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INDEPENDENCE OF CONSTITUTIONAL JUSTICES: STUMBLING BLOCKS IN UKRAINE AND POLAND

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INDEPENDENCE OF CONSTITUTIONAL JUSTICES: STUMBLING BLOCKS IN UKRAINE AND POLAND

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Abstract The article is devoted to the problems of the functioning of constitutional justice in Poland and Ukraine. Applying the methodology of comparative law research and empirical analysis, the authors consider the problems of the violation of the principle of independence of constitutional justice in these countries, explore common and distinctive features of crisis situations, try to find the reasons that cause them, and deduce the relationship between the legitimacy of the decisions of the constitutional justice bodies and independence of these bodies. The authors substantiate and analyse two components of the legitimacy of the constitutional courts' decisions: substantive (fairness and compliance of decisions with the principles of constitutionalism) and instrumental (proper validity and argumentation, which leave no doubt about the fairness and correctness of such a decision).

Keywords: constitutional justice, constitutional crisis, independence of judges, constitutionalism

1 INTRODUCTION. THE ROLE OF CONSTITUTIONAL JUSTICE IN THE CONSTITUTIONAL SYSTEM OF THE MODERN STATE AND SOME METHODOLOGICAL REMARKS

The modern constitutional state, which is based on the ideas of constitutionalism, is inconceivable without independent constitutional justice. It aims to ensure the supremacy and protection of the constitution, the constitutional order established by it, and the constitutional values on which they are based. The constitutional state (following F. Fukuyama on the state of liberal democracy) is founded on three pillars: the state itself, the rule of law, and democratic accountability.¹ The latter two are largely provided by constitutional jurisdiction. The doctrine of constitutionalism, which is also built on the ideology of liberal democracy, is based on the fact that without effective and efficient tools of limiting public authority, the state power, sooner or later, becomes arbitrary². The Constitution, which is the most important guarantee against state arbitrariness and of the inviolability of freedom

1 F. Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Present Day*, in Ukrainian (Nash Format 2019).

2 A. Sajo, *Limiting Government. An Introduction to Constitutionalism* (Central European University Press 1999) 14.

and fundamental human rights, needs 'special protection'³. The provision of this protection has been carried out by specialised bodies in continental European countries (with a few exceptions⁴) since 1920. However, it is hardly possible to talk about the reality and effectiveness of this function in the conditions of the political dependence of constitutional justice. Thus, the independence of constitutional justice is not an end in itself but a means of ensuring the constitutional limitations of state power and guaranteeing freedom and human rights, which is achieved through various areas of its activities.

The main activity of constitutional jurisdiction bodies, through which they ensure the achievement of these goals, is to resolve issues of the constitutionality of legal acts. Notably, constitutionality, according to the doctrine of constitutionalism, is understood not only as the correspondence of the statute wording to the letter of the constitution but in a broad sense, as was best described by John Marshall in his famous saying:⁵

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate [...] which are not prohibited [...] are constitutional.⁶

However, declaring acts unconstitutional is not the only function through which constitutional justice ensures the protection of the constitution. As stated in one of the Venice Commission's conclusions:

The state constitutional courts are the institutions which can, by interpreting the wording of the constitution prevent the arbitrariness of the authorities by giving the best possible interpretation of the considered constitutional norm at the given time.⁷

Taking into account that the Court has a monopoly on binding constitutional interpretation in light of constitutional values and principles, we can thus argue that the interpretation of the constitution, as well as other activities of the constitutional jurisdiction bodies, are no less important in ensuring the non-arbitrariness of the state power. Such types of activities are, for example, the resolution of competence and other disputes, election disputes, prosecution of senior state officials, etc. They are mainly aimed at ensuring balance in the system of the separation of state power. At the same time, the last few decades have seen a rethinking of the place and importance of constitutional jurisdiction, both at the practical and doctrinal levels, in its role in defending personal human rights, which definitely increased. In the vast majority of European states, mechanisms for the protection of fundamental rights by means of constitutional jurisdiction (through the instrument of constitutional complaint) have been introduced.

Thus, the independence of constitutional justice is a condition for its effective operation and protection of constitutional values and principles and their observance by the state authorities in the process of their activities.

We started this article from the point of view that the existence of constitutional jurisdiction is directly linked with the system of constitutional democracy. Moreover, there is a two-way connection between these phenomena. It is well-known from history that unrestricted parliamentary democracy can be arbitrary, even if it is legitimised by a general election. Only if there are real constitutional means of restricting it – first of all, constitutional jurisdiction –

3 H Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4 (2) *The Journal of Politics* 185.

4 These are Switzerland and six northern European countries: Norway, Finland, Iceland, Denmark, Sweden, and Estonia.

5 The Chief Justice of the United States in 1801-1835.

6 *McCulloch v Maryland*, US Supreme Court, 17 US (4 Wheat) 316 (1819) <<https://www.history.com/topics/usa/constitution/mcculloch-v-maryland>> accessed 21 February 2021.

7 CDL-AD (2010)044 Opinion on the Constitutional Situation in Ukraine, para 52 <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2010\)044-e#](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)044-e#)> accessed 21 February 2021.

does democracy cease to threaten individual freedom and fundamental human rights. Conversely, constitutional jurisdiction needs democracy to function. This interrelationship will be seen in the further analysis of the problems of the functioning of constitutional justice in post-socialist states, where most attempts to concentrate power in an undemocratic (or democratic only outwardly) way involve political pressure on constitutional courts, refusal to enforce their judgements, or even by blocking their activities.

