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# SOME ISSUES OF CONSTITUTIONAL JUSTICE IN UKRAINE

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**Summary:** 1. Introduction. – 2. Judicial Status of the CCU as a Body of Constitutional Jurisdiction. – 3. Legitimacy of Constitutional Courts and their Constituent Powers. – 4. Problems of Constitutional Complaint Realization in Ukraine. – 5. Concluding Remarks

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# SOME ISSUES OF CONSTITUTIONAL JUSTICE IN UKRAINE

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**A**bstract The article identifies trends in the development of and access to constitutional justice in Ukraine at the current stage. It is alleged that on the one hand, there are attacks on the judicial status of the Constitutional Court of Ukraine, which intensified after the 2016 constitutional reform and the position of the Supreme Court. On the other hand, the effectiveness of a constitutional complaint as a human rights mechanism, i.e. for the formulation of the rights and responsibilities of the individual, is still insignificant. This is due both to the model of the constitutional complaint itself (being exclusively normative) and to the practice that is being formed. The reason for inefficiency can also be called doctrinal unpreparedness for the implementation of a constitutional complaint, because, in fact, despite the large number of studies on the subject, the practical aspect was not well thought out. Both the institutional component and the regulatory framework of the Constitutional Court of Ukraine itself need to be significantly improved. We refer specifically to the Law 'On the Constitutional Court of Ukraine' in terms of the interim provisional and protective measure, the implementation of decisions of the Constitutional Court of Ukraine, their actions in time, and specific mechanisms for the restoration of individual rights. In pursuance of the Constitution of Ukraine, a legislative mechanism for compensation for damage caused by unconstitutional acts of public authorities needs to be developed. The provisions of procedural law regarding the review of court decisions in exceptional circumstances as a result of declaring laws unconstitutional need to be adjusted.

**Key words:** constitutional proceedings, constitutional complaint, legitimacy, right to a fair trial, exceptional circumstances

## 1 INTRODUCTION

From time to time in the scientific literature we may come across opinions denying the Constitutional Court of Ukraine (hereinafter - the CCU) of its judicial status. This

discussion became especially relevant after the amendments to the Constitution of Ukraine of 2016, according to which the CCU is no longer mentioned in the relevant section of the Constitution of Ukraine, 'Justice'<sup>1</sup>. In addition, the judicial nature of the legal nature of the CCU was questioned by the Supreme Court in the decision of the Grand Chamber of 14 March 2018 in case № P/800/120/14<sup>2</sup>.

Issues related to the status of the CCU directly affect its 'integration' into the mechanism of protection of individual rights and consideration of the appeal to the CCU as an effective means of protection of rights from the standpoint of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). To date, the constitutional complaint, after the reform of 2016, is directly inscribed in Part 4 of Art. 55 of the Constitution of Ukraine as a separate right of a person<sup>3</sup>.

In addition, the question of the legitimacy of the constitutional judiciary and its connection with the constituent authorities needs special attention, as non-compliance and ignoring the decisions of the CCU means encroaching on the constitution itself. Today, the theory of democratic legitimacy of constitutional courts<sup>4</sup>, which emphasizes their special role due to the legitimacy of impartiality, is becoming relevant. In this case, the attempt to make the CCU a political body, rather than a judicial one, cannot avoid raising concern.

Given the special hopes and expectations placed on the introduction of the institution of an individual constitutional complaint, it is necessary to analyse the practical problems associated with the functioning of such a complaint. First of all, we refer to a large percentage of decisions with a refusal to initiate proceedings related to constitutional complaints, as well as to the problems of reviewing court decisions in exceptional circumstances on the basis of declaring a law (its provision) unconstitutional.

## 2 JUDICIAL STATUS OF THE CCU AS A BODY OF CONSTITUTIONAL JURISDICTION

In 2016, the provision of Part 1 of Art. 147 (in the old version) with the words 'the Constitutional Court of Ukraine is the only body of constitutional jurisdiction in Ukraine' was excluded from the text of the constitution. The same happened to Part 3 of Art. 124 (in the old edition): 'Judicial proceedings are carried out by the Constitutional Court of Ukraine and courts of general jurisdiction.'

