

# The Constitutional Court of Ukraine as the main actor in safeguarding of the Constitution

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## **Abstract**

*This article deals with the main issues of the constitutional justice in Ukraine – its concept, significance and the main principles of development. In this article we try to research pure, clear vision, essential and effective mission of the Constitutional Court of Ukraine on legal and political chessboard of Ukraine, keeping in mind its prominent sole role in constitutional justice. Main objective of this study is to examine the trajectory of legal and political development of the Constitutional Court of Ukraine and to demonstrate the impact of its opinions and decisions on legal doctrine of Ukraine. In this study regarding the constitutional justice in Ukraine we used few mixed research methods to obtain specific scientific results: observation, surveys, secondary data analyses, etc. The present study related to the essence of the Constitutional Court of Ukraine, its foundation and trajectory of its development, its key role in constitutional review should be viewed as a follow-up to the one previously published research in Polish. This article might be useful for students and master students of law faculties, practitioners in the field of constitutional law and justice.*

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## **1. Introduction**

Certainly, the first best known example of constitutional justice is concerned to be the decision of the US Supreme Court in the context of exercising constitutional review in case *Marbury v. Madison* (1803) on the constitutionality of the application of Article 3 of the US Constitution (1787)<sup>3</sup>. This decision is deeply rooted in the essence of the constitutional review and became a starting point for real path maker in constitutional justice worldwide.

The principle of separation of powers is supposed to be the primary principle of formation of all state bodies in every democratic state. It is not an ideal, however, its universal theoretical essence is a real pathway to provide a practical response to

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<sup>3</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

the needs and challenges of modern society. Additionally, we know other principles what can be used to ensure constitutional justice everywhere: rule of law, proportionality, check and balances, national interest, protection of human rights etc.

The legal system of such a society guarantees that every citizen will enjoy and fully realize his/her rights and freedoms underpinned by fundamental democratic values. By consideration of the role of the constitutional court in protecting the rights and interests of its citizen, it must be understood that such judicial protection is the highest form of guaranteeing respect for human rights in every democratic society. The construction of a state mechanism on the principle of checks and balances properly confirms this recognition. The said structure usually is duly incorporated in primary national legislation (acts of the highest legal force) - Basic Laws (Constitutions). Ukraine is not an exception.

According to art. 6 of the Constitution of Ukraine (1996), the State power in Ukraine shall be exercised with the consideration of its division into legislative, executive, and judicial branches. Legislative, executive, and judicial bodies shall exercise their authority within the limits determined by this Constitution and in accordance with the laws of Ukraine<sup>4</sup>.

The Constitutional Court of Ukraine was established in Ukraine in 1992, and *de facto* started its activity in October 1996 - after the current Constitution of Ukraine was adopted. Article 147 of the Constitution of Ukraine (1996), provides: "The Constitutional Court of Ukraine shall be the sole body of constitutional jurisdiction in Ukraine. The Constitutional Court of Ukraine shall resolve the issues of conformity of laws and other legal acts with the Constitution of Ukraine and provide the official interpretation of the Constitution of Ukraine (1996) and laws of Ukraine"<sup>5</sup>.

During the past at least ten years, courts in Ukraine have indeed become a specific hostage of the struggle between different branches, political parties for power and their particular influence on the constitutional court to overrule unwanted legislation, further to receive wanted decision/opinion due to its (often hypothetical) incompatibility with the constitution.

That is why six years ago the level of people's trust to the constitutional court's activity (simply justice and its effectiveness) dropped sharply. Such decreasing of trust (distrust) was deeply rooted in (including for objective reasons, when the constitutional court was used as an effective instrument to combat the opposition, particularly during the revolutionary events in Ukraine at the end of 2013 – at the beginning of 2014. Political bodies of legislative and executive branches of state power, who violated its independence, intervened into its activity, competed to receive more influence on the constitutional court, as well as the mass media and other so-called 'experts' in constitutional justice do not allow to create a positive image of the court.

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<sup>4</sup> Constitution of Ukraine. Law № 254к/96-ВР, 28.06.1996 (URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80?lang=uk>).

<sup>5</sup> Constitution of Ukraine. Law № 254к/96-ВР, 28.06.1996 (URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80?lang=uk>).

The situation around the Constitutional Court of Ukraine was partly improved only in 2014, when a group of independent and professional 'young' judges, including those elected in March 2014, joined the CCU<sup>6</sup>. To improve the situation with trust to the Constitutional Court of Ukraine and effect/power of its judgments on state policy and state activity during the last five years other eight judges were elected/appointed, and now there remained only six judges (one-third of the court's composition), elected/appointed by the 'old regime' during 2010-2013 (among them we see Natalia Shaptala, acting Chairman of the CCU, elected on 14.05.2019, whose powers as a judge of the CCU will expire in the end of September 2019).

Due to sociologic data, the level of trust to the Constitutional Court of Ukraine increased in 2018 to 30 %, which definitely is not enough in any democratic state, but shows that ongoing reforming is going in the right way, time and palce.

