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DOCTRINAL ISSUES OF INTRODUCTION OF THE CONSTITUTIONAL COMPLAINT IN UKRAINE

Introduction

Active research on constitutional justice in Ukraine actually began only after the adoption of the Constitution of Ukraine and the establishment of the Constitutional Court of Ukraine (CCU) in 1996. A number of dissertations on topics related to constitutional justice were defended only after the CCU was established.[1] Moreover, textbooks and academic course books on constitutional jurisdiction were published then.[2] Later on, authors began to analyse this subject from the perspective of judicial constitutionalism[3] and some problems of constitutional complaint provided in system legal remedies in Ukraine[4].

The first studies within dissertations and monographs devoted to constitutional justice were mostly in the spirit of statism and positivism, studies conducted in the last ten years have leaned towards the anthropocentric and humanistic perspective. For example, in his doctoral theses Anzhelika Krusyan examines

[1] P.V. Volvenko (2006) *The Activity of Constitutional Court of Ukraine for interpretation of the Constitution of Ukraine*. Kyiv; V.O. Herheliynyk (1999) *The Legal Problems Established and Functioning of Constitutional Justice in Ukraine.* Kyiv; Z.V. Loun' (2000) *Legal protection of the Constitution of Ukraine*. Kyiv; M.V. Savchyn (2003) *Constitutional Court of Ukraine as a Guarantor of Constitutional Order*. Kyiv; H.O. Khrystova (2004) *The Legal Nature of the Acts of the Constitutional Court of Ukraine,* Kharkiv.

[2] Yu. G. Barabash, A.O. Selivanov (eds.) (2012) *Constitutional Jurisdiction*. Kharkiv.

[3] V.D. Bryntsev (2013), *Judicial Constitutionalism in Ukraine: The Doctrine and the Practice of Formation*, Kharkiv.

[4] M.M. Hetsko (2015) Institute of constitutional complaint as a means of protecting rights and freedoms: comparative legal analysis. Uzhhorod; M. Hultai (2013) Constitutional complaint in the mechanism of access to constitutional justice Kharkiv: Law; V. Lemak, O. Petryshyn (2017) Constitutional complaint in Ukraine: problems of the mechanism of implementation 2 Bulletin of the National Academy of Legal Sciences of Ukraine 79-88. G. Zubenko (2017) Institute for Constitutional Complaint in Ukraine: Issues of Implementation 23 Bulletin of the V.N. Karazin University of Kharkiv. The series "Law" 58-61; O. Petrysyin and other (2010) Problems and perspectives of the introduction of an individual constitutional complaint in Ukraine Kyiv: Atika-N.

constitutional justice in terms of the condition of modern constitutionalism,[5] whereas the author of this paper does so from the perspective of the values related to constitutionalism, the implementation and interpretation of the constitution.[6]

In the early days of the Court's work, CCU judge Stanislav Shevchuk singled out the correlation between legal positivism and natural law as a legal justification for determining the effect of positive law, and the principle of fairness and due process in administering constitutional justice[7]. That author emphasises the importance of changing the legist paradigm of constitutional law, which prevails in Ukraine and has a decisive influence on the functioning of constitutional justice. At the same time, Shevchuk emphasises the features of constitutional norms which can be seen as a kind of "'open text' and 'empty vessels' which must be filled with concrete content during the application of the Constitution."[8] The author views constitutional justice as one of the leading institutions for ensuring the supremacy of the constitution in the light of the rule of law and the protection of fundamental principles of law, whether written or unwritten.[9] Shevchuk's work on judicial law-making is also considered considerably authoritative. [10]

In his advanced doctoral dissertation, Igor Slidenko cites arguments that constitutional review is the activity of state bodies aimed at implementing the principle of the supremacy of the constitution and supporting constitutional legality with the use of their specific methods.[11] Viktor Skomorokha, a retired CCU judge, stresses that "constitutional review of laws should be understood as an organised activity aimed at verifying the constitutionality of laws." As an institution, constitutional review "incorporates the rules pertaining to the authorities competent to carry out this review, and the procedure to be followed to implement this function."[12]

As regards the limits of interpreting the Constitution, a relatively common viewpoint is that "in the process of interpreting the constitutional provisions, the CCU can resort to the provisions of laws that make the constitutional provisions

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[5] AR Krusyan (2010) *Contemporary Ukrainian Constitutionalism: Theory and Practice*, Odessa.
[6] M.V. Savchyn (2013), *Constitutionalism and the Nature of the Constitution: Theory and Practice of Realization*. Kyiv.
[7] С. Шевчук, *Основи конституційної юриспруденції*, Київ 2001.
[8] Ibidem, p. 9.
[9] С. Шевчук, *Принцип верховенства права та найвища юридична сила Конституції України*, «Право України» 2011, № 5, с. 21-24.
[10] С. Шевчук, *Судова правотворчість: світовий досвід та перспективи в Україні*, Київ 2007.
[11] І.Д.Сліденко, *Конституційний контроль в механізмі сучасної правової держави*, дисертація доктора юридичних наук, Київ 2010.
[12] В.Є. Скомороха, *Конституційна юрисдикція в Україні: проблеми теорії, методології і практики*, Київ 2007, с. 53.

more concrete, and can determine the content of individual constitutional provisions with the help of those laws."[13] A separate analysis of problems arising when the Constitution is interpreted can be found in the study by Slidenko, where the author examines the evolution, nature, types and ways of interpreting constitutional provisions and rules. The author emphasises that this ensures the implementation of the constitution, whereas "interpretation is an instrument that helps to observe the separation of powers, the system of checks and balances, and the priority of the protection of citizens' rights and freedoms, etc."[14] In his academic works, Ukrainian scholar Yu. Todyka [15] adhered to the traditional point of view on the interpretation of the constitution.

Taking into account the origins and the evolution of constitutional justice as an institution, this paper will provide a description of the peculiarities surrounding the introduction of judicial constitutional review in the context of Ukraine's transitional democracy, the fundamental rules underlying the organisation of the Constitutional Court of Ukraine (CCU) and the legal status of judges, as well as the grounds, the subject-matter and limits of powers exercised by the CCU, and the international and social context of the CCU's operation.

1. The place and role of the Constitutional Court of Ukraine in ensuring constitutional order and human rights

According to the Constitution of Ukraine, the country has been established as a 'mixed republic'. The prevailing opinion in the Ukrainian doctrine is that the power is more balanced under such a system. This decision was motivated by the view that authoritative presidential power is capable of implementing reforms effectively. This synergy enables to launch the constitutional mechanisms that prevent the concentration of power in one set of hands.

In turn, those who profess the doctrine of organic constitutionalism have always stressed the importance of judicial review as an important institution preventing the usurpation of power and an important instrument for the protection of human rights. However, the socio-political debate shows that there was considerable

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[13] А. Єзеров. *Роль конституційної юстиції в розвитку сучасного українського конституціоналізму*, [в:] А.Р. Крусян (ред.), *Проблеми сучасної конституціоналістики. Вип. 3. Сучасний український конституціоналізм*, Одеса 2015, с. 472.

[14] Сліденко І.Д., *Тлумачення конституції: питання теорії і практики в контексті світового досвіду*, Одеса 2003, с. 20.

[15] Ю.М. Тодика, *Тлумачення Конституції і законів України: теорія і практика*, Харків 2001.

distrust towards the judiciary in this context, as followers of the statist post-Soviet approach believed that the judiciary, with its law-making competence, posed a threat to the legislature. The discourse about the legitimacy of the Constitutional Court of Ukraine also included opinions that showed a lack of understanding for the deterrent role of constitutional justice in the separation of powers, including checks and balances, and its role as a guarantor of human rights and freedoms.

Modern systems of the distribution of powers are characterised by the diffusion of power within the classic triad. As regards the functions performed by the Parliament and the Constitutional Court, they are closely related to the implementation of power. Their functions are similar in nature since, under the existing codified constitution in Ukraine, both the Parliament and the Constitutional Court engage in more concrete and detailed interpretations of the constitutional provisions.[16] However, they exercise these prerogatives in different ways: the Verkhovna Rada formulates abstract provisions that regulate typical circumstances of life and are designed for an indefinite circle of persons and an indefinite number of cases. The Constitutional Court, guided by constitutional values and principles, adapts abstract constitutional provisions to specific circumstances, or evaluates abstract provisions of the law. Such an evaluation is carried out to analyse the legitimacy of interference in the autonomy of an individual in accordance with the three-part test, based on a systemic and teleological interpretation of Articles 3, 8, 22 and 64 of the Constitution. For example, when examining an appeal against decisions made in administrative proceedings, the Constitutional Court of Ukraine formulated the proportionality principle as follows (CCU decision No. 3-рп/2015[17]):

"... pursuant to the Constitution of Ukraine, the right to appeal and cassation appeal of a court decision can be restricted (Article 129 section 3 paragraph 8), but such restriction may not be arbitrary or unfair. Such a restriction must be established solely by the Constitution and the laws of Ukraine; it must pursue a legitimate aim; it must be conditioned by a public need to achieve this aim, and must be proportional and justified. If the right to appeal against court decisions is restricted, the legislator is obliged to introduce such legal regulation that will

[16] M.V. Savchyn (2016) Constitutional innovations and loyalty to the constitution 7-8 *Viche* 44-47.

[17] Decisions of the Constitutional Court of Ukraine are available on its official website under the heading «Акти КСУ» ["Acts of the Constitutional Court"] (http://ccu.gov.ua/storinka/akty-ksu), where the sections relevant for the present paper are entitled «Рішення», «Висновки» & «Ухвали» ["Decisions", "Opinions" and "Resolutions"]. The site also contains judges' dissenting opinions special opinions of judges. The year of publication indicated in this text after the slash should be found in the corresponding section, and then the serial number of the decision given at the beginning. In this example, it is the third decision of the CCU in 2015.

enable the parties to achieve the legitimate aim in an optimal way, with minimal interference into the exercise of the right to judicial protection without violating the essential content of such a right."

Therefore, both the parliament and the constitutional justice engage in law-making but the latter creates the law in a different way, which consists of nothing else but the implementation of the constitution.

In the mechanism of public authorities, it is the Constitutional Court that holds the primacy in ensuring the supremacy of the Constitution, the constitutional order, as well as fundamental rights and freedoms. Therefore, this body actions as a constitutional authority of special competence, and its functions are fully independent and play an important role in the constitutional system of checks and balances. Thus, the CCU is a constitutional body of specialised competence and the main authority in the system of legal protection of the Constitution of Ukraine (as the basic law for the society and the state), protecting fundamental values and principles on the basis of the rule of law and due process.

Based on the foregoing, constitutional justice can be understood as a way of organisation and a special procedural order for resolving constitutional and legal disputes in order to ensure the supremacy of the constitution, i.e. to restrict power, ensure the dignity of the individual as well as the supremacy of human and civil rights and freedoms, and to make sure that public authorities are bound by fundamental rights and freedoms.