The explanatory note to the draft law on amendments to the Constitution of Ukraine contains the following thesis:

In accordance with the recommendations of the Venice Commission and given the legal nature of the Constitutional Court of Ukraine, the draft law distinguishes the Constitutional Court of Ukraine as an independent institution.<sup>5</sup>

1 Konstyutsiia Ukrainy [Constitution of Ukraine]: pryiniata na piatii ses. Verkhovn. Rady Ukrainy 28.06.1996, Vidomosti Verkhovnoii Rady Ukrainy (1996) № 30, St. 141 <<https://zakon.rada.gov.ua/laws/show/254k/96-bp#Text>> accessed 9 April 2021.

2 Decision of the Supreme Court of Ukraine, 14 March 2018, No П/800/120/14 <<https://zakononline.com.ua/court-decisions/show/73195164>> accessed 9 April 2021.

3 Constitution of Ukraine, see Part 4 of Art. 55.

4 P Rosanvalon, *Democratic legitimacy. Impartiality, reflexivity, closeness* (Kyiv-Mohyla Academy Publishing House 2009).

5 Explanatory note to the draft Law of Ukraine 'On Amendments to the Constitution of Ukraine (regarding justice)' (Verkhovna Rada Ukrainy, 25 November 2015) <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=57209](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57209)> accessed 9 April 2021.

At the same time, neither in the preliminary opinion (document CDL-PI (2015)016) of 24 July 2015<sup>6</sup>, nor in the final opinion (CDL-AD (2015)027) of 23 October 2015<sup>7</sup>, we will find the relevant opinions of the Venice Commission.

Instead, in the opinion on the draft Constitution of Ukraine of 21 May 1996 (CDL-INF (96)6) on the text approved by the Constitutional Commission on 11 March 1996, the Venice Commission approved the provisions of the Constitutional Court. It noted that the existence of a permanent Constitutional Court 'is fully consistent with the common practice in new democracies to protect the constitutionality of their own legal order through a special, permanent and independent *judicial body*' (italics added by the author).<sup>8</sup>

As we can see, the judicial status of the Constitutional Court of Ukraine was not denied at all by the Venice Commission. On the contrary, it was approved. In the same way, the Venice Commission spoke about other European constitutional courts. And even the very name 'court' should not leave any doubts – the Constitutional Court of Ukraine is referred to as a judicial body endowed with a special constitutional jurisdiction.

The Constitutional Court of Ukraine and the relevant Law of Ukraine 'On the Constitutional Court of Ukraine' of 13 July 2017 № 2136-VIII (Art. 1), adopted after amendments to the Constitution of Ukraine, recognize the Constitutional Court as the body of constitutional jurisdiction, although compared to the previous constitutional wording, which was enshrined in the Constitution of Ukraine, the adjective 'single' disappeared. Here it is appropriate to use the definition of 'jurisdiction' provided by the authors of the draft law to amend the Constitution of Ukraine: jurisdiction should be understood as the competence and authority of the court to consider and resolve any legal disputes, as well as other statutory issues about which there was an appeal to the court of the subject.<sup>9</sup>

One can to some extent agree with M. V. Savchin, that the changes in 2016 did not significantly affect the real legal status of the CCU.<sup>10</sup> Similarly, M. V. Shepitko confers the CCU, along with other courts, with the judiciary in Ukraine. In his opinion, the CCU is a body of the judiciary, and this opinion is also in accordance with Art. 6 of the Constitution of Ukraine.<sup>11</sup> S. V. Riznyk notes that the amendments to the Constitution of Ukraine in 2016 do not mean that the CCU has ceased to be a court, although it argues that its legal nature is 'not limited to one branch of government' and that it has a position 'outside the "traditional" judicial system of authorities'.<sup>12</sup>