## **2. Basic legal and political roots of the Constitutional Court's of Ukraine foundation and trajectory of its activity (1996–2019)**

According to Volodymyr Kampo, a former judge of the Constitutional Court of Ukraine (2005-2013), a well-known fact is that, by exercising its powers, every constitutional court may perform various legal functions in different spheres: law and justice (to examine the validity of a law, or other object of scrutiny, and check its compatibility with constitution or higher norm), human rights protection (to ensure and protect the rights and freedoms of persons, legal entities), law and governance (to fill the gaps in the legislation and to eliminate legislative conflicts in the process of interpretation of the provisions of the constitution, laws and other legal acts, testing their constitutionality), etc.

It is obvious that constitutional justice as one of the important attributes of the rule of law principle and democracy could not exist in severe isolation from the other segments of the national constitutional law and order. However, it is difficult to find its unique meaning: there is a version that constitutional justice is materialized by bodies of constitutional justice, and its constitutive element is the constitutional appeal submitted by ordinary citizens, since “only using it they can protect their rights and freedoms in bodies of the constitutional justice”<sup>7</sup>.

There are few essential doctrinal arguments related to constitutional justice, that demonstrate pure effect of principle of rule of law application in Ukraine:

- constitution is the highest norm in a legal system and therefore all other law derives from its authority and needs to be compatible with it;

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<sup>6</sup> among them we see Prof. Dr. Stanislav Shevchuk, previous judge *ad hoc* at the European Court of Human Rights ex-Chairman of the Constitutional Court of Ukraine, dismissed from the office recently on 14.05.2019 because of ‘commitment of a substantial disciplinary offense, grossly or systematically neglecting his duties, which is incompatible with the status of a judge of the Constitutional Court of Ukraine’.

<sup>7</sup> Кампо В.М. Деякі проблеми розвитку конституційної юстиції в Україні. *Науково-практичний фаховий журнал «Право України»*. 2010. № 6. (Кампо В., Some Problems of Constitutional Justice Development in Ukraine. *Legal Journal 'Law of Ukraine'*, Issue 6, 2010) pp. 60–69.

- national lawmaker (parliament) simply should take account of the constitution when passing laws, while thinking on their constitutionality.

Honestly speaking, the Constitutional Court of Ukraine (hereinafter referred to as “the CCU”) had been formally established already in 1990, when on October 24<sup>th</sup> 1990 the Verkhovna Rada of the Ukrainian SSR adopted the Law “On amendments to the Constitution (Fundamental Law) of the Ukrainian SSR” № 404-XII<sup>8</sup>. In Article 112.1 was stated that, “The Constitutional Court of the Ukrainian SSR shall be elected by the Verkhovna Rada of the Ukrainian SSR for the period of ten years from among specialists in law composed of the Chairperson, Deputy Chairperson and 23 members of the Court”<sup>9</sup>. However, at that time the CCU had not been established. The Verkhovna Rada of Ukraine, whose essential powers were to form the constitutional composition of this legal institution, had only managed to elect its Chairman (Leonid Yuzkov), but he remained not effective.

Finally, the modern CCU was ‘born’ in the historical night back in 1996, when the Verkhovna Rada of Ukraine (Ukrainian Parliament) was considering the draft Constitution of Ukraine. Notwithstanding, the adoption of the Basic Law of Ukraine on 28<sup>th</sup> June 1996 was the starting point for the development of constitutional science and practice in Ukraine.

During 20 years of the activity of the CCU (not in exclusively in favorable conditions, but on contrary, sometimes under serious political pressure) the outstanding lawyers-constitutionalists, such as Mykola Koziubra (1996-2003), Petro Martynenko (1996-2001), Volodymyr Shapoval (1996-2005), Viktor Shyshkin (2006-2015), Petro Stetsyuk (2006-2016), Stanislav Yatsenko (1996-2002), and many others worked in it.

As it is written in the Constitution of Ukraine (1996) and duplicated in the basic law 'On the Constitutional Court of Ukraine' it consists of 18 judges, where the Ukrainian Parliament (the Verkhovna Rada) elects six of them, the President of Ukraine appoints another six and Congress of Judges of Ukraine appoints the rest (six) for the one-term of nine years, without the right to reappointment. Only a citizen of Ukraine who

- a) has command of the state [Ukrainian] language,
- b) has reached the age of forty as of the day of the appointment,
- c) has higher education in law and at least fifteen years of professional experience in the field of law, high moral character, and
- d) is a lawyer with a recognized level of competence might be eligible to become a judge of the CCU<sup>10</sup>.

Immunity of every judge of the CCU is one of the elements of their status, it is not a personal privilege, and should have only public and legal purpose, to ensure the impartial administration of justice by impartial and fair court<sup>11</sup>. Therefore, a

<sup>8</sup> Bulletin of the Verkhovna Rada of the Ukrainian SSR dated November 6, 1990. № 45, P. 606.

<sup>9</sup> *Ibid.*

<sup>10</sup> On the Constitutional Court of Ukraine. Law of Ukraine № 2136–VIII, 13<sup>th</sup> July 2017 (URL: <https://zakon.rada.gov.ua/laws/show/2136-19>).

