

INDEPENDENCE OF CONSTITUTIONAL JUSTICE BODIES AS A PREREQUISITE FOR THE RULE OF LAW

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In terms of scope, the principle of independence is an interdisciplinary principle of the judiciary, which is enshrined in Articles 126 and 129 of the Constitution of Ukraine¹ and Articles 1, 6, 7, 48, 126, 128, 133 of the Law of Ukraine «On the Judiciary and the Status of Judges»² No. 1402-VIII of June 2, 2016, as well as in Articles 6 and 21 of the Convention on the Protection of Human Rights and Fundamental Freedoms³, ratified by Law No. 475/97-BP of July 17, 1997.

Article 149 of the Constitution of Ukraine is dedicated to establishing guarantees of independence and inviolability of judges of the Constitutional Court of Ukraine, and their specification and implementation procedures are contained in the Law of Ukraine «On the Constitutional Court of Ukraine» No. 2136-VIII of July 13, 2017 (hereinafter – the Law)⁴. In practice, the implementation of constitutional principles is ensured by guarantees, and guarantees by proper procedures.

According to Article 149 of the Constitution of Ukraine, the independence and inviolability of judges of the Constitutional Court of Ukraine are guaranteed by the Constitution and laws of Ukraine. It is prohibited to influence a judge of the Constitutional Court of Ukraine in any way. Without the consent of the Constitutional Court of Ukraine, a judge of the Constitutional Court of Ukraine may not be detained or kept in custody or under arrest until the court pronounces a guilty verdict, with the exception of

¹ Верховна Рада України (1996). Конституція України. Відомості Верховної Ради України (ВВР), 1996, № 30, ст. 141.

² Верховна Рада України (2016). Закон України «Про судоустрій і статус суддів» від 2 червня 2016 р. № 1402-VIII. Відомості Верховної Ради (ВВР), 2016, № 31, ст. 545.

³ Рада Європи (1950). Конвенція про захист прав людини і основоположних свобод. Конвенцію ратифіковано Законом № 475/97-ВР від 17.07.97. (Зі змінами та доповненнями, внесеними Протоколом № 11 від 11 травня 1994 року, Протоколом № 14 від 13 травня 2004 року). URL: https://zakon.rada.gov.ua/laws/show/995_004#Text.

⁴ Верховна Рада України (2017). Закон України «Про Конституційний Суд України» від 13 липня 2017 р. № 2136-VIII. Відомості Верховної Ради (ВВР), 2017, № 35, ст. 376.

the judge's detention during or immediately after committing a serious or particularly serious crime⁵.

A judge of the Constitutional Court of Ukraine cannot be held accountable for voting in connection with the adoption of decisions by the Court and the provision of conclusions by the Court, with the exception of committing a crime or a disciplinary offense. The state ensures the personal safety of the judge of the Constitutional Court of Ukraine and his family members.

The independence of the judiciary is undoubtedly an essential part of the principle of the rule of law and is designed to ensure that every person has the right to a fair trial, and therefore it is not a privilege for judges, but a guarantee of respect for human rights and basic freedoms, which ensures trust in justice system⁶.

According to Article 1 of the General (Universal) Charter of Judges (adopted on November 17, 1999, by the Central Council of the International Association of Judges in Taipei (Taiwan)), «judge independence is an important condition for an impartial judiciary that meets the requirements of the law». It is indivisible. Any institutions or authorities, both nationally and internationally, must respect, protect and safeguard this independence⁷.

The independence of a judge of the Constitutional Court of Ukraine contains both an institutional and a functional component. The first of them consists in the fact that the judge is not dependent on any of the branches of government or the President of Ukraine (even if they are appointed by them), and the second is that the judge is guided in the exercise of his powers, as established by Article 24 of the Law, only by the Constitution of Ukraine and the Law on the principles of the rule of law. And such a special component of the status of a judge of the Constitutional Court of Ukraine is related to the main tasks of the Constitutional Court of Ukraine – maintaining the balance of the separation of powers, preventing the usurpation of power, applying the mechanism of checks and balances, ensuring the rule of law, guaranteeing the rule of law, etc.

The independence of a judge of the Constitutional Court of Ukraine is ensured, including by a special procedure and grounds for termination of powers, dismissal of a Judge from office.

⁵ Верховна Рада України (1996). Конституція України. Відомості Верховної Ради України (ВВР), 1996, № 30, ст. 141.

⁶ Рада Європи (2010). Рекомендація CM/Rec (2010) 12 Комітету Міністрів Ради Європи державам-членам щодо суддів: незалежність, ефективність та обов'язки. Ухвалено Комітетом Міністрів Ради Європи 17 листопада 2010 р. на 1098 засіданні заступників міністрів. URL: [https://rm.coe.int/cmrec-2010-12-on-independence - efficiency-responsibilities-of-judges/16809f007d](https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilities-of-judges/16809f007d)

⁷ Central Council of the International Association of Judges (1999). The Universal Charter of the Judge. URL: <https://www.icj.org/wp-content/uploads/2014/03/IAJ-Universal-Charter-of-the-Judge-instruments-1989-eng.pdf>

Such a constitutional value as «judge independence» follows from the meaning of this concept and, at the same time, can be interpreted as a way of thinking, status and attitude towards others, in particular towards the executive branch of power, which is based on objective conditions or guarantees. Ways and means of ensuring the independence of judges are interconnected with the implementation of constitutional norms in real social relations.