The process of spreading constitutional democracy in Europe, in general, was accompanied by the introduction of constitutional courts in the vast majority of states. Their existence was foreseen by the post-war constitutions of Germany and Italy, the post-socialist constitutions of Spain and Portugal, and, ultimately, the post-communist states of Central and Eastern Europe. An attempt to explain the connection between these phenomena is contained in one of the conclusions of the Venice Commission, which states:

Constitutional justice is a key component of the system of checks and balances in a constitutional democracy. Its importance is further enhanced when the ruling coalition can rely on a large majority and is able to appoint to virtually all state institutions individuals with loyal political views.⁸

At the same time, despite the role of independent constitutional justice in the constitutional state, a number of Eastern European countries have demonstrated crises related to the functioning of constitutional courts in recent decades. As Dieter Grimm wrote:

Just as constitutionalism is an endangered achievement constitutional adjudication is in danger as well. Politicians, even if they originally agreed to establish judicial review, soon find out that its exercise by constitutional courts is often burdensome for them. Constitutions put politics under constraints and constitutional courts exist in order to enforce these constraints.⁹

Such crisis situations occurred, in particular, in Hungary, Romania, Poland, and Ukraine.¹⁰ In this article, we will analyse the issues of the independence of constitutional justice in Ukraine and Poland, embracing the methodology of comparative studies. We will try to discover common and distinctive features and define the reasons for these crises, considering both commonalities and differences.

We consider constitutional justice in Ukraine and Poland to be appropriate objects for the comparative analysis, firstly, because they both use the concentrated model of constitutional review; secondly, they were introduced in the conditions of post-socialist societies with weak (at the start) institutions and relatively low levels of political culture; and finally, both countries are members of the Council of Europe and make efforts to implement the European Convention on Human Rights and the case-law of the European Court of Human Rights. At the same time, we are taking into account some important facts leading to the distinctive circumstances in which the constitutional justice of Ukraine and Poland exist. These are the membership of Poland in the European Union and the extension of the Court of Justice jurisdiction to it, as well as some institutional differences resulting from their separation of powers systems.

8 CDL-AD (2013)014 Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para 76 <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)014-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)014-e)> accessed 21 February 2021.

9 D Grimm, 'Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics' (2011) 4 (1) NUJS Law Review 18.

10 For more on this, see: O Boryslavska, *European Model of Constitutionalism: System and Axiological Analysis* (Pravo 2018).

2 ISSUES OF CONSTITUTIONAL JUSTICE INDEPENDENCE IN POLAND

Poland has managed to make significant progress in the formation of a system of constitutional democracy and creating an appropriate institutional system, and other countries in the region, including Ukraine, often refer to the Polish experience as applicable. However, in 2015, when the Law and Justice political party initially won a majority in the Senate and Seimas, formed a government, and later won the presidential election, processes related to the pressure on constitutional justice began.

2.1 Position of the Constitutional Tribunal (as a starting point)

The 1997 Constitution classifies the Tribunal as a judicial body (Art. 10). Defining the Constitutional Tribunal as a court does not generate much controversy. Arguments in favour of such a qualification are, e.g., the name is characteristic for a judicial body, members of the Tribunal are called judges, their independence is recognised, and they issue judgments after a hearing. However, one has to agree with the opinion that the principle of the separation and balance of powers does not remove all controversies related to the position of the constitutional court in the system of powers. It is emphasised in the literature that the Tribunal, in the scope of issues not regulated by the Constitution of 1997, uses legal means that are not typical of courts but are closer to bodies classified by the Constitution as 'legal protection bodies'. The arguments in favour of treating the Tribunal as a legal protection body are mainly related to the fact that – unlike a judicial body – it is not an entity that applies the law but an entity that reviews the law. However, the Tribunal does not administer justice. This is done by independent courts headed by the Supreme Court (cf. Art. 175 para. 1).¹¹

The Constitutional Tribunal adjudicates on legal norms, and its main function is to determine which norms are binding. The Tribunal used to describe itself as 'a court over law'. According to this identification, it is not a court over facts, which interprets facts in accordance with a relevant norm (typical of common courts). The exception in this respect (i.e., when the Constitutional Tribunal acts as a court over facts) concerns the examination of the compliance of the activities of political parties with the Constitution (Art. 188 para. 4) and determining the President's incapacity to hold office (Art. 131). Borderline cases in the examination of the constitutionality of law that occur before the Tribunal ('court over law' – 'court over facts') are usually the subject of major disputes. A case in point is judicial review of the 2015 resolutions of the Sejm on the election of judges to the Constitutional Tribunal.

According to the Constitution (Art. 197), the organisation of the Constitutional Tribunal and the mode of proceedings before it shall be specified by statute. Since 2016, the position and work of the Tribunal and the status of its judges are regulated by the following laws:

- 1) the law of 30 November 2016 on the organisation and mode of proceedings before the Constitutional Tribunal, Journal of Laws 2019,¹²
- 2) the law of 30 November 2016 on the status of judges of the Constitutional Tribunal, Journal of Laws 2018,¹³
- 3) the law of 13 December 2016 on the provisions implementing the abovementioned laws, Journal of Laws 2016.¹⁴

11 See Dz U Nr 78, poz 483 ze zm.

12 See Dz U z 2019, poz 2393.

13 See DzU z 2018, poz1422.

14 See Dz U z 2016, poz 2074.

The Tribunal is composed of 15 judges (Art. 194 para. 1). They are elected individually by the Sejm for a term of nine years. The Constitution leaves no discretion to the legislator in determining by means of an ordinary law the entity that elects (appoints) judges. However, vesting the election of judges in the Sejm alone is sometimes criticised. From the doctrinal point of view, this solution is supported by the proximity of tribunals to the legislature (Kelsen classified them as legislative bodies). However, the rationale behind legitimising the position of the constitutional court may speak in favour of vesting the election (appointment) in, for example, several different central bodies, which will be discussed later.

Individual election means, firstly, that a separate vote is held over each candidate (no joint election is possible). Secondly, each judge has an individual term of office that lasts for a strictly defined period of time. Thirdly, the re-election of the same judge to the Tribunal is not allowed (Art. 194 para. 1). The number of judges is similar to the numbers in other countries. The same can be said about the term of office. Previously, in the years 1985-1997, the Tribunal was composed of 12 judges who were elected for a term of eight years. The increase in the number of judges resulted from the fact that the Constitutional Tribunal was equipped with new powers, and a longer term of office made judges independent from the term of office of the Parliament. This solution made it easier to differentiate the composition of the Tribunal from the point of view of the ruling majority in the Sejm. The Constitution does not specify the procedure of nominating candidates for judges, the beginning of the term of office, or the moment of taking the oath, although these issues – as indicated by the jurisprudence of the Constitutional Tribunal in the years 2015-2016 – prove to be extremely important from the practical point of view.