<sup>11</sup> Decision of the Constitutional Court of Ukraine No. 19-rp/2004 dated December 1, 2004.

judge of the CCU shall not be detained or arrested without the consent of the Verkhovna Rada of Ukraine, until a verdict of guilty is rendered by a court. Additional guarantees of the independence of judges of the CCU are the followings: judges of the CCU shall not bear legal liability for voting results or expression of their opinions in the CCU and in its Collegia, except liability for offense or slander when considering cases, adopting decisions and providing opinions by the CCU.

Every judge of the CCU has a right to dissenting opinion, irrespective of his/her voting “for” or “against” adopting a decision or providing an opinion. A dissenting opinion of a every judge of the CCU should be published in the Bulletin of the Constitutional Court of Ukraine, other official publications of Ukraine and on the official web-site of the CCU along with the decision/ruling of the CCU.

On September 30<sup>th</sup> 2016 the amendments to the Constitution of Ukraine (1996) concerning the judicial system<sup>12</sup> are supposed to be the foundation for the reform of judiciary in general, and the Constitutional Court in particular, became effective. The reform introduced norms that significantly enhance the real independence of the CCU. They exempt it from non-inherent functions and significantly expand the powers of the CCU. It (the CCU) in its nature should be extremely apolitical body, equidistant and completely independent of all branches of power, since it is the chief arbiter monitoring the observance of the Constitution of Ukraine (1996) in social and legal relations.

During 1996-2016, the CCU has processed more than 70 000 documents, including more than 1 000 constitutional petitions and over 5 500 constitutional appeals<sup>13</sup>.

As a result of the reform the Verkhovna Rada of Ukraine adopted Law of Ukraine “On the Constitutional Court of Ukraine” on 13<sup>th</sup> July 2017 № 2136–VIII (hereinafter referred to as “the Law”)<sup>14</sup>. What is the most important outcome of the reform and the Law that each of the 18 judges, having been sworn in, could fairly and professionally work in accordance with the letter of the law and in the spirit of the law, guided by his/her own conscience.

### 3. Essential powers of the Constitutional Court of Ukraine

According to Article 151<sup>1</sup> of the Constitution of Ukraine (1996)<sup>15</sup> citizens of Ukraine regardless mode of its acquisition and legal entities shall have the right for

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<sup>12</sup> Law of Ukraine “On Amendments to the Constitution of Ukraine (on justice)” №1401-VIII. Holos Ukrayiny № 118 dated 29.06.2016

<sup>13</sup> *Конституційний контроль і процеси демократичної трансформації у сучасному суспільстві*. Збірка матеріалів міжнародної конференції, присвяченої 20-річчю Конституційного Суду України. Київ: ВАІТЕ, 2016. (Constitutional control and processes of democratic transformation in modern society: Scientific collection of international conference, dedicated to 20<sup>th</sup> anniversary of the Constitutional Court of Ukraine. Kyiv: VAITE, 2016). P. 23.

<sup>14</sup> On the Constitutional Court of Ukraine. Law of Ukraine № 2136–VIII, 13<sup>th</sup> July 2017 (URL: <https://zakon.rada.gov.ua/laws/show/2136-19>).

<sup>15</sup> Constitution of Ukraine. Law № 254к/96-ВР, 28.06.1996 (URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80?lang=uk>).

appeal to the Constitutional Court of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of the provisions of laws of Ukraine provided a subject of appeal alleges that the law of Ukraine applied to render a final court decision in his/her case contravenes the Constitution of Ukraine. Usually, a constitutional complaint may be lodged after exhaustion of all other domestic legal remedies.

The CCU is designed to be the only body of constitutional jurisdiction in Ukraine. Therefore, it does not belong to the judicial system of Ukraine and its decisions could not be appealed and must be carried out immediately. The existing powers of the CCU are defined by Articles 147, 150, 151, 151<sup>1</sup> of the Constitution of Ukraine (1996)<sup>16</sup>, Article 7 of the Law of Ukraine “On the Constitutional Court of Ukraine”<sup>17</sup>.

Ukraine, having such a prestigious institution to conduct the constitutional review and to hold the constitutional stability in society, must provide for its efficiency to ensure constitutionality and preserve the constitutional law and order, and respect of human rights and freedoms. The main aim of the CCU is to secure protection and supremacy of the Constitution of Ukraine (1996), to be its real guarantor, to examine the validity of legal acts by setting them against the constitution and to review the compatibility of the normative legal acts with the constitution<sup>18</sup>.

According to recent version of the Law of Ukraine “On the Constitutional Court of Ukraine of Ukraine” (Article 7)<sup>19</sup> the CCU adopts decisions and conclusions in cases related to:

- resolving the issues of conformity with the Constitution of Ukraine (constitutionality) of the laws of Ukraine or other legal acts of the Verkhovna Rada of Ukraine (Ukrainian Parliament), acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea;
- official interpretation of the Constitution of Ukraine;
- providing opinions on conformity to the Constitution of Ukraine of enforced international treaties of Ukraine or those international treaties that are submitted to the Verkhovna Rada of Ukraine for its consent to their binding nature;
- providing opinions on compliance with the Constitution of Ukraine (constitutionality) of the questions to be put to an all-Ukrainian referendum on a popular initiative;

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<sup>16</sup> *Ibid.*

<sup>17</sup> On the Constitutional Court of Ukraine. Law of Ukraine № 2136–VIII, 13<sup>th</sup> July 2017 (URL: <https://zakon.rada.gov.ua/laws/show/2136-19>).

