

E-ISSN: 2360 – 6754; ISSN-L: 2360 – 6754

# European Journal of Law and Public Administration

2018, Volume 5, Issue 2, pp. 115 -127

<https://doi.org/10.18662/eljpa/47>

**REFORM OF THE COMPETITION PROCEDURE FOR  
JUDGES IN UKRAINE**

*Oksana SHCHERBANYUK*

**Covered in:**

**CEEOL, Ideas RePeC, EconPapers, Socionet,  
HeinOnline**

---

**Published by:**

**Lumen Publishing House**

**On behalf of:**

**STEFAN CEL MARE UNIVERSITY FROM SUCEAVA,  
FACULTY OF LAW AND ADMINISTRATIVE SCIENCES,  
DEPARTMENT OF LAW AND ADMINISTRATIVE  
SCIENCES**

# REFORM OF THE COMPETITION PROCEDURE FOR JUDGES IN UKRAINE

Oksana SHCHERBANYUK<sup>1</sup>

## Abstract

*The article is devoted to the problems of constitutional implementation of the competitive selection of judges. The practice of conducting competitive selection of judges is investigated and the necessity to improve its normative-legal support, in particular, the definition of the principles of conducting the competition and specific criteria for determining professional ethics and integrity of a candidate for a judge's position, is urgent. The relevance of the study of the problem of constitutional implementation of the competitive selection of judges is due to the aspirations of Ukraine through constitutional, legal and judicial -legal reforms to overcome the critical attitude to the judiciary, justice, judicial protection the rights and freedoms of the individual and to restore public confidence in the court.*

*The purpose of the article is to study the problems of constitutional implementation of the competitive selection of judges, identify shortcomings, gaps in the provisions of the law and search for solutions to this issue.*

*It is established that the legal mechanism of selection of candidates is intended to provide an objective assessment of not only their professional but also personal and moral qualities. The practice of conducting competitive selection of judges and the necessity to improve its normative and legal support, in particular, the definition of the principles of conducting the competition and the specific criteria for determining the professional ethics and integrity of a candidate for a judge position, is being investigated.*

---

1 Shcherbanyuk Oksana: Doctor of Law, Associate Professor Head of the Department of Justice, Chernivtsi National University, Chernivtsi, Ukraine, oksanashcherbanyuk7@gmail.com, +380509983936.

**Keywords:**

*Judicial reform, competitive selection of judges, competition, candidate for a position of judge, competition for the post of judge of the Constitutional Court of Ukraine.*

**Introduction**

Actuality of the study of the problem of constitutional implementation of the competitive selection of judges is conditioned by the aspiration of Ukraine to carry through constitutional-legal and judicial-legal reforms to overcome the critical attitude to the judiciary, justice, judicial protection of the rights and freedoms of the individual, and restore society's trust in the court. "The state, for its part, - as AO correctly observes. Selivanov has no tools other than the judicial system, including the Constitutional Court of Ukraine, so that, through the right to justice, gain confidence in people's real assessments of all administrative, social and economic measures with which everyday people associate the welfare and protection of their rights " [1: 4]. This is due to the relevance of the study of the constitutional implementation of new procedures for the selection of judges of courts of general jurisdiction and the Constitutional Court of Ukraine.

**Theoretical background**

Problems of the selection of judges were the subject of V.F. Boyko, V.D. Brintseva, V.V. Gorodovenko, Yu.M. Groshevogo, V.V. Dependent, VT Malyarenko, I.E. Marochkin, LM Moskvich, IV Nazarova, O.M. Ovcharenko, O.V. Petryshina, A.O. Selivanova and others. With the diversity in our legal literature of works on the status of judges, the procedure for the selection of candidates, initiated by the constitutional reform in the area of justice in 2016, is new for Ukraine and needs to be analyzed.