Constitutional judges are elected from among 'persons distinguished by their knowledge of the law' (Art. 194 para. 1 of the Constitution) who meet the requirements necessary to hold the office of a judge of the Supreme Court or a judge of the Supreme Administrative Court (Art. 3 of the law on the status of judges of the Constitutional Tribunal).

An application for election to the position of a constitutional judge may be submitted by the Presidium of the Sejm or by at least 50 MPs (Art. 30(1) of the Rules of the Sejm).¹⁵ The application cannot be subject to vote earlier than the seventh day from the date of delivery of information on the candidates to MPs unless the Sejm decides otherwise (Art. 30 para. 4 of the Rules of the Sejm).

The Sejm adopts a resolution on the election of a judge by an absolute majority of votes in the presence of at least half of the total number of MPs. Since November 2016, this rule has been entrenched in the Rules of the Sejm (Art. 31) and not in statutory provisions. Regulating the majority necessary to elect a judge by the Rules of the Sejm undermines the significance of the election. This solution probably expresses the legislator's assumption that the staffing of the Tribunal is a legislative matter, but such an approach can be found only in the law on the Constitutional Tribunal of 1985. The seat of a constitutional judge, which is one of the most important public offices, is therefore filled by a majority determined in an internal act of the Sejm.

The beginning of a judge's term of office is not precisely defined. Until 2015, it was usually the date indicated in the resolution of the Sejm or the date on which the outgoing judge's term of office expired. It was not the day of taking the oath before the President. However, the actual practice shaped in the years 2017-2020 is that the beginning of the term of office is associated with taking the oath.

The method of staffing the Tribunal, in which judges are elected by the parliamentary majority, is relatively simpler than complex mechanisms of appointing constitutional judges in other

¹⁵ See MP z 2019, poz 1082 ze zm.

democratic states. For example, in other countries, the right to appoint constitutional judges is divided between central bodies (the president of the republic, presidents of chambers, councils of the judiciary, etc.), and the selection (appointment) procedure, as well as formal requirements for candidates for judges, are generally defined. The functioning of these procedures, however, is 'oiled' by the political culture, the trust between the parliamentary majority and minority, and by custom. These procedures are not as dependent on legal rules and yet result in the appointment of judges of unquestionable position. This observation applies even more to the staffing of the US Supreme Court.

There is no doubt that a stronger legitimacy of a judge would result from the introduction of the requirement of a qualified majority (e.g., a two-thirds majority) and not just an absolute majority. It is relatively easy to refute the objection that the election of a judge by the Sejm is political. It takes place within the parliamentary system, and judges receive their mandate indirectly from the nation. Regardless of the majority of votes or the body which elects judges, there is always a political dimension to the procedure. It must be remembered that the Tribunal is elected by the legislative branch, but according to the Constitution, it is independent (Art. 173). As shown by research, it was possible to prove the independence of the court from politicians empirically.

A constitutional judge – unlike judges of other courts – is not bound by statutory provisions when adjudicating on their constitutionality. He or she is independent in the exercise of their office and is subject only to the Constitution (Art. 195 para. 1). This property of the status of a judge played a special role in 2015 when the Tribunal ruled on the amendment of 22 December 2015 to the law on the Constitutional Tribunal. As was already mentioned, the Tribunal reviewed the constitutionality of the amendment on the basis of the Constitution and the 2015 law on the Constitutional Tribunal, excluding some of the provisions contained therein.

A constitutional judge must meet the requirements of political independence and neutrality (Art. 195 para. 3). This means that he or she must not belong to a political party or a trade union or perform public activities incompatible with the principles of the independence of the courts and judges. These requirements also hold with regard to retired judges of the Constitutional Tribunal.

Constitutional judges enjoy formal immunity and the privilege of physical integrity (Art. 196).

A judge is irremovable from office. A judge's mandate may expire before the end of the term of office only in the cases specified in the law on the status of judges of the Constitutional Tribunal, and this state must be confirmed by the General Assembly.

2.2 Changes in the Constitutional Judiciary Introduced in 2015 and in the Following Years

In 2015, after the elections to the Sejm for the eighth term (2015-2019), some politicians started to question the fundamental role of the Constitutional Tribunal in upholding the principle of constitutionalism. Instead, they emphasised the role of the Sejm and the principle of national sovereignty. Such opinions appeared independently of the conflict on the staffing of vacancies in the Tribunal, which will be referred to below. From the perspective of constitutional principles, what was much more important than this conflict was that the executive assumed the right to decide whether the rulings of the Tribunal are valid judgments. The questioning of the finality of the Tribunal's decisions by the executive after 2015 by refusing to publish some of them is the key to undermining the position of the constitutional court in general.

In October 2015, at the turn of the seventh (2011-2015) and eighth (2015-2019) term of the Sejm, a conflict broke out over the staffing of vacancies in the Tribunal, which appeared when terms of office of three judges expired. The Sejm of the seventh term elected five

judges, including three to fill the seats of the outgoing judges and two 'in advance', i.e., to fill the vacancies that would appear during the eighth term of the Sejm. It should be emphasised that the Sejm of the seventh term had the right to fill only three seats in the Tribunal because three seats were vacated before the end of its term. However, the President of the Republic did not take the oath from any of the five judges. Furthermore, the newly elected Sejm of the eighth term stated that the resolutions of the previous Parliament on the election of these five judges were not legally binding.¹⁶ Then, it elected another five judges, who were sworn in by the President.

The Provincial Administrative Court in Warsaw, in the judgment of 20 June 2018,¹⁷ referring to the judgments of the Constitutional Tribunal in cases K 34/15, K 47/15, and K 39/16, confirmed that the Sejm of the seventh term validly elected three judges of the Constitutional Tribunal on 8 October 2015.