The Constitution of Ukraine was amended in the sphere of justice, and the amendments came into force on 30 September 2016. Afterwards, a presidential commission consisting of leading scholars and lawyers[18] prepared a draft act on the Constitutional Court, which spelt out details of the new provisions of the Constitution. The following constitutional amendments regulating the status of the CCU can be named here:

- the amendments codified the rules of operation for the CCU, which had previously been included, in a fragmentary manner, in the previous version of the act on the CCU;

[18] In particular, it includes Prof. Serhiy Golovaty (representative of Ukraine in the Venice Commission), Prof. Vasyl Lemak (University of Uzhgorod, corresponding member of the National Academy of Legal Sciences of Ukraine), Prof. Mykola Onishchuk (rector of the National School of Judges of Ukraine), Alexander Vodyannikov, PhD, LLM of the Eastern European University, Budapest (Head of the rule of law programmes at the OSCE Permanent Representative in Ukraine).

- the amendments introduced coherent criteria for the appointment of judges (high personal integrity and high authority as a lawyer), alongside with a competitive procedure leading to appointment;
- the amendments strengthened the independence of CCU judges by establishing a clear list of grounds for their removal from office, and such removal was to be decided by the Court itself following the results of an independent internal investigation;
- the amendments modernised the structure of the CCU, which operates through meetings of the Grand Chamber and senates (the latter are established to examine constitutional complaints);
- the amendments introduced direct access for individuals and legal entities to the CCU through constitutional complaints regarding the violation of their rights and freedoms;
- following the amendments, the Constitutional Court may only interpret the Constitution of Ukraine, and its prerogatives in the interpretation of acts of law were passed on to the Supreme Court;
- following the amendments, a group of at least 45 deputies is entitled to approach the Constitutional Court with a request to determine the constitutionality of an international treaty; the aim behind this amendment was to prevent the adoption of laws that would undermine the national security (as was the case with the ratification of the so-called ‘Kharkiv accords’).

These constitutional amendments were adopted in response to the previous very controversial decisions adopted by the CCU, in particular regarding the possibility for President Kuchma to stay in office for the third term in a row (since the introduction of presidency in Ukraine in 1991, a person may hold this office for maximum two terms in a row), thus violating the principles of legal succession and the continuity of state institutions (CCU decision No. 22-рп/2003). This issue became especially relevant when the CCU was actually used by Viktor Yanukovich as part of the power usurpation mechanism following a decision allowing non-party deputies to become part of the parliamentary majority and to form the government (decision No. 11-рп/ 2010), and then the Constitution of Ukraine was effectively revoked under Act No. 2222-IV of 8 December 2004 (CCU decision No. 20-рп/2010). Therefore, it became crucial to ensure reliable and proper guarantees

of the independence of the CCU, to prevent any forms of external pressure on the operation of the CCU, and to increase requirements imposed on constitutional judges.

On the basis of these provisions, on 13 July 2017, the Verkhovna Rada adopted a new version of the act on the Constitutional Court of Ukraine. The draft bill specified the constitutional provisions relating to the organisation of the Constitutional Court, the examination of cases by the Grand Chamber and the senates, as well as the procedures for the CCU to examine cases and adopt decisions. The draft bill provided more details regarding the examination of cases involving verification of constitutionality of a nationwide referendum organised upon the people's initiative, cases regarding compliance with the investigation procedure where impeachment of the President is considered, as well as details of situations where the senate transfers cases for examination to the Grand Chamber. These elements will be analysed in more detail in subsequent chapters and paragraphs of this paper.

During the period of activity undertaken by the Constitutional Court of Ukraine after the adoption of its status act on 16 October 1996, the legal status of the CCU changed twice. The actual position of the CCU in the constitutional system of checks and balances, as well as human rights guarantees is determined by the mechanisms which ensure its independence as well as the Court's ability to provide high-quality legal argumentation to support its decisions, this being an important source of the democratic legitimacy of the CCU.

Therefore, before discussing the doctrinal understanding of the status of the Constitutional Court in Ukraine, we should briefly compare the constitutional approaches towards defining the formal features of the legal status of the CCU.

The legal status of the Constitutional Court of Ukraine in the Constitution of Ukraine is defined differently in two versions of Article 147. In the initial wording of the Constitution of Ukraine, dated 28 June 1996, the status of the Constitutional Court was defined as the sole body of constitutional jurisdiction in Ukraine. In the current version, adopted on 2 June and effective since 30 September 2016, the legal status of the CCU is defined through its leading competences. Accordingly, the Constitutional Court "decides on the constitutionality of the laws of Ukraine and, in cases provided for by the Constitution, also other acts; it provides an official interpretation of the Constitution of Ukraine, and is vested with other competences in accordance with this Constitution."

In fact, these changes have not significantly affected the real legal status of the Constitutional Court of Ukraine. The legal certainty of the legal status of the CCU is crucially influenced by the following factors: 1) the system of checks and balances between the institutions of power; 2) the real readiness of the CCU to protect human rights and other constitutional values; 3) the legal style applied to justify its decisions, which is also the source of the Court's legitimacy; 4) the activities of the CCU in the international context, in particular in ensuring a minimum standard for the protection of human rights.

As regards the legal status of constitutional courts, post-Soviet scholars specialising in constitutional law (state law)[19] have characterised constitutional courts as: bodies established to protect the constitution,[20] constitutional justice bodies[21]. Another group of scholars believe that the constitutional court, as a body of justice, "is, within its competence, superior to courts of general jurisdiction."[22] According to A. Selivanov "constitutional jurisdiction should be understood as a set of powers of the Constitutional Court based on the Constitution and laws of Ukraine, where the Constitutional Court is a single body of judicial power competent in the resolution of constitutional and legal disputes (conflicts) and the official interpretation of the Constitution ... of Ukraine, as well as competent in carrying out other activities in matters of constitutional importance."[23] The CCU directly formulated the doctrine whereby it is a constitutional review body (CCU decision No. 8-за/97).

When resolving constitutional disputes, the Constitutional Court's mission is to ensure a balance of interests of the parties, based on the Constitution. As noted by Yu. Todyka, in such cases "it should be understood that a modern state is based on compromise, and the constitution is a compromise that reconciles the various claims and interests of the most influential social forces in the country.[24] In the activity of constitutional justice bodies, the main focus is on resolving constitutional

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[19] The post-Soviet science of state law mainly views the constitution as a social contract that expresses the sovereign will of the people and the balance of political forces. This interpretation has been known since the times of Ferdinand Lassalle, who apparently relied on the formalist doctrine of the rule of law, which prevailed in the Weimar Republic and Nazi Germany. A significant number, if not the majority, of Ukrainian scholars also adopt the same formalist positions. This author does not share this approach, as will be discussed below.

[20] Reinhold Zippelius (2014) *Legal methodology*. Kyiv^: Tandem 160.

[21] O.O. Myronenko (1998) Мироненко, Prepositional Origins of Constitutional Justice in Ukraine 4 Herald of the Constitutional Court of Ukraine.

[22] V. Skomorokha (1998) Some issues of separation of powers and jurisdiction of the Constitutional Court of Ukraine 5 *Law of Ukraine* 16.

[23] Yu. G. Barabash, A.O. Selivanov (eds.) (2012) *Constitutional Jurisdiction*. Kharkiv 7.

[24] Ю.Н. Тодыка, *Основы конституционного строя Украины,* Харьков 1999, с. 280.

and legal disputes. Since the bodies of constitutional justice exercise the function of justice, the dispute resolution function is organic: it is part of organic constitutionalism. Based on the following discussion, we will analyse the implementation of the CCU's status in the context of its interaction with other public authorities in Ukraine.

From the perspective of democratic legitimacy, the bodies of constitutional jurisdiction are bound by the rule of law and, in particular, by the requirements of due process as a guarantee that the rights of participants in constitutional proceedings will be observed as they present their legal position for public examination of the case. According to the principle of separation of powers, constitutional justice bodies may not interfere in the competence of the parliament. Acts adopted by the parliament may be recognised as unconstitutional if they disproportionately narrow or cancel the very essence of the right. Moreover, constitutional justice bodies should be cautious and aware that the parliament has a broad discretion, because it is the parliament (rather than the constitutional court) that has the right to determine the rules. However, the parliament is bound by the constitutional requirement that any encroachment on the very essence of the right is inadmissible with regard to human rights.[25] In this system of coordinates, constitutional justice puts the political process into a legal framework and protects the fundamental legal values and principles. This determines the nature of the interaction between the Constitutional Court and key participants in constitutional legal relations.

2. Organization of the Constitutional Court of Ukraine and peculiarities of the trial of constitutional complaints

After the constitutional reform of justice, the composition of the CCU changed significantly. The act on the Constitutional Court dated 13 July 2017[26] provides that the CCU may work in the form Grand Chamber meetings, where the Grand Chamber consists of all judges. Moreover, two senates are established within the CCU and the examination of constitutional complaints should be distributed between those two senates. The CCU has retained the practice of working through boards of judges which decide on the admissibility of constitutional complaints and

[25] М.В. Савчин, *Конституціоналізм і природа конституції: теорія та практика реалізації,* Дисертація доктора юридичних наук, Київ 2013, с. 377-378.

[26] Закон України «Про Конституційний Суд України» від 13.07.2017 р. № 2136-VIII, *Відомості Верховної Ради України*, 2017, № 35, ст. 376.

appeals. Each of the six boards (instead of three, as was the case earlier) should consist of three judges.

The work of the Grand Chamber is organised to ensure consistent practice of the CCU. The legislative amendments aim to introduce a function whereby the Grand Chamber distributes cases between the senates and boards of judges, and may change the jurisprudence of the CCU. In turn, senates may refer constitutional complaints to the Grand Chamber wherever such complaints may lead to a change in the CCU's jurisprudence or if the case is of fundamental importance and the senate is incapable of adopting a decision.

The structure of the Constitutional Court remains vulnerable because the Court is formed by three institutions of power: the Verkhovna Rada, the President and the Congress of Judges, each of them appointing six judges. When the Constitution was amended in the section concerning the justice system, this formation model was not changed, although many scholars emphasise that career judges often have difficulties in situations where they need to verify the legality of provisions contained in acts of law. This is due to their longstanding habits in the application of laws, which makes it difficult for career judges to overcome their professional habit of applying the law consistently. Neither the Constitutional Assembly nor the Constitutional Commission managed to overcome this controversial element in the formation of the Constitutional Court, and retained the original formation model.

Practice has shown that this formation of the CCU may lead to its obstruction and, as a consequence, to a paralysis in the work of the Constitutional Court. For example, when the powers of many judges ended in October 2004, the remainder of the CCU proved to have no competence to examine cases (the Constitutional Court must have twelve judges to work in a valid way). This was because the Verkhovna Rada failed to appoint the judges within its quota, whereas judges appointed by the President and the Congress of Judges were not called to be sworn in Verkhovna Rada meetings. The CCU was able to resume its work only after judges were appointed by the parliament in June 2006.