Note that when forming the legal framework for the functioning of the judiciary and the status of judges in the United States, the founding fathers of the Constitution of the United States took into account the fact that a true separation of powers is impossible without an independent judicial branch of government, and the institutional independence of the judiciary, in turn, is impossible without the personal independence of the judges themselves. Thus, Alexander Hamilton, an American politician of the time of the revolution, one of the most outstanding thinkers of his time and George Washington's secretary during the Revolutionary War, actually predicted that any danger could come from the union of the judiciary with any other branch of government. In support of this thesis, he quoted Montesquieu, who claimed that «there is no freedom if the judicial power is not separated from the legislative and executive power.» Actually, Hamilton was one of those who most influenced the content of the American Constitution on September 17, 1787.

According to the first starting point of the Bangalore Principles of Judicial Conduct, independence of judges is a prerequisite for the rule of law and the main guarantee of a fair trial. Therefore, a judge must in every possible way support and demonstrate judicial independence, both at the personal and institutional level⁸.

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The independence of a judge of the Constitutional Court of Ukraine implies impartiality. A judge must not have connections, inclinations or biases that affect or may be perceived as affecting his ability to make an independent decision. The independence of a judge is a confirmation of the legal axiom «Nemo iudex in causa sua» («No one judges in his own case»). It is a principle of natural justice that no person can judge a case in which he has an interest. Moreover, the importance of this principle extends much further than the

⁸ Економічна та Соціальна Рада ООН (2006). Бангалорські принципи поведінки суддів від 19 травня 2006 року. Схвалено Резолюцією Економічної та Соціальної Ради ООН 27.07.2006 N 2006/23. URL: https://zakon.rada.gov.ua/laws/show/995_j67#Text

specific parties in any dispute, as society as a whole must trust the judicial system.

In addition, the status of a judge of the Constitutional Court of Ukraine is enhanced by guarantees of the Court's financial independence, which also correlates with funding and proper conditions for the judge's activities.

The body of constitutional jurisdiction based on its own legal positions is set out in a number of its decisions emphasizes that any pressure by representatives of the legislative and executive authorities on the judiciary is impossible, including during the consideration of cases, and interference in its activities with the aim of making certain decisions is also not allowed. The independence of the judiciary is one of the main principles of its effective activity, that is, any influence of the legislative and executive authorities is completely excluded⁹.

For comparison, the separation of power and independence in decision-making (decision independence) by judges of the US Supreme Court are based on the concepts of: judicial activism and judicial restraint. On the one hand, a judge can creatively interpret the texts of the Constitution and legislative acts, going beyond the scope of traditional interpretation, and on the other hand, in order to protect the legislative act, the court chooses preventive measures to limit the power of judges.

It should be noted that Ukraine is not the only country where only the body of constitutional justice is authorized to dismiss its member from his position in the manner and cases provided for by law. This cohort includes the Republic of Albania, the Republic of Bulgaria, the Federal Republic of Germany, the Republic of Latvia, the Portuguese Republic, Romania, the Swiss Confederation, the Republic of Turkey, and others. The Constitution of the Republic of Bulgaria, for example, provides that the inviolability of members of judicial bodies in the performance of official duties can be canceled at the request of one-fifth of the members of the Supreme Judicial Council (consisting of 25 members). In the Slovak Republic and the Republic of Armenia, the body that appointed the members of the Court renders a final decision based on the opinion of the Court. In the Republic of Finland, the State of Japan, the United States, and the Republic of Lithuania, a judge is removed from his position in a special order of impeachment.

Thus, the addition of Article 149-1 to the Constitution of Ukraine in accordance with Law¹⁰ No. 1401-VIII of June 2, 2016, became necessary foremost to establish the independence of the judiciary, in particular by

⁹ Конституційний Суд України (2004, 2013, 2018). Рішення № 19-рп/2004 від 1 грудня 2004 року; Рішення № 3-рп/2013 від 3 червня 2013 року; Рішення № 11-п/2018 від 4 грудня 2018 року.

¹⁰ Верховна Рада України (2016). Закон України «Про внесення змін до Конституції України (щодо правосуддя)». Відомості Верховної Ради (ВВР), 2016, № 28, ст. 532.

depoliticizing it, strengthening the judiciary's responsibility to society, and clearly delineating the grounds for dismissal from office and termination of the Judge's powers.

Without the existence of a complex of special legal guarantees (from the French *garantie* – «guarantee») of the activity of a judge of the Constitutional Court of Ukraine, the principle of independence would remain declarative. Appropriate guarantees ensure the implementation of the principle of independence and inviolability of the Judge. They correspond to the basic principles of the Court's activity set forth in Article 2 of the Law: the rule of law, independence, collegiality, transparency, openness, completeness and comprehensiveness of the consideration of cases, the validity of its decisions and conclusions.