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CONSTITUTIONAL COURT OF UKRAINE IN THE SYSTEM OF STATE AUTHORITIES OF UKRAINE

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The article is devoted to revealing the peculiarities of the position of the Constitutional Court of Ukraine in the system of state authorities in Ukraine in terms of the legal nature of the tasks entrusted to it and the corresponding functional relationship with the bodies of legislative, executive and judicial power.

Despite the spread in the domestic scientific literature of the definition of the Constitutional Court of Ukraine as a judicial body or body related to the so-called control branch of power, nevertheless, the necessity of a comprehensive perception of the Constitutional Court of Ukraine as an atypical organ of state power, which simultaneously combines features, as well as the judiciary, while carrying out specific governmental activities. This approach allows to consolidate the legal status of the Constitutional Court of Ukraine as a separate body of state power, emphasizing its independence in the system of separation of powers and contributing to the effective fulfillment of the role in the mechanism of checks and balances.

Keywords: *constitutional jurisdiction, constitutional justice, system of checks and balances, separation of powers, Constitutional Court of Ukraine.*

КОНСТИТУЦИОННЫЙ СУД УКРАИНЫ В СИСТЕМЕ ОРГАНОВ ГОСУДАРСТВЕННОЙ ВЛАСТИ УКРАИНЫ

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Статья посвящена раскрытию особенностей положения Конституционного Суда Украины в системе органов государственной власти в Украине с точки зрения юридической природы возложенных на него задач и соответствующего функционального соотношения с органами законодательной, исполнительной и судебной власти.

Несмотря на распространение в отечественной научной литературе определения Конституционного Суда Украины в качестве судебного органа или органа, относящегося к так называемой контрольной ветви власти, тем не менее, обосновывается необходимость комплексного восприятия Конституционного Суда Украины в качестве нетипичного органа государственной власти, который одновременно сочетает черты как контрольной, так и судебной власти, осуществляя при этом специфическую по предназначению государственную деятельность. Такой подход позволяет закрепить правовой статус Конституционного Суда Украины как особого органа государственной власти, подчеркивая его независимость в системе разделения властей и способствуя эффективному выполнению роли в механизме сдержек и противовесов.

Ключевые слова: *конституционная юрисдикция, конституционная юстиция, система сдержек и противовесов, разделение властей, Конституционный Суд Украины.*

CURTEA CONSTITUȚIONALĂ A UCRAINEI ÎN SISTEMUL PUTERII DE STAT AL UCRAINEI

Articolul este dedicat dezvăluirii particularităților poziției Curții Constituționale a Ucrainei în sistemul autorităților de stat din Ucraina în ceea ce privește natura juridică a sarcinilor încredințate și relația funcțională corespunzătoare cu organele puterii legislative, executive și judiciare.

În ciuda răspândirii în literatura științifică internă a definiției Curții Constituționale a Ucrainei ca organ judiciar legat de așa-numita ramură de control al puterii, este necesară o percepție cuprinzătoare a Curții Constituționale a Ucrainei ca organ atipic al puterii de stat, care combină simultan trăsături, precum și sistemul judiciar, în timp ce desfășoară activități guvernamentale specifice. Această abordare permite consolidarea statutului juridic al Curții Constituționale din Ucraina ca un organism separat al puterii de stat, subliniind independența sa în sistemul de separare a puterilor și contribuind la îndeplinirea efectivă a rolului în mecanismul verificărilor și soldurilor.

Cuvinte-cheie: *jurisdicție constituțională, justiție constituțională, sistem de verificări și solduri, separarea puterilor, Curtea Constituțională a Ucrainei.*



Formulation of the problem. In the political and legal practice of modern democratic countries an important place is the doctrine of separation of powers, which is practically embodied through the formation of mechanisms of checks and balances and the balance of powers of the branches of power. Along with the considerable elaboration of the problem of separation of powers as such, at the same time the issues of determining the place of the Constitutional Court of Ukraine in the system of state bodies of Ukraine have not been sufficiently researched, which became the subject of this publication.