CCU judges are appointed for nine years without the right to be re-appointed (Article 148 of the Constitution). Previously, the requirements for a judge of the Constitutional Court in Ukraine were more formal. In particular, the judge was required to have the Ukrainian citizenship, higher legal education, and 15 years of work experience in a legal profession. After the Constitution of Ukraine was amended on 2 June 2016, these requirements were retained and, in addition,

constitutional judges must meet certain qualitative requirements such as, in particular, have high moral qualifications and be recognised as highly competent lawyers. This approach is criticised for being based on arbitrary criteria, which, as critics maintain, may lead to arbitrary appointments of judges. However, the appointments of constitutional judges are connected with the public-political debate, which means that the degree of citizens' control over this process plays a role, as well as the possibility to assess candidates in terms of their competence, ability to resist external pressure and ability to adopt complex decisions under conditions of legal uncertainty, while aiming to protect fundamental constitutional values and principles.

Constitutional court judges must maintain political neutrality, and the position of the judge may not be combined with other spheres of activity. In particular, judges may not be members of political parties or trade unions, they may not be involved in any political activity, have a representative mandate, hold any other paid positions, perform any other paid work, except for academic activity, teaching or creative work (Article 11 of the act).

Judges are appointed based on the results of a competitive procedure. The Legal Policy and Justice Committee at the Verkhovna Rada organises the competition. The selection committee, consisting of lawyers "with a recognised level of competence", is established at the office of the President whereas the judiciary is represented by the Council of Judges. The appointment of judges is finally determined at the plenary session of the Verkhovna Rada. In this case, Article 208^4 section 3 of the Verkhovna Rada Rules[27] does not correspond with Articles 3, 8 and 148 of the Constitution, since the former narrows the essential content of the rights of individuals who meet the formal criteria defined in the Constitution since, according to those Rules, candidates can only be proposed by parliamentary factions. However, parliamentary factions are not mentioned in Article 148 of the Constitution as subjects which may nominate candidates for constitutional court judges. Moreover, factions are not the official bodies of the parliament but, instead, a form of association for the deputies. The selection committee refused to register four candidates by invoking exactly section 3 of Article 208^4 of the Verkhovna Rada Rules.[28] After interviews with the candidates and a special

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27 Закон України Про Регламент Верховної Ради України від 10 лютого 2010 року N 1861-VI, «Відомості Верховної Ради України», 2010, № 14-15, № 16-17, ст.133 с последующими изменениями.

[28] Рішення про конкурс на посади суддів Конституційного Суду України, Комітет Верховної Ради України з питань правової політики та правосуддя, http://kompravpol.rada.gov.ua/uploads/documents/31884.pdf (last accessed on: 29 November 2017).

screening, the Verkhovna Rada elects CCU judges at the plenary session, by an absolute majority.

The President appoints the judges of the CCU on the basis of the decision of the selection commission, taking into account the results of the interview, the special screening of candidates and analysis of their dossier. On the basis of the materials prepared by the Council of Judges, the Congress of Judges adopts a decision by a majority of votes at its meeting, thus electing its quota of judges. The process leading to the appointment of constitutional court judges should be carried out within three months following the announcement of a vacancy for the position of a CCU judge. The judge proceeds to exercise his/her powers on the day when he/she takes an oath at a special plenary session of the Constitutional Court.

A CCU judge may publicly express his/her opinion on the substance of cases only for cases where the Constitutional Court has already taken a decision or given an opinion. While being in office, a constitutional court judge may not receive state awards, distinctions, special titles granted in Ukraine, or any other awards, decorations, or diplomas, except for rewards for personal courage and heroism shown by risking his/her life.

The procedure of disciplinary liability applicable to constitutional court judges has been changed. Firstly, without the consent of the Constitutional Court, no judge may be detained or held in custody or detention until the court issues a guilty verdict, except situations where the judge is detained while committing a grave or especially grave crime or immediately after such crime was committed (previously, this issue was decided by the Verkhovna Rada).

Secondly, only the Constitutional Court may decide to hold a constitutional court judge liable (previously, such decisions were taken by the Verkhovna Rada, the President and the Congress of Judges, respectively, regarding the judges appointed by those bodies). The CCU decides to dismiss a constitutional court judge from office by a two-thirds of its total number of judges (Article 149 of the Constitution). The Constitution also specifies the grounds for the dismissal of constitutional court judges, and those grounds are exhaustive:

1) if the judge is unable to fulfil his/her duties for health reasons;

2) if the judge has violated the requirements regarding incompatibility;

3) if the judge has committed a serious disciplinary offense, gross or systematic neglect of his/her duties, incompatible with the status of a CCU judge or incompatibility with the position held;

4) if the judge has filed for resignation or dismissal upon his/her own request.

The act on the Constitutional Court regulates, for the first time, issues related to the conflict of interests in the case of constitutional court judges. In particular, a CCU judge may not participate in the preparation, review or adoption of decisions, perform other powers in matters where there is a real or potential conflict of interest. If the judge has a real or potential conflict of interests, he/she must notify the Constitutional Court thereof in writing within one business day and withdraw from the case (Article 60 of the act).

These provisions strengthen the independence of the Constitutional Court.

The functions of the constitutional court are determined on the basis of its position in the state system as a key element of organic constitutionalism. The operation of constitutional courts reflects the dilemma of modern constitutionalism: "people's sovereignty or democracy, and their dependence on constitutional norms, i.e. on human rights and the separation of powers."[29]

Constitutional justice can influence the political process through legal means, with the art of legal argumentation to support decisions being the main one. In order to limit the influence of political circumstances on the operation of constitutional courts, the doctrine of the political question is used. The CCU formulated this doctrine in its own way as a doctrine "the question of political expediency", when examining the constitutionality of the 4% threshold for political parties in parliamentary elections.[30] In its ruling of 5 March 1999, the CCU stressed that the resolution of political issues contradicted its mission as the only body of constitutional jurisdiction, since any political activity is incompatible with the activities of judges of common courts and judges of the Constitutional Court.

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[29] О. Гьофе, *Розум і право. Складові інтеркультурного правового дискурсу*, Київ 2003, с. 220.

[30] In its decision No. 1-рп/98 of 26 February 1998, the Constitutional Court of Ukraine formulated a provision whereby "if the lists of parliamentary candidates proposed by political parties and/or electoral blocs of parties that have received less than four percent of votes are to be deprived of the right to participate in the distribution of deputy mandates, this is a matter of political expediency and, as such, should be resolved by the Verkhovna Rada of Ukraine." However, in this context, we can invoke the decision adopted by the Federal Constitutional Court of Germany regarding the protective threshold, based on a different concept and adopted in a very different on 24 February 2014. According to that decision, the re-establishment of the 3% cut-off threshold in European elections by the Bundestag was declared unconstitutional.

In addition, M. Teslenko proposes functions related to the resolution of competence disputes between various authorities.[31] In the opinion of N. Savenko, the functions of constitutional jurisdiction body are aimed at implementing their competence and accomplishing the tasks assigned to it, primarily to ensure the rule of law and constitutional legality. The main functions of this body are as follows: administration of justice; constitutional review; official interpretation of the Constitution and laws of Ukraine; legal protection of the Constitution; ensuring the observance of the separation of powers (arbitration function) and the protection of constitutional rights and freedoms.[32]

Until recently, there was a widespread view that the constitutional court is not a judicial body. For example, the former deputy chairman of the CCU V. Shapoval believed that the Constitutional Court had no direct connection with the administration of justice.[33] According to N. Savenko, the notion of "justice" should be understood as encompassing the work of a competent court performed on behalf of the state in accordance with the procedure established by law. Such work involves the examination and resolution of conflicts or legal issues arising during the implementation of various norms of constitutional, civil, criminal, administrative or other law.[34] However, this opinion cannot be accepted since the Constitutional Court of Ukraine has all the features of a body of justice: independence and its guarantees; special status of constitutional court judges; the powers and procedure for dealing with cases is defined by law; the CCU takes decisions that are generally binding, final and do not require any additional approval by other authorities. The decisive factor is that the Constitutional Court can justify its decisions based on criteria such as the rule of law and respect for human dignity.

Taking these imperatives as a point of departure, the powers of the Constitutional Court of Ukraine were reformed in accordance with the law amending the Constitution of Ukraine with respect to justice, dated 2 June 2016. These amendments to the Constitution provide that the Constitutional Court may be

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[31] М. Тесленко, *Конституційна юрисдикція в Україні*, Автореф. канд. юр. наук, Київ 2000, с. 9.
[32] М.В. Савенко, *Правовий статус Конституційного Суду України*, Автореф. канд. юр. наук, Харків, 2001, с. 6-7.
[33] В.М. Шаповал, *Проблеми розвитку конституційної юрисдикції в Україні*, «Вісник Конституційного Суду України» 1998, № 2, с. 45.
[34] М.В. Савенко, *Правовий статус Конституційного Суду України,* Автореф. Диссертац. канд. юрид. наук, Харків 2001, с. 7.

approached to rule on the constitutionality of international treaties[35] and issues put on nation-wide referendums upon the people's initiative, and the institution of normative constitutional complaint was introduced with the condition that at least 45 deputies would endorse it. The area where the Constitutional Court may issue official interpretations was also reduced: the Constitutional Court is only competent in interpreting the provisions of the Constitution of Ukraine (formerly, the CCU could also interpret acts of law). Unfortunately, Article 8 section 3 of the act on the CCU also reinforces this problematic situation: the Constitutional Court may not consider the legality of decisions adopted by the Verkhovna Rada, acts issued by the President and the Cabinet of Ministers, although this competence is implicitly included in Article 8 section 2 of the Constitution of Ukraine, which establishes the hierarchy of legal acts: the Constitution – an act of law – a secondary legislative act. In fact, the main criterion should involve the proper concretisation of constitutional principles and values through by legal acts (human dignity, freedom, equality and prohibition of discrimination, democracy, etc.).

In accordance with the doctrine of political expediency formulated by the Constitutional Court of Ukraine, the parliament independently determines the models of legal regulation of certain legislative spheres, as defined in Article 92 of the Constitution. In particular, when deciding on the constitutionality of the 4% threshold for political parties (or groups of parties) in elections, the CCU acknowledged that this was a matter of political expediency. Moreover, the Constitutional Court recognised that the Verkhovna Rada operated exclusively within the limits of its constitutional powers when determining the mechanism of specific procedures during the electoral process. In particular, this doctrine was detailed in the ruling of 5 March 1999, where the Constitutional Court noted that the resolution of political issues contradicted its appointment as the sole constitutional jurisdiction body since any political activity is incompatible with the activities of judges of general jurisdiction as well as judges of the Constitutional Court.

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[35] For example, when the Verkhovna Rada ratified the so-called 'Kharkiv accords' in violation of the constitutional procedure (Іван Капсамун. *Як Харківські угоди підготували «Мінський котел»,* «День», 2017, 25 квітня [Electronic resource]. Access: https://day.kyiv.ua/uk/article/podrobyci/yak-harkivski-ugody-pidgotuvaly-minskyy-kotel (last accessed on: 29 October 2017)), which extended the lease of the city of Sevastopol by the Russian Federation until 2042 for the Black Sea Fleet, in violation of the constitutional ban on the deployment of military bases on the territory of Ukraine (Article 17), the opposition could not challenge this decision of the Parliament, since, until 2016, the competence to appeal to the Constitutional Court about the constitutionality of international treaties was vested only in the interested parties, i.e. the President and the Cabinet of Ministers.

