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Ukraine: proposed law against the Constitutional Court should be withdrawn

Today, the International Commission of Jurists (ICJ) calls on the Ukrainian authorities to abandon a draft law which would dismiss the judges of the Constitutional Court of Ukraine, as a means of retaliation for a decision adopted by the Court and in order to circumvent the decision. The authorities should also refrain from any other actions, including harassment of judges, which undermine the independence of the Constitutional Court.

“This draft law constitutes a direct attack on the ability of the judiciary to exercise its functions independently. It is incompatible with basic principles of the rule of law and the separation of powers, and with international standards on the independence of the judiciary,” said Róisín Pillay, Director of the ICJ Europe and Central Asia Programme.

“By the nature of their role, the judiciary, and especially constitutional courts may be required to decide on controversial matters. It is however essential that particularly in such cases, courts are able to operate without fear of retaliation or repression for the decisions they take,” she added.

The draft law on [Restoring Public Confidence in the Constitutional Court](#), submitted by President Zelensky to the Ukrainian Parliament (Verkhovna Rada), aims to pronounce a decision of the Constitutional Court on anti-corruption legislation “void” and without legal consequences.

This runs contrary to the Ukrainian Constitution according to which “[d]ecisions and opinions adopted by the Constitutional Court of Ukraine shall be binding, final and may not be challenged” (Article 151-2).

The draft law would terminate the mandate of the judges of the Constitutional Court, in contravention of the Constitution of Ukraine as well as basic principles of independence of the judiciary, governing appointments, dismissal and security of tenure of judges.

The draft law provides that the powers of the Constitutional Court of Ukraine in force at the time of the decision on the anti-corruption law would be terminated from the date of entry into force of the law.

According to the explanatory note to the [Draft Law](#), one reason the adoption of the law would be justified is because there had not been a “proper substantiation” of its judgment on the anti-corruption law. The note alleges that Court’s decision was adopted in the private interests of judges of the Constitutional Court of Ukraine, that its proper substantiation was not provided and that it contradicts the principle of the rule of law and denies the European and Euro-Atlantic choice of the Ukrainian people. The ICJ considers these allegations are inappropriate as they directly interfere with the judicial function of the Constitutional Court of Ukraine, contrary to the national legislation and international law on the independence of the judiciary.

On 2 November 2020, Oleksandr Tupitsky, the President of the Constitutional Court was [summoned for interrogation](#) by the State Investigation Bureau in connection with allegations against him of committing crimes as part of an organized group. The ICJ fears that this may be a form of pressure in relation to the Constitution Court’s decision.

Following these incidents, the Constitutional Court has stopped working as four of the judges refuse to take part in its sessions. The Court therefore lacks the necessary quorum to operate. The ICJ calls on Ukraine to withdraw the draft law, and to refrain from any further reprisals against judges for their decisions.

Background information

[The Constitution of Ukraine](#)

Article 149

“Independence and inviolability of a judge of the Constitutional Court of Ukraine are guaranteed by the Constitution and laws of Ukraine.

Any influence on a judge of the Constitutional Court of Ukraine is prohibited.

[...]

Judge of the Constitutional Court of Ukraine may not be held legally liable for voting on decisions or opinions of the Court, except the cases of committing a crime or a disciplinary offence.

[...]”

Article 149¹

“[...]

Dismissal of a judge of the Constitutional Court of Ukraine from his or her office is decided by not less than two-thirds of its constitutional composition.”

On 27 October 2020, the Constitutional Court of Ukraine declared certain provisions of anti-corruption legislation to be unconstitutional. As a result of this decision, among others, the Ukrainian National Security and Defense Council had to deny public access to the system of electronic declarations - state registers which are used to verify declarations of income and assets of officials.

The UN Basic Principles on the Independence of the Judiciary affirm that all governmental and other institutions must respect and observe the independence of the judiciary. This shall be guaranteed by the State and enshrined in the Constitution or the law of the country (Principle 1). The term of office of judges and their independence shall be adequately secured by law (Principle 11) and judges must have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists (Principle 12). They can be subject to suspension or removal only following fair procedures (Principle 17) and only for reasons of incapacity or behavior that renders them unfit to discharge their duties (Principle 18).

The ICJ has previously expressed concern about pressure on the Constitutional Court of Ukraine. In 2015, the ICJ [expressed concern](#) at the attempt to initiate criminal proceedings against the President of the Constitutional Court of Ukraine, following interrogations of judges of the Constitutional Court and seizures of documents from the Court earlier that year.