The status of the CCU as a body of the judiciary and a body of constitutional jurisdiction is evidenced by the practice of the CCU since 2016. In its decision, the CCU defined itself as a body of constitutional jurisdiction, which occupies a special place in the system of public authorities, performing a specific function – exercising constitutional control to ensure the

6 Venice Commission Preliminary Opinion CDL-PI (2015) 016 of 24 July 2015 <[https://supreme.court.gov.ua/userfiles/CDL\\_PI\\_2015\\_016\\_2015\\_07\\_24.pdf](https://supreme.court.gov.ua/userfiles/CDL_PI_2015_016_2015_07_24.pdf)> accessed 9 April 2021.

7 Venice Commission Final Opinion CDL-AD (2015) 027 of 23 October 2015 <<https://vkksu.gov.ua/userfiles/doc/visnovok%2026.pdf>> accessed 9 April 2021.

8 'Venice Commission. Opinion on the draft Constitution of Ukraine of 21 May 1996 CDL-INF (96) 6 on the text approved by the Constitutional Commission on 11 March 1996' in *The Constitution of Independent Ukraine. Vol 2, Part 1* (Ukrainska Pravnycha Fundatsiia 1997).

9 Explanatory note (n 1).

10 Y Zalesny (ed), *Constitutional justice in the camps of Eastern Europe: problems of theory and practice* (Norm 2020).

11 MV Shepitko, *Crimes in the field of justice: evolution of views and scientific approaches to the formation of countermeasures* (Pravo 2018).

12 SV Riznyk, *Constitutionality of normative acts: essence, evaluation methodology and support system in Ukraine* (Ivan Franko Lviv National University 2020).

supremacy of the Constitution of Ukraine<sup>13</sup>. In other decision, the CCU, distinguishing ‘judges of the judiciary and judges of the Constitutional Court of Ukraine’, still mentions them side by side, appealing to the institutional independence of the judiciary<sup>14</sup>.

At the same time, it is possible that the relevant fluctuations in the theory and practice of constitutional reform regarding the status of the Constitutional Court of Ukraine influenced the approach of the Supreme Court used in one of the decisions to appeal the dismissal of a judge of the Constitutional Court. The Supreme Court called the Constitutional Court of Ukraine ‘more political than a judicial body’ (Grand Chamber ruling of 14 March 2018 in case P/800/120/14) and refused to recognize it as a court within the meaning of Art. 6 of the ECHR.

The Supreme Court did not find it possible to use the decision of the European Court of Human Rights in the case of *Oleksandr Volkov v. Ukraine* of 9 January 2013 due to ‘significant differences between the circumstances’, stating the political nature of the formation of a constitutional jurisdiction<sup>15</sup>. In addition, in the opinion of the Supreme Court, the Constitutional Court of Ukraine does not consider specific legal cases in disputes between certain subjects of law, but may declare regulations unconstitutional (i.e. act as a negative legislator) and make binding interpretations of the Basic Law and interpretation of laws under the current version of the Constitution of Ukraine (i.e. act as a positive legislator)<sup>16</sup>.

According to the Supreme Court, the fact that the Constitutional Court of Ukraine is not a court within the meaning of Art. 6 of the ECHR also follows from the decisions of the ECtHR in *Fischer v. Austria* and *Zumtobel v. Austria*, so let us turn to these decisions.

In the judgment in *Fischer v. Austria* of 26 April 1995, paras. 28–30<sup>17</sup>, the ECtHR recalls that in accordance with Art. 6, paragraph 1 of the Convention, it is necessary that in determining ‘civil rights and obligations’ decisions taken by administrative bodies which do not themselves meet the requirements of this article (art. 6, para. 1) are subject to further review by a ‘judicial authority with full jurisdiction’. The Austrian Constitutional Court does not have the necessary jurisdiction. Its revision is reduced to establishing the conformity of the administrative decision to the constitution. It may even refuse to consider the merits of a complaint when ‘the decision cannot be expected to clarify the issue of constitutional law’. A similar thesis is voiced in the decision of 21 September 1993 *Zumtobel v. Austria*, para. 30: ‘The Constitutional Court did not therefore have the power required under Art. 6 para. 1’<sup>18</sup>.