The CCU has developed approaches whereby it refuses to consider issues of political expediency (CCU decision No. 1-рп/98), the legality of legal acts (CCU ruling No. 5-у/99), conflicts of law (CCU rulings No. 20-у/2000 and No. 28-у/2005) and gaps in the current legislation (CCU ruling No. 9-у/2002), investigation of actual circumstances (CCU rulings No. 53-у/97 and No. 31-у/99) and political circumstances (CCU ruling No. 2-уп/2000), as well as verification of constitutionality of legal acts that have become null and void (CCU ruling No. 62-у/97).

In particular, the CCU explains its refusal to examine conflicts and gaps in the current legislation by stating that filling in the gaps and resolving conflicts in the current legislation violates the separation of powers and interferes in the exercise of legislative power. This position stems from the view whereby resolution of conflicts and the filling of gaps in legislation is tantamount to the creation of legal norms. Article 57 of the Constitution of Ukraine obliges public authorities to ensure that the content of regulatory legal acts concerning the essence and scope of individuals' rights and duties is properly notified to the public, which means that gaps and conflicts in the current legislation are unconstitutional. This problem should be addressed exactly by the CCU, applying the analogy of the law or the analogy of rights.

As the basic law in the society and the state, the constitution is a legal act that is applied in a particular social environment under specific historical circumstances and is a kind of "open text". Therefore, the constitution cannot be reduced solely to the analysis of its text. Instead, the constitution is a product of the evolution taking place in the society, it reflects the legal awareness of the constituent authority and the public consensus regarding social values protected by law, the established practice of applying legal norms and socially significant behaviour.

The concept of the constitution as an "open text" is based on the fact that the constitution can not be reduced to a kind of "constitutional code", since the idea that "the constitution should cover all possible life situations and provide answers to all questions without any additional judicial interpretation is illusory and detrimental to the idea of legal regulation via a constitution."[36]

[36] С.В. Шевчук, *Загальнотеоретичні проблеми нормативності актів судової влади*, Дисертація доктора юридичних наук, Харків 2008, с. 82.

The realistic theory of constitutional interpretations[37] are filled with content during the exercise of the powers to clarify the constitutional text (the semiotic aspect) in the context of the actual circumstances of a case (the sociological aspect, which includes the dilemma of effectiveness and the legal force of constitutional norms), based on the discretion of interpreting constitutional jurisdiction on the basis of the Constitution, the rule of law and due process of law.

2.2. Examination of constitutional complaints.

In Ukraine implemented normative model of constitutional complaint, namely, "the hybrid model of the constitutional complaint, which allows to challenge not only the provisions of the law, but also the judicial practice of applying a specific provision of the law as contrary to constitutional rights and freedoms, even if the provision is not unconstitutional"[38].

This power is exercised by reviewing the constitutionality of acts of law or individual provisions upon a complaint filed by a person who believes that the law applied in the final judicial decision in his/her case is unconstitutional.

After the Act amending the Constitution in the sphere of justice and the Act on the Constitutional Court, the normative constitutional complaint was instituted in Ukraine. At the time when this paper was written, there was no practice of reviewing such complaints, although more than 1100 complaints had been registered by the CCU Secretariat, which 50 are accepted for consideration. Therefore, the experience of foreign constitutional courts and similar jurisdictional institutions will be relevant. Moreover, the experience of the European Court of Human Rights seems to be most effective, since post-communist countries of Eastern Europe that are now EU members had followed the same path (the CCU was of the opinion that it could not consider constitutional complaints given the absence of relevant legislative regulations before the adoption of the new version of the Law on the CCU on 13 July 2017; however, this opinion contradicted the fundamental principle of direct applicability of the Constitution and violated the essence of the right to seek defence at the CCU).

Today, the case in point is the application of universal principles of law and universal human rights in the examination of constitutional complaints. When it comes to implementing high standards of human rights protection in the practice

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[37] М. *Тропер, Реалистическая теория толкования*, «Сравнительное конституционное обозрение» 2006, № 1.
[38] Oleksander Vodyannikov (2018) A Gap of the Law as a Subject Matter a Constitutional Complaint. 12 *Law Of Ukraine* 130.

of the CCU, one should also bear in mind the mutual correlation and conflicting jurisdictions in the light of the supremacy of the Constitution of Ukraine vis-a-vis international treaties.

On the one hand, the basis for considering constitutional complaints is the direct link between human rights and the fundamental principles of law – human dignity, freedom, equality, On the other hand, coherence between human rights and the organization of the state in view of the main responsibility of the state to establish and ensure human rights[39]. Apriority and the supra-positive nature of human rights is that they permeate the structure and standards activity of public power, are the basis of modern constitutional statehood, which is limited, in the first place, to human rights[40]. By their nature, human rights combine principles and rules[41]. Krisitina Ayrian in her dissertation explains the arguments that when considering a constitutional complaint, the issues of ensuring constitutional order, and not legality, are solved[42].

Therefore, from these considerations, the concept of understanding human rights as a closed system in the constitutional structure is ineffective and attacks human dignity, which is a fundamental constitutional value. In fact, human rights are a kind of "open source"[43], and they "are derived" through the interpretation of fundamental values – respect for human dignity, freedom, equality and the rule of law. Basic on foregoing, use the term "applied... law" in the Constitution of Ukraine can mean: 1) is there a constitutional practice of interpreting the provisions of the law that are the subject of constitutional review by the general courts; 2) the law in the light of the values and principles of the Constitution is specified in the acts of public administration.

Gradually, the Constitutional Court of Ukraine forms approaches to the application of international standards for the protection of human rights.

Firstly, the CCU can attach a greater importance to the constitutional guarantees of human rights because they may prove to be wider than convention-based

[39] Savchyn Mykhaylo (2018) Doctrinal Issues of Introduction of the Constitutional Complaint in Ukraine 12 *Law of Ukraine* 43.
[40] Isensee I., Kirchhof (eds.) (1994). *The State Law of Germany*. In 2 Vol. Vol. 2. pp. 162, 164.
[41] Lothar Michael and Martin Morlok. (2017) *Grundrechte.* 6. (Nomos Verlagsgesselschaft. pp. 45-8.
[42]Kristina Ayrian (2015) Constitutional Complaint as an Application Form to the Constitutional Court of Ukraine. Kyiv 145
[43] Shevchuk S. (2001). Basics of constitutional law. Kyiv: Ukrainian Center for Legal Studies, pp. 98-102.

guarantees. This issue arises fairly frequently before constitutional jurisdictions or similar institutions in Germany, England, Sweden, etc.

Secondly, following the rule of adopting “a friendly attitude” towards international treaties, the CCU can interpret the provisions of the Constitution of Ukraine in a way that conforms with international expectations. In particular, this kind of perspective should be adopted when interpreting the essence of the inviolability of the right to private property and the legal grounds for acquiring the right to property, i.e. in the light of convention-based guarantees for the unimpeded use of property.

Therefore, one should discuss the acceptability criteria. In the context of Article 151^{1} of the Constitution of Ukraine, and in the light of general principles of law (respect for human dignity, inexhaustibility of human rights, the state’s duty of protection, etc.), these criteria include the following:

1) the essential nature of the right that has been violated and the threat that the harm to the rights and freedoms guaranteed by the Constitution of Ukraine may be irreversible;
2) the conventional legal remedies have been exhausted;
3) such legal remedies must be effective and efficient, ensuring effective restoration of rights and a fair compensation of damage;
4) the review focuses on verifying the constitutionality of the act of law and the practice of its application in the light of the essential content of human rights and fundamental freedoms;
5) ensuring the protection of human rights and freedoms guaranteed by the Constitution of Ukraine, at least at an internationally recognised level.

When the CCU protects human rights while examining constitutional complaints, it might be accused of excessive judicial activism. This may happen if the Constitutional Court applies interim measures, primarily by suspending the act of law concerned since the application of such an act may significantly breach constitutional rights and freedoms; such a step may also aim to prevent irreversible damage to a basic right, where such right might be difficult or impossible to restore in the future.

The act on the CCU does not regulate the detailed procedure for convening the meetings of the Grand Chamber, senates and boards, leaving this issue to the

discretion of the chair of the CCU. When the act on the CCU was being adopted, this problem was not addressed, i.e. the decision to open proceedings in a case following a request is not adopted at a meeting of a board of judges or the Grand Chamber.

The new version of the Act on the CCU retained the fairly decisive role of the CCU chair in deciding on how cases are to be dealt with. However, in order to prevent any malpractice, this procedure should be determined by the Grand Chamber of the CCU. The best option would be to adopt a rule whereby the chair of the Constitutional Court, in accordance with the procedure established by the Grand Chamber, would instruct one of the judges to pre-examine the appeal, within no more than two months following the date of its registration with the Secretariat. The judge’s conclusions from the preliminary examination of the appeal would be reported at the plenary session of the Grand Chamber. The new version of the Act on the CCU provides for the following stages of constitutional proceedings.

3. Constitutional proceedings at CCU

The Law on the CCU does not regulate the detailed procedure for convening the meetings of the Grand Chamber, senates and boards, leaving this issue to the discretion of the chair of the CCU. When the Law on the CCU was being adopted, this problem was not addressed, i.e. the decision to open proceedings in a case following a request is not adopted at a meeting of a board of judges or the Grand Chamber.

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3.1. Preliminary examination of appeals to the Constitutional Court and the opening of constitutional proceedings

The Law on the CCU defines the following forms of appeal to the Constitutional Court: a constitutional petition, a constitutional submission and a constitutional complaint. The constitutional petition is concerned with a decision on the constitutionality of a legal act and the interpretation of the Constitution of Ukraine (Article 51 of the Law). Under the constitutional submission, the CCU is requested to issue an opinion regarding the constitutionality of a constitutional bill, the subject of a nation-wide referendum on people’s initiative, an international treaty, or a violation of, or compliance with, the Constitution and laws of Ukraine in the actions taken by the Verkhovna Rada of the Autonomous Republic of Crimea (Article 53 of the Law). A constitutional complaint is concerned with a violation of constitutional rights and freedoms in the course of application of laws in a final court decision (Article 55 of the Law).

The CCU Secretariat checks appeals for compliance with the formal requirements set out in the act. The act on the CCU contains an important provision whereby if an appeal is returned by the Secretariat due to formal grounds, this cannot prevent the filing of a new appeal (Article 57). To examine the appeal, a judge-rapporteur is appointed from among the board of judges which conducts a preliminary examination. The judge-rapporteur has a number of prerogatives, focused on preparing materials for examination (Article 59 of the Law), in particular:

1) the judge examines the issues raised in the appeal and prepares materials to be examined by the board, the senate, and the Chamber;
2) the judge requests subjects of law to provide documents, materials and other information related to the case;
3) the judge gives instructions to the relevant units of the Secretariat and sets the respective deadlines;
4) the judge invites specialists for consultations and document examination;
5) the judge submits proposals to the senate and the Chamber in order to solicit expert opinions in the case, to invite specialists to take part in the constitutional proceedings, to summon officials, experts, specialists, witnesses, and authorised persons; moreover, the judge exercises other powers provided for in the act on the CCU.