<sup>18</sup> Тихий В.П. Деякі проблеми конституційної юрисдикції в Україні. *Правова держава Україна: проблеми, перспективи розвитку*. Харків. 1995, 298 с. (Tykhuj V.P. Some Problems of the Constitutional Jurisdiction in Ukraine / in a book: *Law State Ukraine: Problems and perspectives of development*. Kharkiv 1995) p. 298.

<sup>19</sup> On the Constitutional Court of Ukraine. Law of Ukraine № 2136–VIII, 13<sup>th</sup> July 2017 (URL: <https://zakon.rada.gov.ua/laws/show/2136-19>).

- providing opinion on the observance, within the limits of the constitutional procedure for investigating and considering a case on removal of the President of Ukraine from office through special procedure (impeachment);
- deciding on compatibility with the Constitution of Ukraine (constitutionality) of laws of Ukraine, upon a constitutional complaint of an individual who considers that the law of Ukraine applied in the final court decision in his or her case contradicts the Constitution of Ukraine.

The CCU may adopt a decision on the unconstitutionality of legal acts in whole or in their separate provisions if it found incompatible with the Constitution or a procedural violation established by the Constitution for their review, adoption or entry into force, or lack of competence (*ultra vires*) to adopt the legal act. Usually, questions regarding the legality of acts of the public authorities, the authorities of the Autonomous Republic of Crimea and bodies of the local self-government, and other questions attributed to the jurisdiction of the ordinary courts, do not fall under the review competence of the CCU. Also, the CCU is not authorized to consider complaints regarding actions and decisions of state authorities and local self-government, their officials or evaluate these actions and decisions.

The CCU does not resolve any issues of establishment and restoration of social privileges, calculation and recalculation of pensions, other issues that fall within the competence (*intra vires*) of Ukrainian legislative and executive bodies, courts and local self-government bodies, etc. The CCU does not provide explanations and/or advice on any legal issues that might arise when applying law in force.

Every case for a court hearing of the CCU is prepared by the justice-rapporteur appointed by the Chairman of the CCU. Current Ukrainian legislation provides two possible forms of the petitions related to the Constitutional Court of Ukraine: constitutional submission and constitutional appeal, which can be recalled on the written statement of an actor who sent it to the CCU at any time till the day of consideration at its plenary meeting.

The constitutional submission means a written petition filed to the CCU:

- to declare the legal act (or its defined provisions) void and unconstitutional<sup>20</sup>,

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<sup>20</sup> Constitutional submission to examine the constitutionality of laws and other legal acts of the Verkhovna Rada of Ukraine, the acts of the President of Ukraine, the acts of the Cabinet of Ministers of Ukraine, the legal acts of the Verkhovna Rada of Ukraine of the Autonomous Republic of Crimea can be put forward by: the President of Ukraine, no fewer than forty-five national deputies of Ukraine, the Supreme Court of Ukraine, the Authorised of the Verkhovna Rada of Ukraine, the Verkhovna Rada Human Rights Representative of the Autonomous Republic of Crimea. Constitutional submission for examining the constitutionality of laws and other legal acts of the Verkhovna Rada of Ukraine, the acts of the President of Ukraine, the acts of the Cabinet of Ministers of Ukraine, the legal acts of the Verkhovna Rada of Ukraine of the Autonomous Republic of Crimea can be put forward by: the President of Ukraine, no fewer than forty-five national deputies of Ukraine, the Supreme Court of Ukraine, the Authorised of the Verkhovna Rada of Ukraine, the Verkhovna Rada' Human Rights Representative of the Autonomous Republic of Crimea. See Art. 40 the Law of Ukraine on the Constitutional Court of Ukraine.

- to examine the constitutionality of international treaties<sup>21</sup> or
- to interpret the Constitution of Ukraine (1996) and the laws of Ukraine<sup>22</sup>.

The Verkhovna Rada of Ukraine, in the form of constitutional submission, submits its conclusions on the observance of the constitutional procedure of investigation and findings in the case about the removal of the President of Ukraine from office by the procedure of impeachment.

The constitutional appeal is a written petition to the CCU on the necessity of the official interpretation of the Constitution of Ukraine and the laws of Ukraine in order to ensure safeguard to the constitutional human and citizens' rights and freedoms, and also persons' rights. Citizens of Ukraine, foreigners, stateless persons and legal persons may submit a constitutional appeal for the official interpretation of the Constitution and the laws of Ukraine.

Until the adoption of recent version of the Law of Ukraine "On the Constitutional Court of Ukraine of Ukraine" in 2017, the legislation of Ukraine did not provide the citizen's rights to submit a motion to the CCU regarding the Constitution of Ukraine or other norms of laws. Therefore, it was very necessary for finalization of ongoing reform to adopt the experience of some other European countries which give their citizens a right to submit a constitutional complaint to the CCU (to protect his/her violated constitutional right).

#### 4. Constitutional review in Ukraine: from theory to practice

The constitutional review in Ukraine might be classified as *ex post*, since it subjects review legislation in force to judicial scrutiny<sup>23</sup>. The system of constitutional review in Ukraine as well in other Central, Southern and Eastern European countries features a special constitutional court and is called continental or Kelsian model of judicial review (keeping in mind name of 'undoubtedly the leading jurist of the time' and 'framer' of constitutional review, Hans Kelsen).