Relevance of the research topic and the state of the study. The problems of constitutional justice have been reflected in many works, including the works of a number of reputable scholars, in particular: S. Avakyan, S. Bobotov, M. Vitruk, V. Gergelinik, M. Gultai, S. Shevchuk, M. Kozyubra, V. Kolesnyk, O. Mironenko, T. Mikheyeva, A. Portnov, A. Selivanov, O. Skripnyuk, P. Stetsyuk, V. Tikhyy, T. Khabrieva, V. Shapoval, V. Chirkin, and many others. Nevertheless, the problem of determining the place of the Constitutional Court of Ukraine in the system of state bodies of Ukraine has enough debatable and unresolved issues.

The purpose and objective of the article is to reveal the peculiarities of the place of the Constitutional Court of Ukraine in the system of state authorities in Ukraine in terms of the legal nature of the tasks assigned to it and the corresponding functional relationship with the bodies of the legislative, executive and judicial authorities.

Statement of the main material. Due to the absence of a direct legal norm that would determine the legal nature and place of the Constitutional Court of Ukraine in the mechanism of state power, for three decades, among Ukrainian

scientists, a debate has been ongoing on this issue. The overwhelming majority of researchers admit that determining the real legal and political purpose of the activity of the Constitutional Court of Ukraine will solve complex problems of theoretical and practical nature related to the organization and activity of this body of state power, which, according to the Constitution of Ukraine, is one of the highest constitutional bodies of the state and the main structural element in the system of protection of the Constitution. Establishing the rational importance of the Constitutional Court of Ukraine in the system of checks and balances, its nature and place in the context of the principle of separation of powers is the main means of neutralizing the occurrence of possible deficiencies in the activity of this body [1]. In our opinion, the experience in solving it in the countries of Western, Central and Eastern Europe is of great importance to highlight this problem.

Today, there are different approaches to addressing the question of the place that the body of constitutional jurisdiction in the state mechanism should occupy and its legal nature, which is explained, first of all, by the lack of a single model of constitutional control in the practice of constitutionalism. Thus, in states with the American model of constitutional control, its functions are exercised by courts of general jurisdiction in a centralized or decentralized manner.

Centralized control implies the exercise of constitutional control only by the highest judicial authority of the country (Australia, Ireland, India, Malta, Mexico, Switzerland and other countries). Sometimes the function of constitutional control is given not to the Supreme Court as a whole, but to its special chamber or panel of the highest court concerned (Estonia, Costa Rica, Paraguay). However,

in some countries (Greece, Portugal) there are also “mixed models” of constitutional justice, in which it is possible to observe a combination of not only different forms and types of control, but also its exercise both by courts of general jurisdiction and by specialized bodies of constitutional justice [2].

The decentralized version of constitutional justice (USA, Denmark, Iceland, Norway, Canada, Finland, Sweden, Japan, and other countries) implies that when considering a particular case, the constitutionality of a normative act can be considered by any link in the judicial system. In this case, the ordinary litigation is interrupted and consideration of the constitutionality of the normative act begins.

American constitutionalism, the main components of which is rigid separation of powers and judicial oversight, has had a significant impact on the development of constitutional law in other countries, especially in Europe. Nonetheless, any extrapolation of American researchers’ findings to European constitutional justice must be done with caution, since, by definition, comparatives have found significant differences in form and content in controlling the constitutionality of Europe and the US. This circumstance is particularly evident in the history of the establishment of this institution, the structure of the judiciary, the social function of ordinary and constitutional justice, the methods of legal analysis, and the authority of the courts among other state institutions.

It is well known that one of the fundamental differences between the American and European models is the determination of the place of constitutional justice in the system of separation of powers. In countries with the American model of constitutional control, such activity is carried out within the judicial branch, which has the right to declare unconstitutional



legal acts that are fully consistent with the mechanism of restraints and balances in these countries, in which each of the branches of government can influence the actions of the other (yes, the President and The US Congress has institutional means of influencing the US Supreme Court: adopting a constitutional amendment that alters or overrides precedent; the use of impeachment by judges, etc.) [3, p. 9 - 10]. In countries with the Austrian model, constitutional justice is exercised by specialized bodies, which makes it urgent to determine the place of constitutional jurisdiction in the mechanism of state power and its relation with the judiciary: whether they coincide, or whether constitutional justice is an independent, fourth kind of power. In this regard, there is a continuing debate in legal science about the nature of the work of constitutional justice and its place in the system of separation of powers.