The court ruled that the status of a judge of the Constitutional Tribunal is obtained upon completing the election procedure by the Sejm (which took place on 8 October 2015, during the Sejm of the seventh term). The resolution of the Sejm in this respect is final and not subject to change. As a result, the Sejm cannot revoke its decision, nullify it, state its invalidity, or convalidate it *post factum*. The competence of the Sejm to elect a judge can be exercised only when there is a vacant judicial position that must be filled. Since the three judicial positions had already been filled as a result of elections held on 8 October 2015, the Sejm of the eighth term could not validly elect another three judges (on 3 December 2015) for positions that were already occupied. Such a practice, in its effects, can be compared to selling tickets for occupied seats.

In 2021, the situation is as follows: three judges validly elected by the Sejm of the seventh term have not been sworn in by the President, and the other three judges elected by the Sejm of the eighth term have been sworn in despite having been elected to replace the former ones. Such a situation paralyses the ability of the Tribunal to function, as the position of the three judges elected for occupied seats is constantly being questioned. It also negatively affects the perception of the position of the Tribunal itself.

Despite the gravity of the conflict over the election of judges in 2015, what was more constitutionally significant was the questioning of the final character of the Tribunal's judgments. Such a situation occurred in 2016 when the Prime Minister refused to publish some of the Tribunal's rulings issued in the same year. It appeared that the recognition of the Tribunal as a judicial body depended on the assessment of its judgments by the executive. Such an attitude of the government to court judgments leads to the destruction of the rule of law.

After the 2015 elections, the ruling party pursued the idea of a political pacification of the Constitutional Tribunal, by means of solutions drawn from Hungary, *inter alia*. This plan was in accordance with the publicly available draft constitution proposed by the party, but its impetus was surprising. The draft constitution of 'Law and Justice' assumed that the Constitutional Tribunal would be reduced to the role of an insignificant body, a kind of ornament that would allow for the formal classification of bodies and institutions as a constitutional democracy. The government used various measures to undermine the position of the Tribunal. In addition to the abovementioned elimination of the three validly elected judges, they involved the enactment of subsequent remedy laws on the Tribunal, including the aforementioned law of 22 December 2015. In connection with the paralysis of

16 Cf Resolutions of the Sejm of the Republic of Poland of November 25, 2015 (MP of 2015, items 1131-1135). In its decision of 7 January 2016 U 8/15, the Tribunal discontinued the proceedings on the review of the constitutionality of the resolutions of the Sejm of 25 November 2015 and 2 December 2015.

17 See V SA/Wa 459/18, LEX no 2530153.

the Tribunal, some theorists announced the 'end of the epoch' in the latest political history of Poland or at least a crisis of the current model of the functioning of judicial review in Poland.

A series of the so-called remedy laws on the Tribunal aimed at shifting its position in the tripartite system of powers, limiting its significance, and, eventually, its takeover by the government. Remedy laws were not incidental activities of the legislator, but they essentially sought to introduce constitutional changes by means of ordinary laws. The law on the Constitutional Tribunal of 22 December 2015 was of particular importance, as the legislator intended to exclude it from the scope of the principle of constitutionalism by securing it against the possibility of being reviewed by the Constitutional Tribunal. The remedy laws were repealed in late 2016 and replaced by the laws on the Tribunal of November and December 2016.

2.3 Conclusion to Part I

As a result of the abovementioned activities, the position of the Tribunal in the judiciary was marginalised. Since the role of the Tribunal in examining the constitutionality of law and in safeguarding the rights of citizens has been weakened, there has been a discussion started in Poland on the importance of dispersed judicial review. Even the opponents of this type of review began to appreciate its potential significance. The state of legal uncertainty forces us to consider whether judicial review could be exercised, to some extent, by common courts.

3 CRISES OF CONSTITUTIONAL JUSTICE IN UKRAINE

Unlike the Republic of Poland, constitutional justice in Ukraine has not yet been in a state in which it could be said that it is an authoritative institution that enjoys the trust of society and due respect from politicians. The only exception is the period of the Constitutional Court of Ukraine (CCU) during the term of its initial composition, which managed not only to lay the foundations of the constitutional doctrine of the Court but also to accumulate the authority and respect necessary to protect the Constitution. Already in the early 2000s, the first problems related to the independence of the CCU appeared, which later became periodic and systemic, and especially intensified during the last year.

3.1 Position of the Constitutional Court of Ukraine (short overview)

The Constitutional Court of Ukraine is a relatively young institution, introduced by the 1996 Constitution and formed for the first time in 1997. Therefore, the constitutional foundations for the functioning of the current bodies of constitutional justice in Poland and Ukraine were laid almost simultaneously. The 1996 Constitution defined the Constitutional Court of Ukraine as the sole body of constitutional jurisdiction, which meant that the decision on the constitutionality of legal acts in the state belonged exclusively to this body. As in the Republic of Poland, the Constitutional Court of Ukraine initially did not belong to the judicial branch of the state power. Following the 2016 constitutional reform of the judiciary (which also covered constitutional justice), the provision that the CCU is the sole body of the constitutional jurisdiction was removed. This means that the approach to resolving the issue of the constitutionality of legal acts has changed in the state as a whole, and courts of general jurisdiction have been given additional opportunities to resolve issues of the constitutionality of legal acts. Such possibilities were legally supported by the amendments to the procedural codes, which obliged the court to directly apply the norm of the Constitution if a legal act (or its provision) contradicts it, justifying its unconstitutionality. Simultaneously with the adoption of such a decision, the general court must notify the Supreme Court (which is the subject of the constitutional submission to the CCU) in order to appeal to

the CCU on resolving the issue of unconstitutionality of the not applied (because of its unconstitutionality) law or its provisions.¹⁸

In addition, as a result of the 2016 reform, some powers of the CCU were changed. In particular, the institution of a constitutional complaint was introduced, and the Constitutional Court was deprived of the power to interpret laws. Instead, the powers to verify issues submitted to the national ('all-Ukrainian') referendum were added. But the key functions remained unchanged: the recognition of legal acts as unconstitutional, the official interpretation of the Constitution (which are explicitly enshrined in the Constitution), and the resolution of constitutional conflicts (which is not explicitly enshrined in the Constitution but follows from the set of powers of the CCU).