The constitutional review of the CCU has a preliminary (preventive) character when adopting conclusion for compliance with the Constitution of the international treaties that are being brought into the Verkhovna Rada for pronouncing on their binding nature, and also to accordance with the requirements of the articles 157 and 158 of the Constitution of Ukraine of draft laws introducing amendments to the

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<sup>21</sup> The President of Ukraine and the Cabinet of Ministers of Ukraine can put forward constitutional submission for examining the conformity with the Constitution of Ukraine of the legal international treaties of Ukraine or international treaties before the Verkhovna Rada for establishing their legally binding character.

<sup>22</sup> Constitutional submission can be put forward by President of Ukraine, no fewer than forty-five members of parliament of Ukraine, the Authorised Human Rights Representative the Verkhovna Rada of Ukraine regarding issues of human rights, the Supreme Court of Ukraine, the Cabinet of Ministers of Ukraine, the Verkhovna Rada of the Autonomous Republic of Crimea, the bodies of the local self-government.

<sup>23</sup> Heringa A.W. *Constitutions Compared: an Introduction to Comparative Constitutional Law* (4<sup>th</sup> edition). Intersentia, 2016. pp. 219-222.



Constitution<sup>24</sup>. Drafts of normative parliamentary acts do not fall under the constitutional review except draft laws introducing amendments to the Constitution. As to the principle of separation of powers which is set in the Constitution, the Constitutional Court of Ukraine cannot carry out the preliminary review of the current laws, as this would be the interference with the legislative process.

During 1996-2016 309 decisions on the constitutionality of laws and other legal acts and on official interpretation of the Constitution and laws of Ukraine and over 1,500 procedural rulings were adopted, 28 opinions on the conformity of the draft laws on introducing amendments to the Constitution of Ukraine with the requirements of Articles 157 and 158 of the Constitution, an opinion on the constitutionality of the international treaty of Ukraine (the Rome Statute) were provided<sup>25</sup>.

The laws in force and other legal acts in Ukraine can be the object of the constitutional review, however, the CCU does not provide their official interpretation. If at the time of consideration by the CCU a normative act has already lost the legal effect, the CCU should review the constitutionality of the act only in those cases when it is impossible to renew the constitutional human and citizens' rights and freedoms, which were breached by the application of this normative act.

The CCU for 20 years has reviewed the constitutionality of norms of over 150 laws and other legal acts, among which over a hundred provisions were declared unconstitutional, and, pursuant to Article 152 of the Constitution of Ukraine (1996), resulted in the loss of their effect from the day of the adoption of the relevant decision<sup>26</sup>. In majority, the grounds for the recognition of the above mentioned norms not constitutional (incompatible with the Constitution of Ukraine), are related to a violation of fundamental human and citizen's rights and freedoms guaranteed by the Constitution of Ukraine (1996), including:

- the right to life<sup>27</sup>,
- right to personal inviolability and freedom of movement<sup>28</sup>,

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<sup>24</sup> Constitution of Ukraine. Law № 254к/96-ВР, 28.06.1996 (URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80?lang=uk>).

<sup>25</sup> *Конституційний контроль і процеси демократичної трансформації у сучасному суспільстві*. Збірка матеріалів міжнародної конференції, присвяченої 20-річчю Конституційного Суду України. Київ: ВАІТЕ, 2016. (Constitutional control and processes of democratic transformation in modern society: Scientific collection of international conference, dedicated to 20<sup>th</sup> anniversary of the Constitutional Court of Ukraine. Kyiv: VAITE, 2016). P. 23.

<sup>26</sup> *Конституційний контроль і процеси демократичної трансформації у сучасному суспільстві*. Збірка матеріалів міжнародної конференції, присвяченої 20-річчю Конституційного Суду України. Київ: ВАІТЕ, 2016. (Constitutional control and processes of democratic transformation in modern society: Scientific collection of international conference, dedicated to 20<sup>th</sup> anniversary of the Constitutional Court of Ukraine. Kyiv: VAITE, 2016). P. 23.

<sup>27</sup> Decision of the Constitutional Court of Ukraine dated December 9, 1999 №11-рр in the case on the death penalty. *Official Bulletin of Ukraine*. 2000. № 4. S.126. P.114.

<sup>28</sup> Decision of the Constitutional Court of Ukraine dated July 29, 2010 № 17-рр in the case upon the constitutional petition of the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine on conformity with the Constitution of Ukraine (constitutionality) of paragraph 8 of Article 11.1.5 of the Law of Ukraine "On Militia". *Bulletin of the Constitutional Court of Ukraine*. 2010. № 5. P.11.

- right to association in trade unions to protect their employment and socio-economic interests<sup>29</sup>,
- right to social protection<sup>30</sup>,
- right to elect freely and be elected to the state bodies and others<sup>31</sup>.