The study of the scientific literature shows that the constitutional justice bodies and courts of general jurisdiction in the countries of the Romano-German legal family have both distinct and common features. Thus, the rules are common that justice is carried out at the request of authorized persons, and the principles of justice (the rule of law, independence, collegiality, equality of judges, transparency, completeness and comprehensiveness of cases and the validity of the decisions made) are inherent in both institutions. At the same time, the general principles of the judicial system in constitutional justice are filled with their own content, specified and acquired specific expression.

At the same time, special features specific to constitutional justice can be distinguished. Thus, by its status, the body of specialized constitutional control is one of the highest constitutional bodies, since its organization and activities are

regulated by the constitution, which complicates the change of its legal status. This institute of state power, even if it is included in the constitution in the judicial system, occupies an autonomous position in it. Appointment of judges is carried out by political bodies of the state (at least - by two branches of government). Not only professional judges, but also other persons, including non-lawyers, are admitted to the body. Unlike other bodies of constitutional control that carry out this activity in addition to other functions, constitutional control is the primary function of this body. The Institute of Constitutional Justice has a special form of activity - constitutional justice (quasi-judicial bodies also operate within the framework of special procedural rules), as well as considerable organizational independence, which is expressed in its right to adopt regulations independently, to elect a chairman of the court, etc. The jurisdiction of these courts extends to the institutions of the legislature, the executive, and often the judiciary. They have exclusive powers to make final decisions, especially in the area of controlling the constitutionality of normative acts, since even a negative act (such as repealing a law because of its unconstitutionality) can become subject to constitutional scrutiny. The decisions of these bodies have a strong legal basis, which compensates for the weakness of their legitimate basis and in the vast majority of countries are final and binding [4, p. 455 - 543].

The analysis of the scientific literature shows that, taking into account the above-mentioned peculiarities inherent in the institute of constitutional justice, in recent years in the world practice of the formation of this state body in the system of separation of powers has been taking place on a fundamentally new constitutional basis, namely on the recognition of its in-

dependent branch of power, and not complementary to other branches of government. In countries with the Austrian model, constitutional justice is often referred to as the fourth power, along with legislative, executive and judicial powers. In recent years, these countries have been characterized by a significant strengthening of the status of political branches of power and, if their domination is not controllable, could be an occasion for abuse. Constitutional justice, as a controlling branch of power that historically emerged later, has the ability to effectively control political power while remaining independent of the judiciary [5, p. 91; 6, p. 1040]. Being outside the three branches of government, it secures the exercise of their powers and, thus, occupies an autonomous position with respect to the legislative, executive and judicial branches and has the task of ensuring the balance of the three branches of state power.

At present, in the domestic scientific literature, the characterization of the Constitutional Court of Ukraine as a judicial body or a body belonging to the judicial branch is widespread. In support of this thesis, her supporters (M. Kozyubra, G. Murashin, O. Skakun, V. Skomorokh, etc.) draw attention to the fact that, according to the Constitution of Ukraine, the judiciary must be exercised by the Constitutional Court of Ukraine and the courts of general jurisdiction, by judges of the Constitutional Court. The same guarantees of independence and inviolability, as well as grounds for dismissal and incompatibility requirements, are provided to the courts of Ukraine, which are provided for judges of courts of general jurisdiction [7, p. 45 - 53]. In support of this position, V. Skomorokh asserts that the Constitutional Court of Ukraine, despite its peculiarities, is a court, because that is how the Constitution defines its nature [8, p. 137]. G. Murashin insists on this,



pointing to the judicial nature and the judicial status of the Constitutional Court of Ukraine, which by its nature and content is intended to exercise a judicial function, not control or supervision. The author notes that the Constitutional Court of Ukraine does not review the laws (because it is a function of law enforcement), and examines constitutional conflicts, while ensuring the supremacy of the Constitution [9, p. 136]. At the same time, describing the place of the Constitutional Court of Ukraine in the mechanism of exercising the judicial power, the authors note that for the purposes of its activity it occupies a higher position than the courts of general jurisdiction, since in the sphere of protection of the Constitution it fulfills the same tasks as the head of state. At the same time, organizationally, the Constitutional Court of Ukraine is not affiliated with other branches of this power, although it is not completely isolated from them.