The decision about opening constitutional proceedings is finally made at a meeting of the boards, senates and the Grand Chamber. This means that if a refusal to open proceedings is to be issued, the decision will eventually be taken by the Grand

Chamber. A refusal to open constitutional proceedings may be issued for the following reasons (Article 62 of the Law on CCU): 1) the appeal has been filed by an unauthorised entity; 2) the CCU has no competence to examine the issue raised in the appeal; 3) the appeal does not comply with the law; 4) a constitutional complaint is inadmissible; 5) the legal act which is to be reviewed for constitutionality has lost its legal force, except when this act continues to apply to continued legal relations and its application violates constitutional rights and freedoms; 6) the issue raised in the appeal has already been resolved in an act issued by the CCU.

In some situations, the CCU may somewhat revise its approaches in determining the criteria for self-exclusion when examining appeals. For example, as of today, the CCU has taken a clear position regarding the examination of political issues. For instance, in its ruling No. 2-уп/2000 on the termination of the constitutional proceedings in the case concerning a constitutional-legal dispute that arose as a result of the parliamentary crisis in January and February 2000, the Constitutional Court stated that the powers of the constitutional jurisdiction body do not include the resolution of political conflicts. The legal position taken by the CCU was based on the fact that the appeal arose from differences between parties/factions in the parliament, and had a procedural, political and moral significance, and thus the decisions adopted during that period were part of the political process.

3.2. The hearing of a case at the Constitutional Court

Article 64 of the Law on the CCU establishes the written form as the main form for the examination of cases. In Ukraine, it is considered that constitutional justice does not involve an adversarial process and pleadings during oral hearings but, instead, the study of documents and expert conclusions written as *amicus curiae*. As was the case with the Rules of procedure of the CCU in the past, the current act on the CCU also determines the procedural status of the participants in the process but does not regulate the procedure to be followed during the court sitting (written or oral). This is a general drawback of Ukrainian laws, where procedures are often skipped and replaced with a definition of rights and duties, powers and responsibilities. This leads to conflicts in the case of high-profile cases and socially significant proceedings in court.

The general period for examining a case is set at six months, although in most cases the CCU does not adhere to this period. As an exception, one month is allotted for the examination of specific cases, i.e. where the CCU is approached to determine

whether a draft law amending the Constitution complies with Articles 157 and 158, and whether acts issued by the Cabinet of Ministers are constitutional in a situation where the President has suspended such acts and simultaneously requested the CCU to review the constitutionality of such acts (Article 75 of the Law on the CCU).

Practice has shown that during an oral hearing, the first persons to be heard are representatives of the entity which filed the appeal, followed by the representatives of the authority that has issued an act whose constitutionality is being challenged. Subsequently, the CCU hears experts and specialists invited to ensure a full and comprehensive examination of the case. Further, the hearing moves on to the phase where the participants deliver their closing speeches on the merits of the case. Depending on the specific nature of the case (e.g. when examining an issue involving the interpretation of the Constitution), the views of the representatives of the Supreme Court are heard in order to clarify the sources, causes and nature of the ambiguities in the application of the constitutional provisions by courts.

Separate attention is given to the procedure for the adoption of the CCU's acts: in the Grand Chamber, rulings are adopted by the majority of judges present at the meeting whereas decisions are adopted by at least 10 judges; in the Senate, rulings are adopted by the majority of judges present at the meeting (if the number of votes for and against the opening of constitutional proceedings is equal, the proceedings are considered to have been opened), whereas decisions are adopted by at least two-thirds of judges who examine the case in the senate (Article 66 of the act on the CCU). At the Grand Chamber meetings, the quorum is not less than 12 judges, while the quorum at senate meetings consists of at least six judges.

3.3. Cases referred by the senate to the Grand Chamber for examination

Since the composition of the CCU has changed, the procedure for referring a case for examination from a senate to the Grand Chamber has been introduced (Article 68 of the Law on the CCU). This procedure was established in order to enable the harmonisation of legal positions between the senates and the Grand Chamber. Obviously, this tool will be used by the Constitutional Court to review its own jurisprudence. It should be emphasised that the senates have been established in order to examine constitutional complaints.

3.4. Adoption of decisions by the Constitutional Court

According to Article 88 of the act on the CCU, the Constitutional Court makes a decision or issues an conclusion at the closed part of the plenary session of the senate and/or Chamber by a roll-call vote of the judges who examined the case. The decision is made by presenting a proposed draft decision or conclusion to the judges; and such decisions or conclusions are put to vote in the order in which they were received. When making a decision or issuing an conclusion, the judge has no right to abstain from voting. Decisions and conclusions of the CCU are signed separately by the judges who voted for, and by the judges who voted against. The decision or conclusion of the Constitutional Court is final and may not be appealed against. Separate regulations apply to cases where judges write dissenting opinions (Article 83 of the act on the CCU). Article 67 of the act takes a restrictive position since a decision on a constitutional complaint may only be adopted by at least two thirds of votes from the judges who examined the complaint in the senate. In other words, it is possible that a complaint is examined by a senate of seven judges and five must vote to adopt the decision, rather than four judges, as is customary in boards of judges (chambers, senates, etc.).

The CCU adopts decisions in the closed part of the plenary session, which begins immediately after the open part of the plenary session has ended. The closed part of the plenary session is where both the concept and the final version of the decision are prepared. In other words, the CCU takes a decision collectively. At the same time, a judge-rapporteur is appointed in each case, charged with preparing the case materials and, in particular, the draft CCU decision. Other judges participate in the development of the draft decision based on the principle of equality of CCU judges, although a judge may confine him/herself to writing a dissenting opinion if he/she does not agree with the legal argument and/or the operative part of the decision. Empirical experience has shown that this technique of decision-making at the CCU directly influences the degree of its validity, and, consequently, legitimacy.

4. Criteria for the admissibility of constitutional complaints.

4.1. Background of the admissibility of constitutional complaints.

According to Art. 151^1 of Constitution of Ukraine the CCU decides on the constitutionality of a law upon constitutional complaint of a person alleging that the law applied to render a final court decision in his or her case contradicts the Constitution of Ukraine. From the point of view of Olexander Vodyannikov, the

meaning of a specific "law" for the purposes of this provision shall be determined on the basis of the meaning given to it by the jurisprudence[44].

In the legal argumentation of decisions of the CCU, compliance with the rules of legal syllogism is essential, taking into account the nature of constitutional justice, which possesses triple characteristics: 1) to determine the factual composition of the case, taking into account the requirement to establish the constitutionality of the procedure to adopt a legal act; 2) to define how essential and significant for the national legal system the violation of subjective public law is; 3) subsidiarity of the constitutional complaint in the system of legal protection.

To answer these questions, one has to decide how constitutional rights and freedoms are and what system of values they are based on.

Since today there exists a generally accepted synthetic combination of a priori and supra-positive recognition of human rights, this problem moves to the plane of human rights interpretation[45]:

"The basis of the rights is neither legal-positive, nor it follows from the law: it is supra-positive. In order to find out the nature of this basis, it needs its interpretation from the respective point of view, anthropological, teleological, philosophical, historical and natural-legal. Both Christian and secular law recognized these rights as merely a reasonable right. Whatever rationale was chosen, the existence of human rights is based on supra-state conquests. Such added quality of human rights permeates the history of our fundamental rights".

The Constitution of Ukraine sets a number of parameters in this domain:

1) ensuring and guaranteeing human rights and freedoms is the main duty of the state (Art.3(3)), the Constitution has the highest legal force (Art. 8(1));
2) human rights and freedoms are inalienable and inviolable; they are not exhaustive (the second sentence of Art. 21 and Art. 22 (1));
3) while adopting new laws or introducing amendments to the existing laws, it is not allowed to narrow the scope and content of the existing rights and freedoms in combination and with the right of everyone to the free development of their

[44] Oleksander Vodyannikov (2018) A Gap of the Law as a Subject Matter a Constitutional Complaint. 12 *Law Of Ukraine* 136.
[45] Isensee I., Kirchhof (eds.) (1994). *The State Law of Germany*. In 2 Vol. Vol. 2. pp. 167.

personality (Article 3, Article 3, and Article 23); this is not a permitted encroachment on the very essence of the right[46].

According to Article 77 of the Law on the Constitutional Court of Ukraine, a constitutional complaint shall be deemed admissible subject according to its compliance with or observance of formalities (Articles 55, 56 of this Law) and where:

1) all domestic legal remedies have been exhausted (subject to the availability of a legally valid judicial judgment delivered on appeal, or, where the law provides for cassation appeal, – of a judicial judgment delivered on cassation);

2) not more than three months have passed from the effective date of a final judicial judgment that complies with the law of Ukraine (specific provisions thereof).

Such requirements are crucial for understanding of the semantic content of the eligibility criteria for a constitutional complaint, in particular from the point of view: 1) the structure of human rights as a fundamental (negative or positive); 2) the duty of protection, which implies specific negative and positive obligations of the state; 3) the social context and the structure of the validity of subjective law as a fundamental; 4) the connection of subjective public law with the constitutional principles and the organization of the state.

The CCU's decisions need careful argumentation. The general criterion for their justification is the common values and principles of law. There exist two main levels of reaching a public consensus on the content of constitutional values and principles that serve as essential core of judicial review.

Verification of certain theoretical positions is achieved through reasonableness and practical utility in terms of efficient and effective implementation of human rights. Scientific postulates thus achieve their functional purpose if with their help there can be accomplished a certain clear algorithm of action. It is for these reasons that the requirement of a proper legal procedure is often not decisive in determining whether there has been arbitrary interference of the state in the sphere of private autonomy of the individual. A substantial criterion is the principle of proportionality, which is an crucial for the permissible limitations of human rights[47]. As the legal principles of human rights determine the very essence of the right (*Wesensgehalt*) of the state's obligation to protect, which often deals with the

[46] Decision of the CCU № 5-р/2018 on 22 May 2018 URL: http://www.ccu.gov.ua/dokument/5-r2018

[47] Decision of CCU № 5-р/2018 on 22 May 2018 URL: http://www.ccu.gov.ua/dokument/5-r2018

resolution of conflicts between human rights and other principles of law, particularly affecting the activities of the constitutional court[48]. Since laws are subject to verification in the aspect of observance of the constitutional procedure for their development, adoption and disclosure, the study of factual circumstances is a prerequisite for this.

To understand the fundamental nature of the law that the complainant seeks to protect before the Court, the vertical and horizontal structure of law is important:

1) The vertical structure of human rights characterizes the relationship between the state and the individual, by virtue of which the state has the duty to protect the person from violations by other authorities or third parties, as well as to provide access to certain material and spiritual goods. In this system of coordinates, the carrier of rights – the individual – independently either decides on the exercise of his right or appeals to the authority to restore the violated right and bring the perpetrators to justice. The state has negative and positive obligations in this sphere, and a certain requirement of the individual should be considered lawful in order to conduct a fair investigation. Negative responsibilities include non-interference in the process of exercising a sovereign choice of the individual, as well as the establishment of such rules and procedures that were excessively oppressive for the exercise of a particular right. The positive obligations of the state are to establish the circumstances of violation of the right and to ensure certain measures to enable access to the benefits. On this basis, the public authorities may take certain measures that express its legitimacy to interfere with the exercise of the right, without infringing upon their substantive content, while observing the requirements of proportionality. On this basis, the public authorities may take certain measures that express its legitimacy to interfere in the exercise of the right, without infringing upon very essence of the right, while observing the requirements of proportionality.

