

# **International participation in selection of anticorruption judges and the sovereignty of Ukraine: legal aspects (brief)**

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## **Background**

On December 22, 2017 the President of Ukraine submitted for consideration of the parliament draft law No7440 On the high anticorruption court. In contrary to explicit recommendation of the Venice Commission, the draft law offered internationally nominated experts only an advisory role in selection of anticorruption judges.

Authorities claim that direct foreign participation in the selection of judges endangers Ukrainian sovereignty and contradicts the Constitution of Ukraine. Below is a legal assessment of these claims with regards to Ukrainian legislation, opinions of the Constitution court of Ukraine as well as the practice of the European Court of Human Rights and legal doctrine.

## **General framework**

Neither the Constitution of Ukraine nor opinions of the Constitutional Court of Ukraine prohibit foreign participation in selection of judges, as long as it is introduced by the law. The same approach is used in modern legal concept of sovereignty.

## **Ukrainian Constitution on the selection of judges and the principle of sovereignty**

Article 128 of the Constitution of Ukraine requires judges to be appointed on a competitive basis by the President following recommendations of the High Council of Judges.

The Constitution does not provide any further regulation on selection of judges, namely does not define which body should organize or have a role in such a competition. This, according to the Constitution, shall be regulated by ordinary law. Therefore, constitutionally acceptable is any procedure of selection of judges, that is introduced by law, involves open competition and leads to the High Council of Justice filing the list of the candidates for the President for appointment.

Articles 1 and 2 of the Constitution define Ukraine as a sovereign independent state with its sovereignty covering all its territory. The Constitution does not provide any other details of the principle of sovereignty.

## **Principle of sovereignty in Ukrainian legislation**

With the law “On direction of internal and external policies” Ukraine adopted the aim of acquiring membership in the European Union (part 2 article 11 of the law). Although membership in the EU also requires the country to recognize supreme authority of European institutions and legislation over national ones, this provision has never been legally challenged as contradicting the principle of sovereignty of Ukraine. On the contrary, legal establishment of EU-membership aspiration of Ukraine shall be interpreted as accepting possibility of supranational involvement in national matters and it being in complying with the principle of sovereignty of Ukraine.

### **Principle of sovereignty in the opinions of the Constitutional Court of Ukraine**

The Constitutional Court of Ukraine did not issue any opinions specifically regarding the principle of sovereignty. However, this issue was touched upon in number of other opinions.

In Opinion of July 11, 2001 [#1-35/2001](#) regarding possibility to ratify the Rome Statute, the Court emphasized that in case of recognizing any extra-national jurisdiction in judicial matters the principle of sovereignty is implemented through parliamentary decision-making on this issue (article 2.4 of the Opinion). Therefore, it is presumed that international involvement in judicial matters in Ukraine complies with the principle of sovereignty as long as such a decision is adopted by the parliament that, according to the Constitution, represents the people of Ukraine and implement sovereignty.

### **Principle of independent judiciary in the ruling of the European Court of Human Rights**

The European Court of Human Rights analyzes international participation in national judiciary with regards to underlying principle of independence of the judiciary. Namely, in the [case](#) of Maktouf and Damjanovic v. Bosnia and Herzegovina of 18.07.2013 the Court stated, that independence of the tribunal shall be assessed through the manner of appointment of its members, the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. Moreover, the Court confirmed that under these conditions involvement of international judges is permissible and is seen as “desire, inter alia, to reinforce the appearance of independence (of the court – ed.) and to restore public confidence in the domestic judicial system”.

### **Modern European legal doctrine of the principle of sovereignty**

In 2008 the Constitutional Court of the Czech Republic, while assessing the possibility for the country to join the Lisbon Treaty of the EU, also confirmed that decision of competent national body regarding international actions, results of which may be bounding for the country, is an act of sovereignty and may not be seen as a limitation of sovereignty. The Court also pointed out, that as long as the country preserves authority to review the scope of powers, transferred to supranational authority, the state’s sovereignty is not weakened.

### **International participation in selection of judges as recommended by the Venice Commission**

The Venice Commission recommended to envisage crucial participation of international donors in the body that would preselect anticorruption judges; this measure was offered as a temporary one, justified by the specific situation in Ukraine.

International participation in the selection of judges as recommended by the Venice Commission is subject

to approval by the competent national authorities at all stages:

- The role of international donors is limited to proposing a list of respected experts that fit legally established criteria for the members of the selection panel (“first filter”); competent national bodies shall have the authority to select experts from the list and appoint them on their own accord;
- Internationally nominated experts shall be involved only as a part of the “first filter”, that shall preselect candidates on the initial stage of competition. Another option may be to give an panel of international experts authority to veto candidates whose records raise concerns regarding integrity, proficiency and ethics; after such candidates are disqualified, the High Qualification Commission of Judges shall enjoy full authority to select candidates from the remaining pool and create a rating.
- After “first filter” panel with internationally nominated experts the list of candidates for anticorruption judges shall be further filtered and approved by two competent national bodies – the High Qualification Commission of Judges and the High Council of Justice. Both judicial councils shall preserve the authority to veto recommended candidates. Final decision on the appointment of judges has to be adopted by the President of Ukraine in accordance with the Constitution of Ukraine and relevant national legislation.

### **Conclusion:**

**Under abovementioned conditions, international participation in the selection of judges does not impose any decision on the sovereign national authorities and as such does not threaten sovereignty.**