The CCU reviews the compliance of normative acts with the Constitution of Ukraine (1996) in force and may not review compliance of normative acts with the previous constitution of Ukraine. Constitutional review extends to acts that have legal importance, are connected with law and generate the legal consequences for the subjects of legal relations. It means that acts such as appeals, statements, and acts of political importance that do not have legal significance may not be the objects of the constitutional review. The CCU does not have the right in any case to review the provisions of the Constitution of Ukraine (1996), and these may not be deemed unconstitutional<sup>32</sup>.

The CCU adopts the decisions on the compliance withof legal acts as *abstract* and *concrete* constitutional review with the fundamental law. Abstract review is not connected with the application of the legal act. The concrete review is in connection with the concrete cases applies to the legal act itself or in connection with the concrete activity of the bodies of state power or officials.

The jurisdiction of the CCU also includes the questions related to the substantive review, as well as the *formal* review of constitutionality of laws and other normative acts, this latter referring to the review of compliance withwith the procedures set by the Constitution of Ukraine (1996) for their adoption or entering into force and observance of the competences during their adoption.

### 5. The official interpretation of the Constitution and the laws of Ukraine

Since January 1997 the CCU has provided official interpretation of nearly 300 provisions of the Constitution and laws of Ukraine that promoted appropriate application of these legal norms by the state bodies in the future.

Official interpretation of the Constitution of Ukraine is provided by the Constitutional Court only upon the constitutional petition of the President of Ukraine, at least forty-five members of Ukrainian parliament, the Cabinet of Ministers of Ukraine, the Representative of the Verkhovna Rada of Ukraine for Human Rights, or the Verkhovna Rada of the Autonomous Republic of Crimea.

The independence of the CCU reveals in the interpretation of the Constitution and the laws of Ukraine. Until recently (before the CCU was formed in 1996), the Verkhovna Rada of Ukraine had the right for the official interpretation

<sup>29</sup> Decision of the Constitutional Court of Ukraine dated October 18, 2000 №11-rp in the case on freedom to association in trade unions. *Official Bulletin of Ukraine*. 2000. № 43. S. 1857. P. 131.

<sup>30</sup> Decisions of the Constitutional Court of Ukraine dated July 9, 2007 № 6-rp, June 18, 2007 № 4-rp and others.

<sup>31</sup> Decision of the Constitutional Court of Ukraine dated February 26, № 1-rp/98 in the case on the elections of People's Deputies of Ukraine. *Official Bulletin of Ukraine*. 1998. № 23. P.93.

<sup>32</sup> Legal nonsense would take place in this case, because it is impossible to check position of the Constitution for the purpose accordance to himself.

of the Constitution and the laws of Ukraine. If such a right belonging to the Verkhovna Rada of Ukraine and the CCU at the same time, it would result in a collision of competences. This would deprive the decision of the CCU of its final status and would lead to their revision and abolition and eventually result in the destabilization of the legislation of Ukraine. Provisions referring to the final character of the decisions of the Constitutional Court of Ukraine of Ukraine can be found in each act of the CCU, except its Rules of Procedure<sup>33</sup>. The Law of Ukraine on the Constitutional Court of Ukraine provides that the only ground for reopening a case is the occurrence of circumstances connected with the case which were not previously taken into consideration by the CCU but existed at time of the consideration and the adoption of decision or at the time of concluding the case.

The object of the official interpretation of the CCU is the Constitution and the laws of Ukraine which were adopted earlier or later than the entry into force of the current Constitution of Ukraine (1996). Laws which have not entered into force and those who have lost their legal affect may not be interpreted by the CCU. Before the beginning of the official interpretation of the proper law, the CCU ascertains the question of its constitutionality. If such a law does not conform to the Constitution of Ukraine (1996), it will be declared unconstitutional. The law-based nature of the official interpretation of the Constitution and the laws of Ukraine means their ascertaining and explanation, interpretation and establishment of the actual content. That is in the definite establishment, and not in their amendments, changes or additions. The official interpretation of the Constitution of Ukraine (1996), its provisions and other laws by the CCU establishes the correct understanding and application throughout the entire territory of Ukraine and explains all of these statements.

The official interpretation of the provision of the Constitution and the laws of Ukraine provides a specification, classification, and detailed overview. The interpretations explain how to understand the terms in a norm, the meaning of the legal norm on the whole and how to apply this legal norm. Interpretations promote the correct implementation of the Constitution and the laws of Ukraine. In this aspect, they are complementary rules. Their complementary character also reveals in the fact that they may not be used separately, independently, without the corresponding provisions for the Constitution and the laws of Ukraine. The interpretations operate only together with the interpreted provisions and can provide the normative basis of legal acts. Resolving some issues, it is necessary to refer to the legal norms of the Constitution and the laws of Ukraine as to the legal grounds for the decision and only additionally can reference be made to their official explanation by the **Constitutional Court of Ukraine**.

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<sup>33</sup> Rules of Procedure of the Constitutional Court of Ukraine, ratified the decision of the Constitutional Court of Ukraine from 6 March 2002 (No. 3-p/2002).

## 6. The consequences of the constitutional review and interpretation made by the Constitutional Court of Ukraine

The CCU, at its plenary meeting, adopts decisions on the constitutionality of the laws and other legal acts and the official interpretation of the Constitution and the laws of Ukraine. In other cases, the CCU adopts conclusions which are mandatory for execution. These acts have a direct effect, and there is no need of their confirmation from any other bodies of state power or officials. If necessary, the CCU determines in its decision the order and terms of its implementation and obligates the corresponding authorities to implement the decision and to confirm the execution in writing. However, such additional determination on the implementation does not abolish and does not replace the general obligation of their execution<sup>34</sup>.