2) The horizontal structure of human rights determines the understanding of the constitution as a legal order, which establishes guarantees of relations between private persons on the principles of equivalence and equality. In this case, the individual's claim lies in the need for the State to perform a duty of protection in the event of an infringement of the rights of third parties by investigating such

[48] Lothar Michael, Martin Morlok. (2017) *Grundrechte*. 6. Auflage. Baden Baden: Nomos Verlagsgesselschaft, 45.

circumstances. Horizontal structure of human rights also determines the interference of the state, which acquires a specific character. As Rüfner emphasizes, fundamental rights create the fundamental foundations for the entire legal order, which guarantees them the necessary status, if they are observed in all branches of law, including private legal rules. As a result, fundamental rights in all spheres bind the legislator, including publication of private legal orders. He is obliged to formulate them in such a way that the constitutionally protected rights do not lose their significance. In the opposite case, the legal order will come to a state of infinite contradictions[49]. The concept of the horizontal effect of rights, in addition to labor, family law, is now also beginning to be applied in ensuring human rights in relations with transnational corporations, in protecting consumers' rights, etc.[50]

It is the failure position that to approach the rejection of the investigation of the CCU factual circumstances. Otherwise the Court should establish them, since it is difficult to establish the legitimacy of interference into private autonomy in the consideration of complaints about liberal rights and the functions of social statehood through the guarantees of the dignity of the individual to develop freely as an individual - in terms of social rights protection. The main thing in this context is that the constitutional jurisdiction here does not affect the subject of the jurisdiction of the general courts. The criterion for delimitation is the importance of the case for the national legal system and the need to overcome a particular institutional problem in the implementation of subjective public law as fundamental.

4.2. Empirical experience of the Constitutional Court of Ukraine on consideration of constitutional complaints and systematics of constitutional values.

Today, in jurisprudence of the CCU the following criteria for the inadmissibility of constitutional complaints have developed.

Firstly, the citation of the prescriptions of the Constitution of Ukraine, the legal positions of the CCU and the decisions of the European Court of Human Rights, the

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[49] Isensee I., Kirchhof (eds.) (1994). *The State Law of Germany*. In 2 Vol. Vol. 2. pp. 231.

[50] Lottie Lane, The Horizontal Effect of International human rights law in practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies, *European Journal of Comparative Law and Governance*, 2018, 5, 1, p. 5-88; Guenther Teubner, Horizontal Effect of Constitutional Rights: A Legal Case on the Digital Constitution, *The Italian Law Journal*, 2017, Vol. 03- No. 01, p. 193-205.

provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, without indicating the inconsistency of the Constitution of Ukraine, is not a reason for unconstitutionality in the understanding of Article 55(2)6 The Law on CCU[51]. The CCU requires a certain quality of argumentation and justification and prevention of arbitrary (in the terminology of the CCU – "own") interpretation of the provisions of the Constitution[52].

Secondly, there are acting criteria under which the CCU is guided by the doctrines of refusing to fill legislative gaps or omissions[53] and conflicts (collisions) in the legislation[54]. The Constitutional Court of Ukraine formulated the doctrine of refusing to fill the legislative gaps in the following way:

"The filling of gaps in the laws, some of which the Constitutional Court of Ukraine declared unconstitutional, does not belong to its powers. According to Article 6 of the Constitution of Ukraine, state power is exercised in Ukraine on the basis of its division into legislative, executive and judicial. Proceeding with this and in accordance with part two of Article 19 of the Constitution of Ukraine, the resolution of these issues is the prerogative of the legislative body – the Verkhovna Rada of Ukraine"[55].

This position has been restored in some decisions, which rejected the consideration of a constitutional submission regarding the observance of the constitutionality of the procedure for the appointment of an ombudsman, although the CCU also cites a number of other arguments to compensate for the lack of its own jurisdiction in dealing with such cases. In this case, the court refused to resolve the conflict between the provisions of Art. 208(7) of the Rules of the Verkhovna Rada and Art. 5(2) and Art. 6(3) of the Law on the Commissioner of the Verkhovna Rada of Ukraine on human rights, between whom there appeared a conflict regarding the settlement of the voting procedure and the procedure of the ombudsman appointment and dismissal, since this issue "is the subject of regulatory regulation in the law". The Court therefore concluded:

"Determination of the way of voting for people's deputies of Ukraine for appointment and dismissal of the Commissioner of the Verkhovna Rada of Ukraine on human rights, elimination of conflicts and filling gaps in the laws on this issue is

[51] Ruling of CCU № 23-1(II)/2018 on 5 April 2018.
[52] Ruling of CCU № 21-у(I)/2018 on 13 June 2018.
[53] Ruling of CCU № 41-у/1998 on 10 July 1998.
[54] Ruling of CCU № 53-у on 21 October 1997.
[55] Decision of CCU № 3-рп on 25 March 1998.

carried out by the Verkhovna Rada of Ukraine in the legislative order on the basis, within the limits of authority and in a way, stipulated by the Constitution and laws of Ukraine"[56].

However, in my opinion, this position of the CCU is inconsistent with a number of provisions of the Constitution of Ukraine, since it restricts the right to judicial protection (Article 55) and the jurisdiction of the courts extends to any legal dispute (Article 124). It also violates the constitutional guarantee to everybody's awareness of their rights and duties under which legal acts, determining their contents, should be disclosed to the public in the manner prescribed by law (Article 57).

At the same time, such an approach contradicts the principles of foreseeability of the law and legal certainty, which are indispensable components of the rule of law doctrine, similarly to the materials of the General Report of the XIV European Conference of Constitutional Courts[57]. Also, Alexander Vodyannikov emphasizes that "undoubtedly, the bodies of constitutional jurisdiction have the authority to exercise constitutional control and recognize legislative gaps as unconstitutional"[58]. Such a state attacks human rights, since under the conditions of legal uncertainty it is difficult to protect them, conflicts in the current legislation give rise to arbitrary and willful application of its provisions by public administration and courts. Whereas the model of a normative constitutional complaint has been introduced in Ukraine, the main burden of settling collisions lies with the Supreme Court, which, in the course cassation complaints consideration, has to solve the problems of institutional order in the national legal system, including the resolution of conflicts in the ordinary legislation. This fact is also observable in the light of the occurrence of human rights violation and the court is obliged to recognize the violation of the law and take effective measures to restore it, rather than expect a possible political decision of the Verkhovna Rada that in the future will decide on the existence of a gap in the current legislation. In the light of such circumstances the refusal to resolve conflicts in the ordinary legislation is nothing but refusal of justice.

Given these circumstances, the Constitutional Court may not always resolve the issue of gaps or collisions in the ordinary legislation. Such function of overcoming

[56] Decision of Grand Chamber of CCU № 50-у/2018 on 29 August 2018.

[57] Birmontiene T., Yarasiunas E., Sprugonys E. (2008) General Report XIV Congress of Conference of European Constitutional Courts on Problems of Legislative Omission in Constitutional Jurisprudence. *Herald of Conference of Constitutional Review Bodies of Young Democratic Countries*. Vol. 2(40)–3(41) 70–245.

[58] Oleksander Vodyannikov (2018) A Gap of the Law as a Subject Matter a Constitutional Complaint. 12 *Law Of Ukraine* 129.

the gaps or collisions in the ordinary legislation by the Constitutional Court is an apt subject to comply with such requirements, which constitute certain positive obligations of the Court in ensuring efficient and effective protection and restoration of constitutional rights and freedoms, namely:

a) the person has exhausted all other legal remedies or the review system of court decisions proves their inefficiency, as a result of which the gap or conflict in the legislation is not overcome, resulting in irreversible consequences in the substantive content of subjective public right;

b) the issue has a constitutional character and is important for the national legal system, posing a certain institutional problem;

c) overcoming the gaps or collisions in the ordinary legislation occurs due to the application of the fundamental principles of law or the horizontal effect of the constitution, according to which the fundamental principles of law permeate the national legal system and should ensure the equality of the parties, the equivalence and maintenance of trust between the parties to the contract and provide access to a fair trial based on the principles of trust, consideration of all essential circumstances of the case, observance of the right of the parties to the case to be heard, reasonableness of the decisions and the right to appeal them.

The same arguments can also be applicable to the problem of overcoming conflicts in the legislation, as their existence actually means narrowing the relativity of the very essence of the human rights and fundamental freedoms (Article 22 of the Constitution of Ukraine). It does not meet the requirements of clarity and unambiguous content of normative legal acts as a prerequisite for their appropriate promulgation in order to enter into force (Article 57 of the Constitution of Ukraine).

In this context, one should speak about a certain hierarchy of values, since universality values are provided through certain instruments, for example, separation of powers or sovereignty. Constitutional values of the first order (values-universal) determine the type of legal consciousness, are inherent in any country, following the traditions of constitutionalism, and have the character of legal universalities that have supranational nature. These principles are valid regardless of their attachment to positive law, and in the case of their constitutional consolidation, their content is filled through an interpretation in the doctrine and constitutional jurisprudence. The fundamental constitutional

principles that have become universal are: 1) human dignity; 2) freedom; 3) equality; 4) justice; 5) the rule of law.

Constitutional values of an institutional nature define the principles of constitutional order and serve as a means of securing universal values[59]. These include the principles of the public authority organization, the legitimacy of which lies in the art of securing public interest and observance of legitimate grounds for interference with the private autonomy of the individual.

In the light of these standards, it should be emphasized that when considering constitutional complaints, one should bear in mind the understanding of the concept of their being " manifestly ill-founded " (Art. 77(2) of the Law on the CCU). In fact, the criterion of being recognised as manifestly ill-founded is the requirements formulated by the Court, according to which "the citation of certain provisions of the Code, the norms of the Constitution of Ukraine, legal positions of the Constitutional Court of Ukraine... without indicating the arguments regarding the non-compliance of the Constitution of Ukraine, which are the subject of the dispute, can not be considered the justification of their unconstitutionality"[60]. This is precisely a sign of the apparent unwarranted nature of the constitutional complaint, since the complainant must bring certain considerations of unconstitutionality of the provisions of the law in need of its review, as well as to bring logical links with reference to some constitutional principles that would serve as a criterion for verifying the constitutionality of the law provisions.

At present, the Constitutional Court is merely under way of developing its own practice, the main obstacle being to specify in detail the criteria for the admissibility of constitutional complaints, the subject of which is of public interest. The subject of any constitutional complaint concerns both private and public interest as it concerns the protection of subjective public law. The concept "public interest", which is used in Art. 77(2) of the Law on the CCU points out exceptions to the general eligibility constitutional complaints due to the following factors:

a) the subject of a constitutional complaint concerns the institutional problems that exist in national law, requiring a solution because it creates further unresolved typical violations of human rights and freedoms, guaranteed by constitutional means;

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[59] Savchyn Mykhaylo (2009) Constitutionalism and Constitution Nature. Uzhhorod: Lira, 185 ff.