Nowadays, the legal bases for the CCU functioning in Ukraine are: 1) The Constitution of Ukraine (as of 2014 with amendments of 2016); 2) The Law on the Constitutional Court of Ukraine (2017); 3) Rules of Procedure of the Constitutional Court approved by the Court itself.

It should be noted that in addition to the changes in the powers of the Constitutional Court, in recent years, there has been some change in the doctrinal and methodological basis of its activities. Thus, for many years, the CCU, like the Constitutional Tribunal of Poland, has repeatedly emphasised that it is 'a court over law, not over the facts.' In practice, this meant that the Court in its activities did not take into account the factual circumstances of the case and did not examine what in other forms of proceedings is called evidence. Given that one of the grounds for declaring legal acts unconstitutional under the Constitution is the violation of the constitutional procedure for their adoption and entry into force,¹⁹ based on this approach, the Court was limited to examining those elements of the constitutional procedure that could not be confirmed without analysis of the facts but had an important impact on the end result of the adoption of an unconstitutional law. For example, the violation of the constitutional requirement for personal voting of deputies could not be confirmed except than by analysing the relevant facts (in particular, the absence of deputies in the Parliament during the voting). However, since 2018, this approach has been replaced by another. Thus, in the case of the principles of state language policy, the Constitutional Court not only took into account the data of the Border Service, which confirmed the absence of some deputies in Ukraine at the time of voting for this law but found an important violation of the constitutional procedure, which, together with other violations of the constitutional procedure, became the basis for declaring the law unconstitutional.²⁰

Such a change of approach has significantly strengthened the Court's position and its capacity to conduct constitutional reviews of Parliament's acts and has enabled the Court to be more active in its work on declaring laws unconstitutional. In turn, the strengthening of the Court's position did not go unnoticed by political elites and affected its independence.

18 See: Civil Procedure Code of Ukraine, 1618-IV, Art 10 <<https://zakon.rada.gov.ua/laws/show/1618-15#Text>> accessed 21 February 2021; Commercial Procedure Code of Ukraine, 1798-XII, Art 11 <<https://zakon.rada.gov.ua/laws/show/1798-12#Text>> accessed 21 February 2021; Code of Administrative Procedure of Ukraine, 2747-IV, Art 7 <<https://zakon.rada.gov.ua/laws/show/2747-15#Text>> accessed 21 February 2021.

19 It should be clarified here that according to the position of the CCU, a violation of the Rules of Procedure of the Verkhovna Rada when adopting legal acts is not considered a violation of the constitutional procedure, which the CCU pointed out in a large number of its decisions. Such a constitutional procedure includes, in particular, rules on legislative initiative, participation of committees in drafting a bill, requirement of personal voting, rules of signing a law by the President of Ukraine, and some others, which significantly narrows the range of procedural violations that may become grounds for declaring an act of parliament unconstitutional.

20 Judgement of the CCU on the Law on the Principles of State Language Policy, no 2-p/2018 29 February 2018 <<https://zakon.rada.gov.ua/laws/show/v002p710-18#Text>> accessed 21 February 2021.

As for the independence of the Constitutional Court and its guarantees, it should be noted that the Constitution of Ukraine in its original version in 1996 was based on the need to insure them. First of all, for this purpose (as well as to ensure the impartiality of the Court), the appropriate method of appointing 18 judges of the Constitutional Court by three entities was chosen: the Parliament, the President, and the Congress of Judges of Ukraine appoint six judges each. However, since the late 1990s, it has become clear that this is not enough to achieve the set goals. Thus, as of 1999, President Leonid Kuchma managed to ensure the decision of the CCU²¹ on the term of office of the President of Ukraine, according to which he actually had the opportunity to run for a third time²² (but did not use it).

This decision of the CCU became a turning point in its further fate. It was the first serious blow to the Court's reputation, which inevitably affected its authority. On the one hand, this undermined public confidence in the Court, and on the other, it demonstrated that the Court could be influenced by 'successful' manoeuvring. Actually, there have been many examples of influence and pressure on the Court over the history of its existence. For example, during October 2005 - August 2006, the work of the Constitutional Court was blocked due to a lack of judges with current powers. First, the Verkhovna Rada did not appoint CCU judges according to its quota; then later, it blocked the procedure of taking the oath by the judges of the CCU, which, in accordance with the law in force at the time, was a condition for the acquisition of their powers.²³ The activity of the Constitutional Court of Ukraine was unblocked only after the adoption by the Parliament of unconstitutional amendments²⁴ to the Law on the Constitutional Court of Ukraine, which limited the power of the Court to consider laws amending the Constitution, which entered into force.²⁵

Another means of pressure was the arbitrary dismissal of judges of the Constitutional Court (both by the Parliament and the President) 'for violating the oath' without any justification as to how exactly such a violation manifested itself. Subsequently, on the recommendation of the Venice Commission, such a ground for terminating the powers of a CCU judge was later removed from the law. In 2008, the President of Ukraine revoked the Decree of 2004 on the appointment of the CCU judge²⁶ (later, this 'tool' would be used during the crisis of 2021, which will be discussed in the next section).

A serious crisis related to constitutional justice took place in 2014 when during the Revolution of Dignity, the Ukrainian Parliament issued a political act (contrary to the formal

21 This wording means that 12 judges, regardless of the subject of their appointment, supported the adoption of the said decision, applying formal approach in the interpretation of the constitutional provision of the Part 3 of Art 106 'One and the same person cannot be the President of Ukraine for more than two consecutive terms'. Using only the rules of the perspective effect of the law made it possible to conclude that the incumbent President, who was in office for the second year at the time of the Constitution adoption and later (in 1999) was re-elected for a second term, had the right to run for President for the third time. Three judges expressed a dissenting opinion on the decision.

