a thesis is not entirely correct. Furthermore, in some states, the desire to expand democratic control over the activities of judges is growing.

CONCLUSIONS

The democratization of judicial power should become an integral part of the development of judicial systems of any democratic country. Ukraine should not be an exception in this aspiration. The analysis of organizational models of public participation in the work of judicial selection commissions showed, that the level of

public trust in the judiciary has a positive correlation with the level of involvement of public representatives in the procedures for selecting judges and in the activities of such commissions.

On the other hand, the study helps to refute the widespread and recently popular idea that the maximum independence of the judiciary and its non-accountability to any state or public institutions should be guaranteed. Closed, isolated systems, even in the biological world, are doomed to die if they do not evolve under the influence of external factors. We agree with the thesis that «a judicial system without any democratic control, as a state within a state, is unacceptable» [6, par 4]. The reasoning above was confirmed by the low quality of Ukrainian justice and the sometimes voluntarist behaviour of representatives of the judiciary.

In addition the effective participation of society in the formation of the judiciary is not necessarily limited to the direct election of judges, although this practice had already been used in Ukraine before. The practice of electing judges continues to be used in some European countries, in particular in Switzerland. Society can also be involved by including representatives of the people in the composition of bodies or commissions that carry out the selection of candidates for the position of judges and the bodies that evaluate of the activities of acting judges.

The following important conclusions, based on the results of the research, will help in understanding certain global trends observed in this area.

First, some European countries consider it completely justified and democratic to form commissions that select candidates for judicial positions not only from representatives of the judicial branch of power, but also from other specialists from the extra-judicial system to be completely justified and democratic.

The composition of such commissions is also not limited to legal specialists, but also includes representatives of other professions, even such unexpected professions as theologians, and film directors, etc. The main idea in this approach is to achieve the maximum pluralism of opinions – pluralism of profession, pluralism of experience and pluralism of mentality.

Second, many states in the US, as well as some European countries, also prefer mixed representation in commissions that select judges. This again strengthens the belief in the correctness of the approach, according to which the participation of representatives of civil society and the professional environment minimizes the risks of the formation of closed corporate systems. Systems that reach such a level of autonomy that any intervention from the outside, even if it is completely justified and necessary to improve the quality of work of the judicial system, is perceived as a real threat to its existence.

Third, some US states take a more democratic approach, in which the quantitative advantage in the composition of commissions for the selection of candidates for the position of judges belongs to representatives of the public sector. In Europe, in contrast, there is still a strong trend towards strengthening judicial autonomy. Similar features in the approaches to the formation of bodies that carry out the selection and evaluation

of judges, that is characteristic for the respective US states, have a more positive effect on the level of objectivity of the selection of judges and their evaluation, and on the level of trust in such a selection and evaluation, primarily by society. Such development directions must be chosen for Ukraine as well.

The experience of the US shows, that the principles of the formation of selection commissions are also an important part of the system of the selection of judges. Such principles can increase not only the quality of persons in the judicial corps, but also the quality of the composition of the commissions themselves and their expertise. These are, of course, interrelated processes.

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