[60] Ruling of GC of the CCU № 31-у on 05 August 2018.

b) the violation of a certain fundamental right guaranteed by constitutional means causes grave and inevitable consequences for its carrier (even if they do not constitute a particular institutional problem for the national legal order) due to a violation of the fundamental principles of the due process of law, thus necessitating an urgent interference of the CCU to consider a constitutional complaint;

c) there is a need to unify or alter the established practice of the CCU, since the constitutional complaint reveals that the current practice of applying the provisions of the Constitution results in excessive and disproportionate restriction of the right that is the subject of consideration of the constitutional complaint.

The influence of practice considering constitutional complaints of has a dual nature:

1) international aspect – to ensure minimum standards of human rights protection according to the principles of friendly attitude to international law and provide constitutional conformal interpretation of international agreements;

2) national – the establishment of qualitatively new parameters of the human rights understanding, based on value principles and understanding of the mission of courts in the consideration of "complex cases", usually related to human rights.

Thirdly, the CCU recognizes the background for refusal to consider a constitutional complaint, if its subject is other legal acts (as well as actions or inactions), not the law. For example, the CCU does this in the case when the complainant asks for the unconstitutional provision by the Cabinet of Ministers of Ukraine[61].

In the opinion of Berchenko and Tkachenko, the refusal to open proceedings, attended by the presence of arguments, albeit one that does not agree with the CCU, raises doubts from the point of view of the reference to the "manifestly ill-founded" complaint[62].

Here it is also possible to indicate other deficiencies of the CCU position. Firstly, the CCU interpretation of “the law” is wrong, because in European legal tradition the term “law” refers primarily to national legislation and common law[63]. However, in Ukrainian legal tradition the term “legislation” also includes jurisprudence of the CCU and Supreme Court.

[61] Rulings of the CCU № 137-2(II)/2018 on 24 April 2018 and № 45-у(II)/2018 on 10 October 2018.

[62] Hryhorii Berchenko, Yevhenii Tkachenko (2018) The Right to Submit an Individual Constitutional Complaint in Ukraine: Theoretical and Practical Aspects 12 *Law of Ukraine* 106

[63] Venice Commission. Report CDL-AD(2011)003rev on the Rule of Law. Strasburg, 4 April 2011. 10

Secondly, according to Art. 89(4) of the Law on the CCU where the Court, when considering the case upon a constitutional complaint, found the law of Ukraine (provisions thereof) being in conformity with the Constitution of Ukraine, but however discovering that a court had applied the law of Ukraine (provisions thereof) by interpreting it in a manner that is not compliant with the Constitution of Ukraine, the Court shall indicate that fact in the operative part of its decision. Therefore, if acts of public administration or in the final court judgment give an interpretation of human rights, which is not compliant with the constitutional principles and values, this should be subject to judicial review by the CCU.

5. Perspectives of the trial of constitutional complaints in Ukraine. The role of first decisions.

The practice of considering constitutional complaints is a valid proof of quite a unique manifestation of its Ukrainian version. The practice of borrowing a legal construct in order to exercise legal protection means, typical of the European Court of Human Rights justice, is unusual within the national legal system. It is also difficult to challenge the legal acts of the public authorities, since this is only possible within the framework of the procedure for determining the constitutionality of the application of the law in the light of constitutional principles, as indicated in Article 92, Section 3 of the Act on Constitutional Court. In comparison with foreign analogues, Ukraine is characterised by a truncated normative (statutory) model of a constitutional complaint. Presently, a plethora of decisions on constitutional complaints is aimed at eliminating discrimination by guaranteeing human rights in the criminal process. In particular, one of the decisions concerns access to justice, based on the possibility of requiring executive services to enforce court decisions. Another solution is problematic, since corporate rights thereby are interpreted fairly extravagantly.

5.1. Senates Decision.

In the case of the constitutional complaint of Anatoly Skrypka and Oleksiy Bobyr (decision No. 1-p (II)/2019), the provisions of Article 59, Section 3 of the Act on Calculation of the Invalidity Pension have presented the subject-matter for consideration, since they are not applicable to servicemen among military reservists, called for the military operation on the elimination of the Chernobyl disaster consequences. Consequently, they receive a pension "three times lower than conscripts", it discriminatingly violating their constitutional rights.

Referring to its previous practice, the Constitutional Court (in particular, decision No. 12-p/2018) brought arguments about special responsibilities of the state to military and servicemen, protecting Ukraine. The obligation of citizens of Ukraine needs to be respected, in accordance with Article 17 of the Constitution of Ukraine, and the status of servicemen of any categories is conditioned by the military service, which grants them special status. Therefore, increased social protection of these categories of persons obliges the state to determine the amount of their social maintenance, which will guarantee them decent living conditions, as well as full compensation of the damage suffered.

The state may establish certain differences regarding the level of social protection of categories of military men along with those affected by the accident at the Chernobyl Nuclear Power Plant. However, the differences, clearly defined by the respective should not do the following: allow any unjustified exceptions to the constitutional principle of equality, contain signs of discrimination in the implementation of the right to social protection by the defined persons, and violate the essence of the right to social protection. Thus, the legal reasoning of the mechanism of calculating social benefits should be based on the criteria of proportionality and justice.

In the case of the appeal of Metro Cash & Carry Ukraine Ltd, the First Board of the First Senate of the Constitutional Court of Ukraine, by an interim ruling of December 4, 2018, opened the constitutional proceeding on the constitutionality of the provisions of the 24th, 25th, 26th section of Act No. 89 on Amendments to the Tax Code of Ukraine on Improving the Investment Climate in Ukraine. The problem lay in the discriminatory taxation approach for part of the Ltd Company property, located in the temporarily occupied territory of Luhansk region. The Tax Office never decided on the compensation of the amount of over-paid land tax, thus leading to a discriminatory attitude towards the complainant. In this case, the decision No. 3-p (I)/2019 of June 5, 2019, the CCU has emphasized:

> *<…>legal certainty enables participants in public relations to predict the consequences of their actions and be confident in their legitimate expectations, in particular in their timely enforcement in accordance with the existing legislation.*
>
> *Legal certainty is conditioned by the fulfilment of legitimate expectations, that being the achievement of the desired result by committing lawful actions in view of the foreseeable probable consequences.*

Implementation of legitimate expectations is impossible, particularly in cases when a person cannot achieve the predicted result within the period, which is either reasonable or justified due to changes in legal regulation.

Further on, the Court analysed permissible limits of the state interference in the exercise of property rights, specifically in the form of the establishment of certain taxes or compulsory payments abiding by proportionality and the very essence of property rights:

Property right is not absolute, that is, it may be limited. However, interference with this right can be exercised only by observing the principle of legal certainty and the principle of proportionality, requiring a reasonable correlation between the interests of the individual and society. When property right is restricted in the public interest, the proportionate measures are those less burdensome for the rights and freedoms of individuals among all available measures.

Nonsystematic changes in tax legislation as if to achieve a high purpose have led to violation of the legal certainty principles, resulting in the inconsistency of actions of the legislator as well as the imbalance between public and private interests. In its turn, the selected means (introduction of such changes) contradict the principle of proportionality. Proceeding from this, the Constitutional Court recognized the provisions of the first sentence of paragraph 26 of Section I of Act No. 1989 as contradicting the principle of the rule of law.

The Court also emphasized that this practice negatively affects the economic freedom and development of entrepreneurship in Ukraine, as well as the investment climate in the state. Although the constitutional and legal content of the concept of economic freedom does not entail obtaining attainable results from economic activities. Moreover, it embraces protection against the risks associated with arbitrary, unpredictable and unreasonable decisions and actions of public authorities, particularly those regarding tax regulation.

The constitutional complaint by Vira Khlipalska claimed that the provisions of the Article 26, Section 2 of Act No. 1404-VIII on enforcement actions have created "unequal conditions for taking an enforcement action, being simultaneously favourable for state bodies (without advance payment) and burdensome for ordinary citizens (with the exception of certain subsidised categories of persons)".

The CCU, acting within its jurisprudence, has pointed out that "execution of a court order is an integral part of every person's right to judicial protection", "failure to observe a court order threatens the very essence of the right to a fair trial by a court", and that "mandatory execution of court orders is a component of the right to a fair judicial protection ", emphasizing that:

> *<…>the state's ensuring of a court order execution as an indispensable part of the right to judicial protection is laid down at the constitutional level.*
>
> *<…>the mandatory execution of a court order is a prerequisite for the implementation of the constitutional right of everyone to judicial protection. Thus, the state cannot refrain from fulfilling its positive obligation to ensure the enforcement of a court order for the purpose of real protection and restoration of the rights and freedoms guaranteed by the court, legal interests of physical and legal entities, society, and the state.*
>
> *<…>the state, by creating appropriate national legal and organizational mechanisms to implement the right to execute a court order, should not merely introduce effective systems for the court order execution, but also ensure the functioning of these systems, guaranteeing that they are accessible to every person in whose favour the court order is sought, in case of a failure to execute a tangible court order by a state body.*

Based on its legal position, the Constitutional Court recognized as unconstitutional the provision of the Law on the executive service, according to which the payer was to make an advance payment in the amount of two minimum wages[64], unless the payer is exempted from paying this contribution in cases specified by the Enforcement Proceedings Act. Since Khlipalska was in a difficult financial situation, and the Law did not foresee either a mechanism of instalment payments, nor a transfer of the court order execution on a debtor, such a state of affairs had the consequence of denying the idea of judicial protection, transforming it into illusion. Therefore, the legal community, especially lawyers specializing in the execution of court orders, approved of the adoption of the given order.

Fairly unusual a court order, causing a significant repercussion in the legal community, was the decision of the Constitutional Court under the constitutional complaint of JSC "Zaporozhsky Ferroalloy Plant", which is a leader in the relevant home market segment. The case concerned the ability of the National Anti-

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[64] At the time making of the decision, the size of this mandatory payment amounted to UAH 8,346, which at the official rate on May 15, 2019 amounted to 284.46 euros.

Corruption Bureau of Ukraine acting as a pre-trial investigation agency to appeal to the court with the requirements to recognise all the agreements as invalid until completion of the pre-trial investigation by the time the court claims the guilty in committing the crime (decision No. 4-р (II)/2019). For no obvious reasons, the CCU adopted an approach, lying in the fact that only the public prosecution office could apply to the court for such matters. Although, in the course of pre-trial investigation there might arise grounds for an urgent court appeal for such reasons as: property integrity preservation and prevention of violations of the rights of other JSC members.