22 Judgement of the CCU in the case concerning the term of office of the President of Ukraine, no 22-rp/2003 25 December 2003 <<https://zakon.rada.gov.ua/laws/show/v022p710-03#Text>> accessed 21 February 2021.

23 The purpose of such a blockade was to prevent the CCU from reviewing the constitutionality of the Law on Amendments to the Constitution of Ukraine of 2004, which was assessed by the Venice Commission (CDL-AD(2005)15 <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)015-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)015-e)> accessed 21 February 2021) as adopted in gross violation of constitutional procedure and later (in 2010) declared unconstitutional and by the Constitutional Court itself.

24 Judgement of the CCU in the case concerning the powers of the Constitutional Court of Ukraine, no 13-pp/2008, 26 June 2008 <<https://zakon.rada.gov.ua/laws/show/v013p710-08#Text>> accessed 21 February 2021.

25 Law of Ukraine no 79-V, 4 August 2006 <<https://zakon.rada.gov.ua/laws/show/79-16#Text>> accessed 21 February 2021.

26 Decree of the President of Ukraine no 297.2008, 3 April 2008 <<https://www.president.gov.ua/documents/2972008-7308>> accessed 21 February 2021.

wording of the Constitution in force at the time) to dismiss five CCU judges who took part in the decision No. 20-rp/2010 (on the basis of which the Law amending the Constitution of 2004 was declared unconstitutional²⁷). A pre-trial investigation has been launched against several judges who voted in favour of this decision, but it has not yet been completed, so it seems impossible to draw any conclusions about the possible validity of such an act of the Verkhovna Rada.

These examples show that the problems with ensuring the institutional independence of the CCU are not new for Ukraine. They have accompanied the Court throughout most of the time of its functioning. At the same time, the authority of the constitutional justice body gradually declined. On the one hand, this did not add legitimacy to its decisions, and on the other hand, it was the legitimacy and validity of the CCU's decisions that became perhaps the most defining preconditions for its current position.

3.2 The Crisis Situation of 2020-2021

The next crisis related to constitutional justice in Ukraine started from the 27 October 2020 judgement of the CCU on the issues of anti-corruption policy.²⁸ The decision itself concerned two issues: 1) recognition of unconstitutional criminalisation of knowingly unreliable information in the declaration, as well as the intentional failure of the subject to declare the declaration; 2) the powers of the NACP²⁹ to verify the declarations of judges and respond to relevant violations.

Regarding the first part of the decision, the CCU pointed out the insufficient level of public danger to criminalise the act, which was fairly quickly taken into account by the Parliament (on 4 December 2020, a law was passed amending the Criminal Code and restoring criminal liability for declaring inaccurate information, as well as for failure to file a declaration by the declaring entity with an increase in the minimum amount of declaration³⁰).

As for the second part of the decision, it is worth noting that the NACP interpreted its powers in a rather broad way, which the CCU considered to be excessively discretionary. Therefore, in the decision, the CCU declared unconstitutional the provisions that provided for the NACP's authority to verify judges' declarations, pointing out that if the NACP is in the structure of the executive branch, which leads to the control of the executive branch over the judiciary. However, the NACP interpreted this as a complete ban on the electronic declaration system and suspended the operation of the website, which, of course, was categorically not accepted by society. These actions of the NACP did not follow from the decision of the CCU, but it seems to have provoked a number of problems. Let us consider them briefly, dividing them into motivational (reasons for the judgement) and operative (the judgement itself) problems.

The main problem of the operative part of the decision was its immediate entry into force. Although the CCU has repeatedly used the postponement construct to give the legislator time to respond to unconstitutionality and adopt new legislation, taking into account the CCU's reservations, this time, the CCU decision came into force immediately (the

27 According to that Law, the Constitution of Ukraine provided for limited powers of the President in the executive branch compared to the 1996 Constitution. That is why the representatives of the parliamentary majority in 2014 believed that it was the Law on amending the Constitution of 2004 that became the basis for the usurpation of power by President Yanukovich.

28 Judgement of the CCU no 13-p/2020, 27 October 2020 <<https://zakon.rada.gov.ua/laws/show/v013p710-20#Text>> accessed 21 February 2021.

29 National Agency on Corruption Prevention.

30 Law of Ukraine no1074-IX, 4 December 2020 <<https://zakon.rada.gov.ua/laws/show/1074-20#n15>> accessed 21 February 2021.

Constitution states that provisions declared unconstitutional shall cease to be valid on the day of the decision unless otherwise established by the decision itself, but not before the day of its adoption³¹). Even if all the other issues (discussed below) were absent, but the repeal of the unconstitutional provisions would be delayed; it would not lead to such negative consequences and would not cause a wave of political and public outrage.

The second problem of the operative part of the decision was that it declared unconstitutional not only those provisions that were required to be recognised in the constitutional appeal but also a number of others, i.e., the CCU went beyond the constitutional appeal. This should be considered in detail.

The fact is that the previous Law on the CCU explicitly provided for such a possibility for the Court, even if it was another legal act. Art. 61 (3) stated:

If in the course of consideration of a case on a constitutional petition or constitutional appeal non-compliance with the Constitution of Ukraine of other legal acts (their separate provisions) is revealed, except for those in respect of which proceedings have been opened and which influence the decision or opinion in the case, the Constitutional Court Ukraine recognizes such legal acts (their separate provisions) as unconstitutional.³²

The current law on the CCU does not contain such a provision. This is used as almost the only argument in favour of the fact that the Court has no right to go beyond the constitutional petition. Even the Venice Commission, in its Opinion, noted that:

The CCU went far beyond the petition it was considering, thus expanding its scope of review: the CCU declared unconstitutional several articles of the 2014 Law which were not mentioned in the petition (para. 25).³³

However, is not the role of constitutional justice levelled and denied by such an approach? If the Constitutional Court is the guardian of the constitution and its nature, according to the Venice Commission itself, is close to the constituent power ('Disregarding a judgment of a Constitutional Court is disregarding the Constitution and the Constituent Power' – as said in its Opinions),³⁴ is it justified to restrict the constitutional court in resolving the issue of the unconstitutionality of a provision of a law which is not the subject of a constitutional submission, but which is clearly contrary to the Constitution? It seems that such an approach to the restriction of the Constitutional Court is not justified because, hypothetically, it may be a question of inconsistency with constitutional values, principles, or violation of constitutional rights by such an act. In the situation under consideration, it should also be taken into account that there is no prohibition on such an extended approach to the interpretation of the CCU's powers in the legislation, and, provided that the reasoning of the decision is duly justified, in our opinion, the CCU should have the right to resolve such issues.