Decisions and conclusions of the CCU are final, which means that they enter into force from the moment of their proclamation. Nobody, including the CCU, may change or abolish decision or conclusion made by the CCU. They may not be appealed either. However, if a person has exhausted all domestic remedies, he/she can appeal for the protection of his/her rights and freedoms to the international judicial establishments or to the bodies of the international organizations if Ukraine is either member or participant<sup>35</sup> and, consequently, can appeal the decision to the CCU. However, regardless of the consequences of the consideration of such a complaint, the mentioned bodies of international organizations have no right to appeal the Constitutional Court of Ukraine's decision.

If the CCU finds the unconstitutionality of the legal acts, these latter are declared unconstitutional and lose the legal effect the day the CCU reveals the decision of their unconstitutionality. Laws and other legal acts, or their separate provisions that are declared unconstitutional **may not be implemented**.

The decisions by which the laws and other legal acts or their separate provisions are declared unconstitutional have the effect of legal acts. Declaring a legal act or its provision unconstitutional and hence annulling it, the CCU executes a function of the negative legislature because such decisions create new legal norms. These new legal norms extend to all legal subjects and generate new rights and duties for them. Decisions of the CCU about the unconstitutionality of an adopted law or other legal act deprive them of their binding nature. However, the legal nature of such a decision shall not be equal to ordinary laws, as, for the revision of this decision, it is necessary to introduce amendments to the Constitution of Ukraine

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<sup>34</sup> Decision No. 15-rp/2000 from 14 December 2000 in business after constitutional presentation the President of Ukraine as to the Constitution of Ukraine of the decision of the Verkhovna Rada of Ukraine on the action the law of Ukraine, on the Chamber of Accounting, the official interpretation of the provisions to the second part of Art. 150 Constitution of Ukraine and also the second part of Art. 70 law of Ukraine on the Constitutional Court of Ukraine.

<sup>35</sup> For example, the Ukrainian citizens often apply for defense of their rights at the European Court of Human Rights. In 2007 Ukraine occupied the fourth place regarding the number of appeals to the European Court of Human Rights, after *Russia*, *Romania* and *Turkey*, and currently – second after *Russia*, but before *Romania* and *Turkey* ([https://www.echr.coe.int/Documents/Stats\\_analysis\\_2018\\_ENG.pdf](https://www.echr.coe.int/Documents/Stats_analysis_2018_ENG.pdf)).

(1996). The decisions of the CCU have a direct and immediate effect, and in cases foreseen by the Constitution of Ukraine (1996) can also have a retroactive effect. The declaration of the unconstitutionality of a legal act can be ground for annulment of other legal acts which reproduce or specify its provisions.

The decision of the CCU on the official interpretation of the Constitution and the laws of Ukraine is a functional legal means of ensuring their correct and unambiguous understanding and application and hence strengthen the constitutional legality. The legal effect the official interpretation of provisions of the Constitution and laws of Ukraine by the CCU reveals in that the interpretation has a binding character. The official interpretations of the provisions of the Constitution and the laws of Ukraine have a higher legal effect in comparison with interpretations by the other bodies of state power or officials.

The official interpretation of the Constitution and the laws of Ukraine by the CCU also have a retroactive effect. The retroactive impact of the interpretation is determined by the moment of entry into force the provisions of the Constitution and the laws of Ukraine which are being interpreted. While implementing the legal norm which has not been changed its form remains the same (unchangeable) and the official interpretation regards the form which was put down by a legislature. Therefore, the norms of law always have that form which is examined by the official interpretations, and they must be applied accordingly. If there is a difference between the official interpretation of the provisions of the Constitution or the laws of Ukraine and the acts of their application, the latter shall be annulled.

Application of the Constitution and the other normative acts is impossible without their interpretation. Without interpretation, it is impossible to adopt a decision or to make a conclusion. But if the particular aim and the result of the official (normative) interpretation of the Constitution and the laws of Ukraine is exactly the official (normative) interpretation of these acts, the direct purpose of the acts is interpretation, and for their constitutionality, the examination focuses on the question about their compliance with the Constitution of Ukraine (1996). The interpretation of the Constitution and the laws of Ukraine is an important component of applying the Constitution, and resolves concrete constitutional and legal disputes or submits an argument for the justification of the decision (conclusion). The interpretation appears only in the explaining part of the decision (judgment) and does not exist as an independent phenomenon. However, regardless that the interpretation of norms of law is conducted with regard to a specific case, it goes far beyond the bounds of a concrete case, because the decision of the CCU in the concrete case extends to the meaning of standards, examples of understanding and application of the provisions of the Constitution and the laws of Ukraine. In these decisions often the general legal interpretation of those or other norms of law can be found. These interpretations, as well as the official (normative) interpretations of the Constitution and the laws of Ukraine, are binding, about CCU as well. Therefore, the conclusions for the normative interpretation by the CCU must be used to its casual interpretation.