### **Argument of the paper**

Modern Ukrainian society and the state are at the stage of a deep awareness of the rights and freedoms of man and citizen, and the ideology of human rights determines the reevaluation of the activities of all state institutions and the formation of a state policy solely on the basis of human-centeredness. The protection of human rights in every European country is an important indicator of its integration into the European legal culture. For Ukraine, human rights protection is a key area of state policy, which has led to the constitutional and legal reform in the area of justice to restore confidence in the judiciary. One of the short stories was the introduction of a public procedure for the selection of judges for the selection of competent, virtuous and high-moral lawyers. It is well-known that the constitutional status of judges is to determine the requirements regarding the business and personal qualities, independence, immutability, immunity and incompatibility of judges. Appointment to a judge's office must be in line with the requirements of apoliticality, so that the procedure for selecting and appointing judges to positions does not give rise to a judge's dependence on the institutions responsible for the selection of judges [2: 313]. In practice, some foreign countries (Italy, Poland, etc.) are subject to requirements regarding the moral or personal qualities of the applicant, they are formulated in the law and acquired legal value.

The legal mechanism for selecting candidates for a judge's role is to provide an objective assessment of not only their professional but also personal and moral qualities. VV In his work "Problems of the Establishment of an Independent Judicial Power", Gorovenko expressed his opinion on the necessity of introducing new regulatory requirements aimed at preventing incidents of access to judicial positions of persons with a low level of moral and personal qualities, as well as violating the norms of judicial ethics [3: 159]. On June 2, 2016, "On the Constitutional Court of Ukraine" introduced a constitutional procedure for the selection of candidates for a judge in Ukraine on July 13, 2017, introducing amendments to the Constitution of Ukraine in the area of justice, the adoption of the Laws of Ukraine "On the Judiciary and the Status of Judges". Thus, according to part two of Article 128 of the Constitution of Ukraine, "appointment to a post of judge is carried out in competition, except in cases specified by law" [4: 51]. The

competition for the vacancy of a judge shall be conducted in accordance with the law and the provision for conducting the competition. The purpose of the competition is to select persons capable of professionally performing official duties. In addition, the appointment in the competition allows to objectively assess the level of vocational training of candidates for filling vacancies, creates a competitive environment, since the participants compete for a vacancy, as well as stimulates, promotes the acquisition of the necessary knowledge. Conduct of the competition is carried out in accordance with the requirements established in the procedure established by the law for the professional competence of a candidate for a vacant position on the basis of evaluation of his personal achievements, knowledge, skills, skills, moral qualities.

The current legislation does not define the concept of "competition", and science literature, on the contrary, contains different points of view on this subject. The Academic Explanatory Dictionary of the Ukrainian language defines a "competition" as a competition that allows you to identify the most worthy of its participants or the best of what is sent for review [5].

Great encyclopedic legal dictionary edited by Yu.S. Shemshuchenko defines "competition" as a competition aimed at identifying the best of the participants (candidates, candidates, applicants) [6: 378]. According to V.M. Zelensky, "the contest is a competition conducted in compliance with a certain order in cases provided for by law, in order to determine the best way to occupy a vacant position among the persons taking part in it" [7: 504].

In accordance with part 12 of Article 79 of the Law of Ukraine "On the Judiciary and the Status of Judges", "a competition for occupying a vacant position of a judge is to determine the participant of the competition, which has a higher position according to the rating" [8]. The criteria of qualification evaluation are competence (professional, personal, social, etc.); professional ethics; virtue. As LM notes Moskvich, the content of the legal personality of a judge is due to the specific legal status of the carrier of the judiciary and is recognized by the state through the legal norms of the suitability of the judge to the requirements of his professional activities [9: 12]. Despite the fact that the Ukrainian legislature brought the requirement for the functioning of the bodies that are selecting candidates for the position of a judge in line

with international standards, the issue of the actual existence of the two bodies that carry out the selection procedure for candidates for the position of a judge remains unresolved [10: 559].

### **Arguments to support the thesis**

According to L.V. Skomorokhi, persons selected for judicial positions, must have high moral qualities and abilities, as well as appropriate training and qualifications in the field of law. Any method of selection of judges must be guaranteed from the appointment of judges for unjustified reasons [11]. This is confirmed by international standards in the field of justice and court status. Thus, in accordance with Article 10 of the Basic Principles on the Independence of the Judiciary, approved by General Assembly resolutions 40/32 and 40/146 of 29 October and 13 November 1985 [12], persons selected for judicial positions should have high moral standards and abilities, as well as relevant qualifications in the field of law. In the selection of judges, there should be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property status, etc.; however, the requirement that a candidate for a legal position be a citizen of the country concerned should not be regarded as discriminatory. Congress recommended these principles for use within national, regional and interregional activities, taking into account the political, economic, social and cultural conditions and traditions of each country, and the General Assembly invited Governments to adhere to them and take into account their national legislation and practices.