> *The Constitution of Ukraine specifying the powers of the state body authority, its number of members, the constitution peculiarities, the subjects of appointment / election and dismissal of its members and / or the head, etc., prevents from altering the principles of the activity of such a state body otherwise than by amending the Fundamental Law of Ukraine.*

Although NABU is not directly mentioned in the Constitution and can be referred to pre-trial investigation bodies, for some reason in the case under consideration the Court has observed delegation of powers, since the public prosecution office is not entitled to transfer its powers to other authorities. The court seemed to be proceeding from the fact that in specifying the provisions of the Constitution there can be no distortion of its provisions. In this regard, the CCU in the decision noted that:

> *The Fundamental Law of Ukraine does not endow the Verkhovna Rada of Ukraine, the sole body of legislative power in Ukraine, with the right to delegate the constitutional powers of the public prosecution office, being a constitutionally recognised state body, to other bodies beyond the limits established by constitutional norms.*

Although in fact the public prosecution office has a subsidiary power to represent the interests of the state "in exceptional cases", according to Article 131[1] of the Constitution of Ukraine, such a formulation of its representative powers means that, under normal circumstances, such powers must be exercised by a competent authority. Only in cases of the competent authority's failure to appropriately or completely exercise powers to take the action to the court in matters pertaining to its subject-matter, the public prosecution office should act within the powers to represent the interests of the state in the court, specifically by appealing to the court.

Such an ambiguous court order, whose fragments make the Constitution sound as some kind of instruction, e.g. coffee or lecho (similar as Irish stew recipe)[65], has evoked hot debates. In particular, its indispensable part presents four separate views of the seven Second Senate judges, having passed it. The Judge Oleg Pervomaisky emphasized that there was no overlapping of the NABU and the public prosecution office functions, given the possibility of such an appeal by the public prosecution office to the court in exceptional cases (paragraph 2.6). The only judge-speaker Alexander Tupitsky adjusts to a consensual view that in the given case the CCU did not consider the issue of the constitutional rights and freedoms protection, as if the NABU appeal to the court with the issue on the validity of the agreements concluded by the JSC presents an excessive state interference with the freedom of economic activity (clauses 4.2-4.3) hereby legally represented by the NABU. Despite considering this issue from the point of view of the JSC individual shareholders, such a position is negligent. The Judge Viktor Gorovenko emphasizes the specialization of prosecutors in criminal investigations as well as the complexity of their proper argumentation of own legal position in civil and commercial courts regarding the validity of commercial transactions, therefore recognising these functions of the public prosecution office as subsidiary. From the point of view of human rights and the legitimate aim of the NABU activities on combating corruption, the priority hereby lies in termination of commercial agreements with a corruption element. The Judge Vasyl Lemak substantiates the idea that, given their nature, legal entities possess fundamental rights, and the fact of judicial verification of a legal entity commercial transaction validity does not provide evidence of interference with its fundamental right.

5.2. Decisions of the Grand Chamber.

The Grand Chamber of the Constitutional Court tends to overlook putting forward any arguments regarding the basis of constitutional complaints, accepted by the Chamber from the Senate. From the point of view of conforming to the standards of legal reasoning of court orders, this seems at least quite strange. It could be comparable to its overall neglect of and consideration of the case with available dispute about jurisdiction or even the jurisdiction of the dispute. In view of the doctrine of self-restraint of the constitutional justice the GC yet has to

[65] It is vegetable ragout, the basis of which is Bulgarian pepper, tomatoes and onions with the addition of some other ingredients (sausages, eggs, sour cream to taste). Agrees with Hungarian cuisine, popular in Transcarpathia, where the author of these lines of papers.

consider such an issue in its decisions, otherwise the decisions of the GC will contradict the standards of legal certainty and prohibition of arbitrariness, both being components of the rule of law.

Apparently, in the case of Victor Glushchenko the subject-matter of a constitutional complaint had a substantial social significance, as it concerned the use of a preventive measure in the form of detention. After all, keeping a person in custody without a conviction is a direct attack on the fundamental constitutional value, i.e. freedom. The subject of the appeal presented the rules of Article 392, Section 2 of the Criminal Procedural Code of Ukraine, which does allow a separate appeal against the interim ruling to extend the detention period, passed before the final court order during the court proceedings in the court of the first instance.

The Court referred to a number of its previous rulings, having set forth arguments regarding the preservation of the very essence of the law, the possibility to restrict relative rights on the proportionality basis, as well as the requirements of judicial verification of legal reasoning for their restriction, with due observance of the appropriate guarantees of the due legal process. In particular, the CCU formulated a requirement to review an appeal, taking into account the overall nature of the right to appeal:

> *<...>the provision of the right to appeal the case provided in clause 8 of part two of Article 129 of the Constitution of Ukraine should be understood as the guaranteed right of a person to have their case reviewed in general by the court of appeal, with a respective obligation of this court to review the case in a comprehensive manner, to provide complete, objective and direct examination of the evidence, taking into account the arguments and requirements of the appeal, and verify the legality and validity of the first instance court order. Ensuring the right to appeal the case, as one of the legal proceedings constitutional principles, is aimed at guaranteeing effective judicial protection of human and civil rights and freedoms, while observing constitutional requirements regarding reasonable time framework for reviewing a case, independence of a judge, obligation of a court order, etc.*

The review of court decisions as it is can be regarded as a counterbalance in crime investigation, since it tackles preventive measures in the form of detention against suspects. Apparently, when balancing the values of freedom and the need to protect and restore the rights of victims, the Constitutional Court considered the factor of a legal margin of error of the first instance court as well as the value of

the individual's freedom. From the viewpoint of the pre-trial investigation, the CCU will focus on the best preparation of a pre-trial investigation evidence base in criminal proceedings to provide the public prosecution office with appropriate and adequate evidence in the proceedings.

Since detention is the most stringent preventive measure, it obliges courts to consider other, more acceptable alternatives, taking into account the need to secure evidence in the case. Also, decision No. 4-p / 2019 cites the need to settle the appeal procedure in a brief period of time, as it concerns the reasonableness of the proceedings timing as well as justification for holding a person in custody until convicted.

The case of detention of persons, suspected of terrorism also triggered significant public response. I contemplated this issue at some point[66], therefore I can state that rather a vexing theme of the fight against terrorism needs a balanced solution, since it tackles not only freedom versus national security balancing, yet a balance between the freedom of suspects and the lives of those, subject to a terrorist attack. Such double balancing requires sophisticated techniques to justify a court decision, for this reason it is no easy thing to dwell upon a ten-page decision No. 7-p/2019 of the CCU.

The complainants, Maryna Kovtun, Nadiia Savchenko, Ihor Kostoglodov and Valery Chornobuk, stated in their constitutional complaint that the provisions of Article 176, Section 5 of the CPC indeed established the presumption that existence of suspicion of committing individual crimes stipulates absolute necessity of selecting a preventive measure in the form of detention without the right to choose another preventive measure. From the perspective of the subjects of the right to constitutional complaints, this approach is discriminatory, since it puts the persons detained in unequal conditions compared to those who are suspected of or charged with committing other crimes of a similar degree of criminal act.

The CCU claimed that "detention is the most stringent preventive measure among all preventive measures" foreseen by the CCP, listing a traditional range of circumstances to take into account when determining a type of precautionary measure, without differentiating persons engaged in subversion, i.e. crimes against national security. Further on, the CCU, through the provisions of the CPC, sought to balance the constitutional values of the suspect's individual freedom versus

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[66] Савчин М. (2017) Забезпечення конституційного порядку та стан війни 2(3) *Український часопис конституційного права* 46, 48-50.

national security without focusing on an important methodological detail, being the need to guarantee a balance between the suspect under the precautionary measure and potential victims of subversion, particularly terrorism.

Abovementioned considered and given that the Crimea has been annexed from Ukraine, some of its territories along with Donetsk and Luhansk regions being under the actual control of the Russian Federation and illegal armed groups, this legal argument seems too superficial and insufficient. Moreover, the interpretation of the constitutional guarantee of individual freedom, as defined in Article 29 of the Constitution, cannot be exercised through the provisions of the ordinary law, since the very provisions of the CPC serve only as a subject of verification of a constitutional complaint, not a criterion for their verification in terms of the supremacy of the Constitution of Ukraine.

Conclusions

The fundamental rights find their expression in the legislation by defining the degree of state interference in private autonomy. A number of factors determine the legislative function in the state as the following: the concept and functions of the law, the scope of legislative competence of the parliament, the distribution of legislative competences between the parliament and other state bodies, as well as the requirements of the legislative procedure. Under such standards, the development of consideration of constitutional complaints by the Constitutional Court lies in the plane of ensuring a state's restrained intervention in the sphere of private autonomy, provided it concerns civil and political rights. The quintessence of this approach is the separate opinion of the judge of the European Court on human rights ad hoc Stanislav Shevchuk in the case of Shmushkovich v. Ukraine[67].

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[67] In the context of my article in the concurring opinion of Judge ad hoc Stanislav Shevchuk (Shmushkovych v Ukraine, App. No. 3276/1 0, Judgment on 14 November 2013) is it about that that:

"...the decision to enact a special law or leave the matter for the judicial practice to develop is within the delicate sphere of national legal policy choices.

The power of the State in such a delicate realm as fundamental freedoms is strictly limited to what is necessary in democratic society, meaning that the State may enact strongly justified restrictions to be invoked under clearly prescribed circumstances. But it cannot legitimately regulate the very enjoyment of such freedoms. In my view, when confronted with the issue of personal freedoms the State should abstain from regulating these and limit itself to regulating such restrictions as are necessary in a democratic society. I see a genuine fallacy in relating the violation of Article 11 of the Convention in the present case to the lack of a legislative enactment regulating the freedom of assembly. We should bear in mind the intricate nexus between freedom of assembly and freedom of expression, and the internal logic of both freedoms does not require any enabling laws to be effective in a democratic society.

However, this approach is not suitable for social rights – here the CCU needs to study the following parameters of the quality of the law: 1) the intensity (density) of legal regulation; 2) accessibility and legal certainty of the law; 3) providing of social infrastructure (social insurance systems, organizations and activities of social protection institutions, providing of social benefits and benefits, and effective control over public finances). Failure to comply with these standards indicates a legislative omission that is nothing but an outright attack on human dignity as a fundamental constitutional value by a legislator who does not properly enforce quality legislation. This will generate inflation of the law in the form of its fragmentary concretization in regulatory acts of the executive and local public administrations, and the general courts will be overwhelmed with a series of claims related to implementation of social rights, an avalanche of which can reach the Constitutional Court of Ukraine in the form of constitutional complaints. Therefore, the currently dominant doctrine to refuse to overcome the circle of sins and gaps in legislation cannot withstand its verification at the level of achievements of the modern doctrine of constitutionalism. Constitutional Court of Ukraine should look for innovative approaches to protect human rights and freedoms in the light of constitutional values and principles.

At present there have been frequent instances of rather a peculiar application of the constitutional complaint serving as a tool for resolving corporate disputes that ought to be resolved via other means of legal protection. Also, the practice of the Grand Chamber of the Constitutional Court in its decisions to not refer to legal grounds for a constitutional complaint consideration seems out of the way as well, given this is an exceptional procedure. It is the Senate to deal with complaints. At least in its decisions the Grand Chamber should at least briefly indicate the legal reasons for such a proceeding. The approved truncated normative (statutory) model of a constitutional complaint in an utterly restricted manner provides constitutional review of arbitrary decisions of the public administration bodies. Unlike other countries with a legal practice of a constitutional complaint, it is necessary to deplete judicial means for the human rights protection.

In this connection I fully subscribe to the opinion of the commissaire du gouvernement in the French Conseil d'État case of Benjamin (1933): "la liberté est la règle, la restriction de police l'exception."