According to the Article 55 of the Law, constitutional complaint shall be a written application submitted by to the CCU regarding review for compliance with

the Constitution of Ukraine (constitutionality) of a law of Ukraine (in total version or specific provisions thereof) which was adopted in the final court decision (after exhaustion of all possible domestic legal remedies). Special requirement of admissibility is related to fact that constitutional complaint shall be deemed as admissible in case not more than three months have passed from the effective date of the final judicial decision in which the law of Ukraine (specific provisions thereof) were applied.

### 7. Modern activity of the Constitutional Court of Ukraine: constitutional complaint

An individual constitutional complaint is a specific remedy that provides the opportunity for a person who considers his constitutional rights to be violated, to appeal to the CCU and to demand verification of a decision made by state authorities.

The foundation and practical application of this particular legal instrument (an individual constitutional complaint) is a general trend of contemporary European constitutionalism. It already exists in Albania, Andorra, Austria, Croatia, Cyprus, Czech Republic, Germany, Hungary, Kosovo, Latvia, Liechtenstein, Malta, Montenegro, Northern Macedonia, Poland, Russia, Serbia, Slovakia, Slovenia, Spain, and Switzerland. It can be assumed that the active introduction of the mechanism of a constitutional complaint can be considered in the legal thought of the future as a particular stage of the evolution of constitutionalism<sup>36</sup>.

The ability of any person to access the CCU directly is an effective means to avoid overloading the European Court of Human Rights (further - the ECtHR). The statistics provided openly by the ECtHR shows that those European countries that have a constitutional complaint mechanism have fewer complaints filed to the ECtHR than those that do not have it<sup>37</sup>.

We can outline few specific criteria of constitutional complaint submission to the CCU: *ratione personae* (who can file a petition), *ratione materiae* (subject of complaint), exhaustion of all national judicial remedies, *ratione temporis* (time/deadline of submission) and finally specific procedure of submission (declaration of admissibility).

There are positive and negative effect of constitutional complaint mechanism application by the CCU in Ukraine: state obligation for constitutional rights protection (positive) and overloading for the CCU, not justifying the expectations of people, who filed petitions (negative). During the last few years the

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<sup>36</sup> *Матеріали Міжнародної науково-практичної конференції з питань запровадження конституційної скарги в Україні*: збірка тез, м. Київ, 18 груд. 2015 р. Конституц. Суд України; за заг.ред. Ю.В. Бауліна. К.: ВАІТЕ, 2016. (Collection of materials of the International Scientific and Practical Conference on the Introduction of a Constitutional Complaint in Ukraine. Kyiv: VAITE,) 186 p.

<sup>37</sup> Європейська Комісія «За демократію через право». Проект дослідження доступу громадян до конституційного правосуддя (European Commission for Democracy through Law. A draft study of citizens' access to constitutional justice), URL: [http://www.venice.coe.int/webforms/documents/CDL-JU\(2010\)004-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-JU(2010)004-e.aspx).

CCU received 356 constitutional complaints in 2017 (after the new law on constitutional court of Ukraine was adopted and enforced), 690 in 2018, and 273 pending cases as of 26<sup>th</sup> April 2019.

## 8. Conclusions

After researching on trajectory of modern constitutional justice in Ukraine we would like to sum it up:

1. The gradual and consistent development of the official constitutional and legal doctrine is an essential precondition for ensuring the stability of the Constitution of Ukraine (1996) and the effective role of the Constitutional Court of Ukraine as the guardian of the Constitution and the rule of law in Ukraine.

2. Obviously, there are differences and even gaps between the official constitutional doctrine and the academic legal doctrine, however, first one is formulated by a special (authorized under the Constitution of Ukraine) institution (the Constitutional Court of Ukraine) whose right and duty to interpret officially the Constitution through its opinions and decisions derives from the Constitution itself and is binding on everyone.

3. Due to its fundamental functions the Constitutional Court of Ukraine adopts rulings, decisions and opinions. The essential powers of the Constitutional Court of Ukraine are the followings: to declare the legal act (or its defined provisions) void and unconstitutional, to examine the constitutionality of international treaties or to interpret the Constitution of Ukraine and the laws of Ukraine.

4. Modern Constitutional Court of Ukraine, guided by the Constitution of Ukraine (1996) and the Law, has respectively:

- set basic requirements for the subject and form of appeal on the conformity of the draft laws introducing amendments to the Constitution of Ukraine with the requirements of the Constitution of Ukraine (1996);
- defined that its jurisdiction does not extend to invalid, ineffective, and those which lost their effect normative legal acts and that its powers shall not comprise the exercise of constitutional review of the legality of acts of the bodies of state power and local self-government, their officials;
- interpreted that inconsistent application of the provisions of the Constitution of Ukraine (1996) or laws of Ukraine as the basis for interpretation of the Constitution and laws of Ukraine, where the subject of the appeal is a citizen of Ukraine, foreigner or a person without citizenship and legal entity should be understood as different application of the same norms of these legal acts by various courts of Ukraine and other bodies of state power under the same legally significant circumstances etc.

5. The Constitutional Court of Ukraine also subjects to mandatory examination the observance of constitutional procedure for review, approval and enactment of laws *ex post*.

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