Actually, the motivation of the Court's decision is a separate block of problems that we have identified earlier. The first thing that stands out is the disproportionately short amount of

31 Constitution of Ukraine, Art 152(2) <<https://zakon.rada.gov.ua/laws/show/254k/96-bp#Text>> accessed 21 February 2021.

32 Law of Ukraine no 422/96-BP, 16 October 1996 <<https://zakon.rada.gov.ua/laws/show/422/96-bp#Text>> accessed 21 February 2021.

33 CDL-AD (2020) 038, 11-12 December 2020 <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)038-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)038-e)> accessed 21 February 2021.

34 CDL-AD(2017)003, 10-11 March 2017, para 8 <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)003-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)003-e)> accessed 21 February 2021.
See also: A Brewer-Carias, 'Constitutional Courts' Interference with the Constituent Power' in *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge 2011). doi:10.1017/CBO9780511994760.004.

motivation regarding the number and content of provisions declared unconstitutional. However, this is not the only problem. Recognition of the provisions of the law as unconstitutional is always an important step because it is a question of the invalidation of an act of a national representative body, which, according to the doctrine of popular representation, represents the will of the people.³⁵ This imposes on the constitutional justice body the obligation to provide detailed and thorough arguments on each provision that is declared unconstitutional. We do not find such an argument in the Court's decision, which inevitably affected its legitimacy.

The immediate reaction of the President of Ukraine to the CCU decision was the introduction in Parliament of a bill on the dissolution of the Constitutional Court and the nulling of its decision. Qualifying the situation as a 'constitutional crisis', the President justified the need to adopt a law that clearly contradicts the Constitution of Ukraine, the principles of separation of state power, and the rule of law by the need to overcome this 'crisis'. However, after the urgent negative conclusion of the Venice Commission, the bill was withdrawn.

The Verkhovna Rada chose a more moderate approach to resolving the situation and drafted a bill on the constitutional procedure. The idea of the act is to transfer the regulation of the procedure of the Constitutional Court activities to the law (as of today, it is regulated by the Rules adopted by the Court itself). The vast majority of the provisions of the draft law are aimed at regulating various aspects of the constitutional procedure: the distribution of cases between judges of the Constitutional Court, additional measures to ensure the openness of the Court (in particular, the publication of constitutional appeals), and other generally positive innovations. However, it is alarming that the goal declared by the ruling party in the adoption of this law is to block the work of the CCU by increasing the number of votes of judges required for the decision of the Court.³⁶

In this regard, let us return once again to the words of John Marshall, which we quoted at the beginning of this study, 'Let the end be legitimate...'. The question arises: Can a law, if a bill is passed, be considered constitutional if its very purpose contradicts the constitution?

The position of the Venice Commission is unexpected in this regard, which in its conclusion, after analysing the bill, indicated that 'The higher voting requirements... can be problematic'. But, at the same time, it considers temporarily raising the voting requirement in the Grand Chamber as 'justifying' in existing circumstances (paras. 61, 62).³⁷ When such an idea was used by the Polish authorities in 2015, the Venice Commission said that it was a non-appropriate tool, contrary to the principle of the rule of law (paras. 78, 79, 82).³⁸

Clearly, this points to a link between the guarantees of the independence of the judiciary and the legitimacy of its decisions. If the decision of the Court is well reasoned, and therefore, there are no doubts about its fairness (or at least they are minimal), it creates the preconditions for their legitimacy in society, as well as in the international community. This, in turn, strengthens the guarantees of the Court's independence.

35 See: SP Croley, 'The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law' (1995) 62 (2) *The University of Chicago Law Review* 689; A Stone Sweet, 'Constitutional Courts and Parliamentary Democracy' (2002) 25 (1) *West European Politics* 77. doi: 10.1080/713601586.

36 This goal has been repeatedly and openly stated by representatives of the People's Servant Party, and deputies of this party even introduced a draft bill to increase the quorum to 17 judges of the CCU (Draft Law on Amendments to Article 10 of the Law of Ukraine 'On the Constitutional Court of Ukraine' <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70312> accessed 22 April 2021.

37 CDL-AD (2021)006, 19-20 March 2021 <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2021\)006-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)006-e)> accessed 21 February 2021.

38 CDL-AD (2016)001, 11-12 March 2016 <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)001-e)> accessed 21 February 2021.

However, despite the fact that the Venice Commission supported a moderate approach to resolving the conflict, the President of Ukraine issued a Decree revoking the President's Decree appointing two CCU judges (one of them is the CCU chairman),³⁹ justifying its necessity on the basis of ensuring national security.⁴⁰ It should be noted that according to the Constitution of Ukraine, the President has no authority to dismiss judges of the CCU. Moreover, given the previous experience of arbitrary dismissals of CCU judges (described above), during the 2016 constitutional reform, it was decided to strengthen the guarantees of independence of both the Court (institutional independence) and the personal independence of judges. To this end, in particular, the powers of disciplinary liability, as well as the dismissal of judges of the CCU, were assigned to the Court itself (which decides such issues in a special plenary session). So, at the time of writing, this Decree has been appealed to the Supreme Court and the Constitutional Court of Ukraine (cases have not yet been considered).