In accordance with the European Charter on the Status of Judges [13], the rules for the selection and appointment of judges by an independent body or commission require selection on the basis of the ability of candidates to freely and impartially assess cases dealt with by them and apply the law respect for human dignity. A candidate can not be denied a post solely on the grounds of sex, ethnic or social origin, or on the basis of his philosophical or political views or religious beliefs. The law should provide for conditions that will be guaranteed by adhering to the requirements for educational qualifications and the

availability of previous experience of appointment to the post of those persons who are capable of performing judicial duties.

In this regard, it should be noted that the Venice Commission for Democracy through Law in paragraph 37 of the Opinion on the Law of Ukraine "On the Judiciary and Status of Judges" of June 30, 2017 [14], reminding Ukraine of its obligations, drew attention to the fact that the judges concerned would be judged by criteria of competence, professional ethics or integrity. The above criteria are too general; they can be difficult to evaluate in practice. For example, the rules of professional ethics, given their nature and traditional wording in general and fuzzy terms, should not be used directly as grounds for imposing sanctions, and especially when it may lead to dismissal [15: 25-8]. Certainly, those who claim to hold positions in higher courts are subject to increased requirements. The requirement for additional legal education in special schools of judges, sometimes in special schools focused on the training of judicial system leaders, magistracy academies, judicial colleges, schools of judges (France, USA, Peru) is quite common. The legislation of most countries puts moral and ethical characteristics in line with the candidate's professional qualities: his conduct in everyday life must be higher than any reprimand (paragraph 4 of the Canon of Judicial Ethics in the United States [16]). This emphasizes the special significance of the authority of the court for the effective exercise of its function of social control in society.

### **Arguments to argue the thesis**

The Law of Ukraine "On the Judiciary and Status of Judges" (Part 16 of Article 79) does not define the principles of conducting the competition, but provides criteria for determining the winners of the competition for the employment of vacant positions in general courts, and the procedure for holding a competition for a judge of the Supreme Anticorruption Court is determined by a separate law, which is registered in the Verkhovna Rada of Ukraine [17]. Thus, according to Article 8 of the bill, a competition for the post of judge of the Supreme Anticorruption Court is carried out in accordance with the procedure

established by the Constitution of Ukraine and the Law of Ukraine "On the Judiciary and Status of Judges", taking into account peculiarities. First of all, it concerns the compliance with the requirements of the persons who can not hold the position of judges (the so-called penalty of iniquity) of the Anticorruption court, namely: who worked (served) during the ten years prior to the appointment in the organs of the prosecutor's office, the internal affairs of Ukraine, the National Police of Ukraine, The State Bureau of Investigations, other law enforcement agencies (law enforcement agencies), the tax police, the Security Service of Ukraine, customs authorities, the National Anti-Corruption Bureau of Ukraine, the National Agency for Prevention the National Agency of Ukraine for the Detection, Investigation and Asset Management of Corruption and Other Crimes, the Antimonopoly Committee of Ukraine, the Accounting Chamber, the central executive body, which ensures the formation and implementation of the state tax and customs policy, the central executive body, which implements the state policy in the sphere of prevention and counteraction to the legalization (laundering) of the proceeds from crime or financing of terrorism; held political positions, had a representative mandate; who during the last five years were part of the governing bodies of a political party, committed corruption or corruption-related offenses, etc. [17].