Based on these and other arguments, the legal literature concludes that today the Constitutional Court of Ukraine is a judicial body that exercises constitutional justice. However, it is noted that the judiciary should not be identified with justice, as this concept is broader in content and more general in nature. Thus, V. Shapoval insists that the competence of the Institute of Constitutional Justice has no connection with the administration of justice, since the enforcement of the Constitutional Court of Ukraine in the process of considering and adjudicating in a case is different in nature from what is carried out Courts of law. At the same time, in the opinion of the author, the fact that the Constitutional Court of Ukraine is referred to in section VIII of the Constitution of Ukraine (“Justice”) does not testify to its functional connection with the corresponding activity of courts of general jurisdiction. In this regard,

V. Shapoval considers the definition of constitutional justice as a “judicial body” incorrect, and sees its main function in deciding the conformity of laws and other legal acts, which are defined in the Constitution of Ukraine. He notes that for this and other functions of the bodies of constitutional justice in the world practice, the notion of “justice” is not universally used, but the concept of “judicial constitutional control”, which allows doctrinal determination of constitutional jurisdiction as a body of judicial constitutional control [7, p. 48].

In domestic legal science (as well as in the research of foreign scientists), there was a discussion as to whether the Constitutional Court of Ukraine could be referred to the so-called controlling branch of power. According to supporters of the point of view that constitutional justice in Ukraine has the nature of controlling power, today it is possible to speak about the formation of a new branch of power - controlling, since for the effective operation of the principle of separation of powers in the state requires an independent arbitrator who would have the authority to exercise restraint and counterweights. As an argument, in support of this position, the provisions of the theoretical works of H. Kelsen on the need for the existence of a fourth power, which should not be power in all its relief characteristics, but which would only act as a fuse or “negative legislator” in the mechanism of state power, are cited. The presence of three fundamental branches of government, which represent a single state power, does not exclude the possibility of functioning functionally independent control and supervisory institutions and is determined by the need for the existence of democracies. Analyzing this problem, some authors point out that by carrying out

the negative lawmaking, the body of constitutional justice implements the function of balance in relation to its other branches, without undermining their independent functioning. It is emphasized that the existence of a fourth branch of power in Ukraine will improve the principle of separation of powers in the system of checks and balances. At the same time, it is emphasized that the activity of the body of constitutional justice in its turn obeys the requirements of the Constitution of Ukraine, a separate section of which regulates its status [10, p. 81 - 85].

On the same occasion, it is sometimes pointed out that constitutional jurisdiction is a higher form of professional state control, which extends to both the sphere of rulemaking and law enforcement activity of state bodies [11, p. 10]. The basic principles and forms of activity of the Constitutional Court of Ukraine coincide or can be compared with the relevant features of courts of general jurisdiction. However, this does not give grounds to include the Constitutional Court of Ukraine in the unified judicial system, in particular because of the specific nature of decisions on the conformity or non-conformity of a specific legal rule with the provisions of the Constitution of Ukraine, which are adopted during the exercise of constitutional control. At the same time, the application of a rule of law to the particular circumstances of a court case is peculiar to courts of general jurisdiction. This in turn gives grounds to conclude that the Constitutional Court of Ukraine is a special body of justice and at the same time a body of state power along with such constitutional bodies as the President of Ukraine, the Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine [12, p. 36].

According to the followers of this approach, the assignment of



constitutional justice to an independent branch of state power and emphasizing its exclusive nature will be of great theoretical and practical importance, which will prove to increase the degree of its independence, which is necessary for a clear fulfillment of the main task in the system of separation of powers, and their restraint and balancing. This conclusion is also confirmed by the constitutional practice of countries such as Spain, Italy, Portugal, Sweden, which at the constitutional level consolidate the supervisory power and separate the rules on constitutional justice from the sections dealing with justice [13, p. 15].