3.3 Conclusion to Part II

Ensuring the conditions for the proper functioning of constitutional justice proved to be a much more difficult task than the introduction of this institution after the adoption of the Constitution of Ukraine. The whole set of problems that exist in this area can be divided into two groups. On the one hand, there is the lack of effective and proportionate guarantees of the independence of constitutional justice, which makes it impossible for the Constitutional Court to properly perform the functions necessary for the existence of a constitutional state. On the other hand, there is a somewhat simplistic approach of the Court itself to the adoption of certain decisions, the reasoning of which does not provide them with the necessary legitimacy in society. The way out of the current crisis seems possible by finding a balance between the independence of the Court and its responsibility in a democratic society.

4 COMMON FEATURES AND DIFFERENT APPROACHES TO RESOLVING CRISIS SITUATIONS IN POLAND AND UKRAINE

Crisis situations with the constitutional justice bodies in Poland and Ukraine are not unique. Similar things have happened in other young democracies, in particular, in a number of post-socialist countries (Hungary, Romania, Moldova, etc.). The first question that seems interesting in the context of this issue is whether there can be any common causes of crises in constitutional justice. Therefore, comparative analysis gives grounds to draw some conclusions, highlighting certain common and distinctive features. Of course, it is more pleasant to analyse the causes of joint gains, but in order to have these, it is necessary to focus on existing problems, ways to solve them, and how to avoid them in the future.

If we take a purely legal component as a starting point, we could begin with the fact that Poland and Ukraine have a mixed form of government, which is somewhat different in terms of institutional design but still has many common features. In particular, in a situation where the President has his own political majority in Parliament, he receives a significant amount of power. Of course, the constitutional court, which is called upon to prevent arbitrariness

39 Decree of the President of Ukraine no 24/2021, 27 March 2021 <<https://www.president.gov.ua/documents/1242021-37701>> accessed 21 February 2021.

40 This is questionable from the point of view of the essence of national security, because not every violation of national interests can be considered an encroachment on national security. See: A Yezero, 'Constitutional Security as a Component of National Security' (2017) 2 *Ukrainian Journal of Constitutional Law* 60.

and excessive concentration of powers in one subject, sooner or later becomes an obstacle to such actions, and therefore, naturally, becomes the object of pressure. However, a similar situation exists in countries with other forms of government (in particular, Hungary is a parliamentary republic and has also experienced serious problems with the independence of constitutional justice). So, obviously, the problem is not so much in the form of government, but in the very fact of excessive concentration of power in the hands of one political force, which is possible in different forms of government.

Alternately, there are examples of quite successful democracies in which such a political majority is present, but the bodies of constitutional justice function successfully. It seems that a high level of political and legal culture is a guarantee of the authority of constitutional justice and, at the same time, a safeguard against the emergence of crisis situations similar to those described above. In fact, the insufficiently high level of the latter is also, unfortunately, a common feature of the political and legal systems of Poland and Ukraine, which is obviously due to the socialist past and the consequent interruption of the democratic tradition.

Of course, there are a number of differences. As noted at the beginning of this study, Poland has advanced much further in terms of democratic constitutional development and the implementation of the principles of constitutionalism than Ukraine (which can be confirmed empirically by the Rule of Law and Democracy Indexes). Poland is an EU member, which implies additional obligations, as well as additional deterrents from violations of constitutional values and principles. Thus, the authorities' actions to put pressure on justice resulted in a violation of the sanctions procedure under Art. 7 of the Treaty of the EU. Ukraine does not have such deterrents, having only an association agreement with the EU, without even the prospect of future membership. So, perhaps the most limiting factor on the international scene is the reaction of the Council of Europe and its bodies. However, the position of the Venice Commission as an advisory body is not always taken into account (as demonstrated by the adopted Decree of the President of Ukraine on the dismissal of judges of the CCU).

The different positions of the Venice Commission in similar situations that took place in Ukraine and Poland are also noticeable. If an increase in the quorum for a decision by a constitutional justice body in Poland was considered by the Commission to be a violation of the rule of law, in Ukraine, it was considered an extreme but permissible measure. As mentioned above, it seems that the reason for such different approaches is the different degree of legitimacy of the constitutional justice bodies' decisions. The CCU's decision on electronic declaration undermined its legitimacy and negatively affected its guarantees of independence. Although from the constitutional law point of view, the declared unconstitutional law still raised a number of problematic issues regarding its constitutionality, but the lack of detailed reasoning of the judgement combined with the immediate invalidation of the unconstitutional provisions led to its categorical rejection by society, as well as deprived the Constitutional Court of support from international bodies. This testifies to the existence of a link between the legitimacy of decisions of constitutional justice bodies and guarantees of their independence.

5 CONCLUSIONS

The performance of constitutional justice in the conditions of a constitutional state is, in one way or another, connected with relations that have a potentially conflicting character. Protecting the constitution and preventing the arbitrariness of the political majority, which is the purpose of constitutional justice, require guarantees of its true independence. However, this independence is not an end in itself. It is a necessary precondition for the implementation in the state of the ideas of constitutionalism: respect for human dignity, human rights, democracy, the rule of law, etc. At the same time, if the independence of the

constitutional court is used to the detriment of these ideas, the body of constitutional justice loses its legitimacy, and the crisis of constitutional justice becomes threatening.

In this study, we tried to prove that the other 'side of the coin' of the constitutional justice body's independence is its authority and legitimacy of decisions. The legitimacy of the decisions of the constitutional court is ensured by two components: substantive (fairness and compliance of decisions with the principles of constitutionalism) and instrumental (proper validity and argumentation, which leave no doubt about the fairness and correctness of such a decision).

However, the authority of the constitutional justice body largely depends on itself, but not entirely. After all, political elites have a wide arsenal of means to involve the court in political disputes, where the court is limited in its status. If desired, there can be created situations that will either strengthen the authority of the court or vice versa. If, in the past, elites were aware of the benefits of having a truly independent, impartial body of constitutional justice, today, they unfortunately often prefer to administer it manually. And until the opposite becomes their strategic interest, constitutional law will have to develop many tools for resolving crisis situations.

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