In contrast, from the competitive selection of judges of general courts, with the purpose of assisting the High Qualifications Commission of Judges of Ukraine in establishing for the purposes of qualification an assessment of the suitability of candidates for positions of judges of the Supreme Anticorruption Court for criteria of professional ethics and integrity, including on the legality of sources of origin of property, candidate or family members of declared income, observance of norms of ethical behavior, in particular in matters of morality, integrity, integrity, conformity of the method the candidate's status as a candidate, as well as the criteria for having significant experience in international law enforcement agencies working in international intergovernmental organizations or international judicial institutions abroad in the area of law enforcement in the field of countering and fighting corruption and possessing knowledge and skills in applying modern international anti-corruption standards and best practices in the world. the field of counteraction and fight against corruption, the practice of the European Court of Human Rights, the



Public Council of international experts is established. This body has the right to make the conclusions on which the High Qualifications Commission of Judges of Ukraine may decide to confirm the ability of such a candidate to serve as a judge in the Supreme Anticorruption Court only if such decision is supported by at least eleven of its members. After analyzing the provisions of the draft law, in our opinion, the law should determine the principles of conducting the competition and the criteria for having a significant experience of implementation in international intergovernmental organizations and defining the concept of "significant experience". Who should he confirm and how to differentiate from the concept of "experience"?

International observers, rating the conduct of the contest to the Supreme Court, called the competition an unprecedented openness and pointed out that there is nowhere in the world such transparency in the selection of judges and public discussion of candidates. Indeed, in most European and other developed countries, the selection of candidates to the Supreme Court is a purely political process and is based on a rather non-transparent decision-making procedure at the level of government officials, "says the coordinator of the EU project" Supporting reforms in the field of justice in Ukraine ", Dovidas Vitkauskas According to him, often before the final approval of the candidature, the parliament is happy with the candidates for a real "passionate interrogation" that is far from the transparency and accountability of the whole process, which Ukraine seeks to secure [18].

### **Dismantling the arguments against**

A special role in the competition is played by the Public Council of Integrity, which, by examining the dossier and the declarations of candidates, public registries, after examining the information in open sources, draw conclusions on the suitability of a candidate for a position of judge for the criteria of integrity and professional ethics. The status of the Public Council of Integrity, which consists of representatives of public organizations, is defined in Article 87 of the Law of Ukraine "On the Judiciary and Status of Judges" [8]. In its activities, the Public

Council for Integrity is guided by the Code of Judicial Ethics, the Bangalore Principles of Judicial Conduct, the Regulations on the Procedure and Methodology of Qualification Establishment, approved by the decision of the High Qualifications Commission of Judges of Ukraine No. 143 / zp-16 of November 3, 2016.

It should be noted that during the competition to the Supreme Court the panel of the High Qualifications Commission of Judges agreed with the negative conclusions of the Public Council of Integrity regarding fourteen candidates to the Supreme Court. To date, there are already five decisions of the Supreme Court refusing to sue the High Qualifications Commission of judges, a third person - the Public Council of Integrity, the recognition of unlawful and abolition of the decision and the obligation to take certain actions [19, 20, 21]. Thus, the Supreme Court in its decision noted that the controversial decision was taken by the defendant collectively on the internal convictions of the members of the High Qualifications Commission of Judges in compliance with the competition procedure in accordance with the requirements of the Constitution and laws of Ukraine, Regulations on the procedure and methodology of qualification evaluation, indicators of compliance with the criteria of qualification assessment and means their establishment, approved by the Commission on November 3, 2016, No. 143 / zp-16. A systematic analysis of the above normative legal acts provided grounds for the Supreme Court to conclude that the evaluation of the criteria of professional ethics and integrity lies precisely on the members of the High Qualifications Commission of judges and is based on the principles of equality and ownership of the decision, but at the same time it is determined that the further participation in the competition The candidate shall submit a proposal if such a decision is supported by at least eleven its members [22].

The amendments to the Fundamental Law of Ukraine concerning the functions and powers of the Constitutional Court of Ukraine led to the updating of its legal and regulatory framework, in particular, on July 13, 2017, the Law of Ukraine "On the Constitutional Court of Ukraine" [23] was adopted. In accordance with Part 3 of Article 148 of the Constitution of Ukraine, "the selection of candidates for the position of a judge of the Constitutional Court of Ukraine is carried out on a competitive basis in accordance with the procedure established by law. A judge of the Constitutional Court of Ukraine may

be a citizen of Ukraine who has a state language, has attained forty years on the date of his appointment, has a higher legal education and has completed professional experience in the field of law for at least fifteen years, has high moral qualities and is a lawyer with a recognized level of competence » [4: 61]. Article 12 of the Law of Ukraine "On the Constitutional Court of Ukraine" [23] "Competitive bases for selecting candidates for the position of a judge of the Constitutional Court" does not define the concept of "competition", the principles of its conduct, and establishes the procedure for selection by the Competition Commission under the President of Ukraine, the Verkhovna Rada Committee Ukraine on Legal Policy and Justice, and the Council of Judges of Ukraine.