At the same time, other scholars, on the basis of their analysis of the functions of the Constitutional Court of Ukraine, are inclined to conclude on the multiple nature of this state body, as they consider it to be an organ of constitutional justice, constitutional control and at the same time an independent element of the judicial branch with which it unites: the nature of powers; requirements for the judicial composition; guarantees of independence of judges; principles of activity, etc. [14]. Some representatives of this approach, who insist on the complex nature of the institution of constitutional justice, analyzing the relevant provisions of the Constitution, point to the dual legal status of the Constitutional Court of Ukraine (which administers both justice and constitutional control at the same time), as well as the dualism of the judicial system of Ukraine Part Three of Article 124 of the Constitution [15, p. 102]. The latter argument sometimes suggests that the Constitutional Court of Ukraine, having certain characteristics of a judicial authority, is, in fact, a special state body of constitutional control.

Conclusions. The conducted research allows to draw a number of conclusions.

Today, there are different approaches to addressing the question of the place that the body of constitutional jurisdiction in the state mechanism should occupy and its legal nature, which is explained, first of all, by the lack of a single model of constitutional control in the practice of constitutionalism. Thus, in states with the American model of constitutional control, its functions are exercised by courts of general jurisdiction in a centralized or decentralized manner. In countries with the Austrian model, constitutional justice is often referred to as the fourth power, along with legislative, executive and judicial powers. Being outside the three branches of government, it secures the exercise of their powers and, thus, occupies an autonomous position with respect to the legislative, executive and judicial branches and has the task of ensuring the balance of the three branches of state power.

Although the characteristics of the Constitutional Court of Ukraine as a judicial body or a body belonging to a judicial branch of power or to a so-called controlling branch of power are disseminated in the national scientific literature, in our opinion, however, the Constitutional Court of Ukraine should be considered as a separate state body power, which includes both the control and the judiciary, while exercising the highest state control activity. This approach allows to consolidate the legal status of the Constitutional Court of Ukraine as a special body of state power, which will emphasize its independence in the system of separation of powers and will facilitate the effective fulfillment of the role in the mechanism of checks and balances.

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О НЕКОТОРЫХ ПУТЯХ ПРЕДОТВРАЩЕНИЯ КОРРУПЦИОННЫХ И ДРУГИХ ПРЕСТУПЛЕНИЙ, СОВЕРШАЕМЫХ В СФЕРЕ ИСПОЛНЕНИЯ НАКАЗАНИЙ (ЗАРУБЕЖНЫЙ ОПЫТ)

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«Львовская политехника»

В статье, на основании результатов изучения международно-правовых актов и зарубежной практики, разработанные научно обоснованные меры, направленные на предотвращение совершения уголовных преступлений, включая коррупционного характера в сфере исполнения наказаний, а также на устранение, блокирование, нейтрализацию и т.д. детерминант, которые их вызывают и обуславливают.

Ключевые слова: предупреждение; уголовное преступление; сфера исполнения наказаний; детерминанты; коррупция; субъект преступления; субъект предупреждения преступлений.

ABOUT SOME WAYS TO PREVENT CORRUPTION AND OTHER CRIMINAL OFFENSES (FOREIGN EXPERIENCE)

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In the article, based on the results of the study of international legal acts and foreign practice, developed scientifically grounded measures aimed at preventing criminal offenses, including corruption, in the sphere of execution of penalties, as well as to eliminate, block, neutralize, etc. and conditioned.

Keywords: prevention; criminal offense; sphere of execution of punishments; determinants; corruption; the subject of the crime; the subject of crime prevention.

DESPRE UNELE MODALITĂȚI DE PREVENIRE A CORUPȚIEI ȘI A ALTOR INFRAȚIUNI COMISE ÎN DOMENIUL EXECUTĂRII PEDEPSEI (EXPERIENȚĂ STRĂINĂ)

Pe baza rezultatelor studiului actelor juridice internaționale și a practicilor străine, articolul a elaborat măsuri științifice în scopul prevenirii comiterii infracțiunilor, inclusiv a corupției în domeniul executării pedepselor, precum și eliminarea, blocarea, neutralizarea etc. factorilor care le determină și le condiționează.

Cuvinte-cheie: avertizare; infracțiune; sfera pedepsei; determinanților; corupție; subiect de criminalitate; subiect de prevenire a criminalității.