Thus, the law defines three tender procedures of bodies that appoint the judges of the Constitutional Court of Ukraine. Thus, the selection of candidates for a position of a judge of the Constitutional Court of Ukraine on competitive basis regarding the persons appointed by the President of Ukraine is carried out by the Competition Commission, which was formed by the Decree of the President of Ukraine of October 4, 2017, No. 306 [24]. Protocol No. 1 of the Commission's meeting of October 18, 2017, approved the Terms of Contest for the Employment of Vacant Positions of Judges of the Constitutional Court of Ukraine [25].

Proceeding from the foregoing, although the Constitution of Ukraine and the Law of Ukraine "On the Constitutional Court of Ukraine" determine the competitive procedure for selecting candidates for the position of a judge of the Constitutional Court of Ukraine, at the same time attention is paid to the inconsistency of the legislator in ensuring equal opportunities for competitive selection by authorized agents.

It should also be noted that the criteria for determining the high moral qualities of the candidate and the high level of competence of the lawyer in the contest process remain uncertain. In this regard, the position of O. Vodyannikov (National Legal Advisor, Head of the Rule of Law Unit of the OSCE Project Co-ordinator in Ukraine), which proposes to comply with the constitutional requirements for determining the high moral qualities and the recognized level of competence to introduce such measures, should be taken into consideration. [26]. Dividing the position of O. Vodyannikov, we see it

necessary to reconcile the provisions of Article 2084 of the Law of Ukraine "On the Rules of Procedure of the Verkhovna Rada of Ukraine" with Article 12 of the Law of Ukraine "On the Constitutional Court of Ukraine". In addition, in the Law of Ukraine "On the Constitutional Court of Ukraine" it is advisable to determine the principles of conducting competitive selection, which will enable to prevent abuse and ensure a transparent selection of lawyers with a recognized level of competence and high moral qualities. Such principles include: ensuring equal access, political impartiality, legality, public trust, non-discrimination, transparency, integrity, effective and fair selection process.

### **Conclusions**

Therefore, for a genuine selection of candidates, it is necessary to introduce specific criteria for determining the professional ethics and integrity of a candidate for a judge. As A.A. Butyrsky, the procedure for conducting a contest to the Supreme Court is imperfect and needs to be changed, which should stipulate the advantage of a professional criterion in determining the winners of the competition. At the same time, the study of the dossier and the interview with the candidate should begin first, and only then the exam, the results of which should determine the winners of the competition [23: 13].

Thus, the unconditional significance of the competitive selection procedure for judges is to find the most worthy candidates for judicial positions. If the right to participate in the competition is fixed by the legislator, the state is obliged to provide guarantees of its fair realization with the system of special anti-corruption and anti-protection measures against abuses. At the same time, the competitive procedure for the appointment of judges is not necessary as a measure that can be easily manipulated, but as a permanent and specially protected society, a guarantee of professional recruitment.

### **References**

- [1]. Selivanov AO. The Judiciary Must Undergo a Reform of Its Authority and Trust. *Voice of Ukraine*. 2017 Nov 07; 6711 (206).

- [2]. Mishin NV, Mikhalova VO, editors. Constitutional Law of Foreign Countries. Vol. 1: General Part. Dnipropetrovsk: T.K. Middle School; 2014.
- [3]. Gorovenko VV. Problems of the Establishment of an Independent Judiciary in Ukraine. Kiev: Phoenix; 2007.
- [4]. The Constitution of Ukraine as of 2017 Sep 01, Kharkiv: Law; 2017.
- [5]. Academic Explanatory Dictionary of the Ukrainian Language. Available from: <http://sum.in.ua/>.
- [6]. Shemshuchenko YS, editor. Large Encyclopedic Legal Dictionary Kiev: Yurid; 2007.
- [7]. Zelensky VM. Competition in the System of Legal Facts: The Grounds for the Emergence of Labor Relations. Customs. Vol. 96 (6): 502-506.
- [8]. The Law of Ukraine on the Judiciary and Status of Judges dated 2016 Jun 02. Available from: <http://zakon0.rada.gov.ua/laws/show/1402-19/print>
- [9]. Moskvich LM. Organizational and Legal Problems of the Status of Judges. Kharkiv: National Law Academy of Ukraine named after Yaroslav the Wise; 2003.
- [10]. Marochkin IE, Moskvich LM, Nazarov IV et al. Judiciary: monograph. Marochkin IE, editor: Law; 2015.
- [11]. Skomoroha LV. Competitive Selection of Candidates for the Position of Judges, International Experience and National Realities. Available from: <http://www.vru.gov.ua/Docs/a160909.pdf>.
- [12]. United Nations General Assembly Resolutions No. 40/32 of 1985 Nov 29 and No. 40/146 of 1985 Dec 13 on the basic principles of the independence of the judiciary. Available from: [http://zakon1.rada.gov.ua/laws/show/995\\_201](http://zakon1.rada.gov.ua/laws/show/995_201).
- [13]. European Charter on the Status of Judges 1998 Jul 10. Available from: [http://zakon3.rada.gov.ua/laws/show/994\\_236](http://zakon3.rada.gov.ua/laws/show/994_236).
- [14]. Conclusion of the Venice Commission on the Law of Ukraine on the Judiciary and Status of Judges of 2017 Jun 30. Available from: [https://vkksu.gov.ua/userfiles/doc/perelik-dokumentiv/visnovok\\_osce.pdf](https://vkksu.gov.ua/userfiles/doc/perelik-dokumentiv/visnovok_osce.pdf).
- [15]. Joint O.S.C.E./O.D.I.H.R. Venice Commission Conclusion on the Draft Amendments to the Regulatory Framework for Disciplinary Responsibility of Judges in the Kyrgyz Republic of

- 2014 Jun 16. Available from:  
<http://www.legislationline.org/documents/id/19099>
- [16]. United States Courts. Canon of U.S. Court Ethics. Available from:  
<http://www.uscourts.gov/>.
- [17]. Draft Law on the Supreme Court Anti-Corruption No. 7440 of 2017  
Dec 22. Available from:  
[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=63218](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=63218).
- [18]. "Purgatory" of the Supreme Court: What Came Out of the  
Country's First National Contest for Judges. Available from:  
<https://nv.ua/ukr/ukraine/events/chistolishche-verhovnogo-sudu-shcho-vijshlo-z-pershogo-v-istoriji-krajini-konkursu-suddiv-1084418.html>.
- [19]. United States Supreme Court decision of 2018 Feb 01. Available  
from: <http://reyestr.court.gov.ua/Review/72029066>.
- [20]. United States Supreme Court decision of 2018 May 02. Available  
from: <http://reyestr.court.gov.ua/Review/72064913>.
- [21]. United States Supreme Court decision of 2018 Feb 06. Available  
from: <http://reyestr.court.gov.ua/Review/72065254>.
- [22]. United States Supreme Court decision of 2018 Feb 01. Available  
from: <http://reyestr.court.gov.ua/Review/72029066>.
- [23]. The Law of Ukraine on the Constitutional Court of Ukraine of  
2017 Jul 13. Available from:  
<http://zakon3.rada.gov.ua/laws/show/2136-19/print>.
- [24]. Decree of the President of Ukraine No. 306 of 2017 Oct 04.  
Available from: [//www.president.gov.ua/documents/3062017-22754](http://www.president.gov.ua/documents/3062017-22754).
- [25]. Terms of holding a competition for vacant positions of judges of  
the Constitutional Court of Ukraine, approved by the minutes of  
the meeting of the Commission from 2017 Oct 18. Available  
from: <http://www.president.gov.ua/news/umovi-provedennya-konkursu-na-zajnyattya-vakantnih-posad-sud-44022>
- [26]. Vodyannikov O. Competition to the Constitutional Court from  
the Judiciary: An Equation with Six Unknowns. Available from:  
[https://ukr.lb.ua/blog/oleksandr\\_vodennikov/381760\\_konkurs\\_konstitutsijnogo\\_sudu\\_vid.html](https://ukr.lb.ua/blog/oleksandr_vodennikov/381760_konkurs_konstitutsijnogo_sudu_vid.html)