It would be appropriate for the Supreme Court to clarify that it is within the competence of the CCU, in its view, to allow, when relevant, *mutatis mutandis* to apply the above-mentioned ECtHR judgments in the cases against Austria to the Ukrainian case and therefore not to consider the CCU a court in the meaning of Art. 6 of the ECHR. After all, the ECtHR has repeatedly recognized national constitutional courts as a ‘court established by law’ within

13 Decision CCU, 2 December 2019, No 11-r/2019 paragraph 2, item 2.1 <<https://zakon.rada.gov.ua/laws/show/v011p710-19#Text>> accessed 9 April 2021.

14 Decision CCU, 27 October 2020, no 13-p/2020, paragraph 5 <[https://ccu.gov.ua/sites/default/files/docs/13\\_p\\_2020.pdf](https://ccu.gov.ua/sites/default/files/docs/13_p_2020.pdf)> accessed 9 April 2021.

15 *Oleksandr Volkov v. Ukraine* no. 21722/11 (ECtHR, 27 May 2013) <<http://hudoc.echr.coe.int/fre?i=001-115871>> accessed 14 April 2021. See more in OZ Khotynska-Nor, Theory and Practice of Judicial Reform (Alerta 2016), P. 180 etc and I Izarova Independent judiciary: experience of current reforms in Ukraine as regards appointment of judges in Judicial Management Versus Independence of Judiciary ed. by K Gajda-Rosczyńska and D Szumilo-Kulczycka (Walters Kluwer, 2018) 242–263.

16 Decision of the Supreme Court of Ukraine, 14 March 2018, No II/800/120/14 <<https://zakononline.com.ua/court-decisions/show/73195164>> accessed 14 April 2021.

17 *Fischer v. Austria* App no 16922/90 (ECtHR, 26 April 1995) paras 28–30 <<http://hudoc.echr.coe.int/eng?i=001-57916>> accessed 14 April 2021.

18 *Zumtobel v. Austria* App no 12235/86 (ECtHR, 21 September 1993) para 30 <<http://hudoc.echr.coe.int/eng?i=001-57847>> accessed 14 April 2021.

the meaning of the relevant Art. 6 of the ECHR. It is obvious that the appropriate approach in a particular decision of the ECtHR may be due to the national specifics of the powers of a particular constitutional court. Moreover, the ECtHR uses its own, autonomous interpretation of the term 'court'.

In addition, with the case of Oleksandr Volkov, the Ukrainian parliament violated art. 6 of the Convention not because it dismissed the judge, but because the parliament that carried out the dismissal did not meet the criteria relating to the court in art. 6 of the ECHR. In other words, by dismissing a judge, the parliament actually performed the function of a court, if we again remind ourselves of the autonomous interpretation of the ECHR, while violating the standards of art. 6 of the ECHR.

The Supreme Court tried to explain why the CCU is not a court, referring only to part of the case law of the ECtHR, and ignoring the other decisions, as well as the principle of the autonomous interpretation of the ECHR itself. Instead, based on the circumstances of the case, the Supreme Court would have to explain why the parliament, having dismissed the judges of the CCU, and when acting as a court, did not violate art. 6 of the convention. It is unlikely that the 'political' nature of the CCU, as alleged by the Supreme Court, is an indisputable fact that removes the issue of the dismissal of CCU judges from the right to a fair trial, which is enshrined in art 6 of the ECHR.

It is also worth mentioning the opposite practice of the ECtHR, in which it recognized national constitutional courts as courts within the meaning of Art. 6 of the ECHR.<sup>19</sup>

The most common violations found by the ECtHR were delays by constitutional courts in dealing with individuals' complaints or violations of judicial standards. In these cases, it is important that, in accordance with the autonomous interpretation of the ECHR's provisions, the dispute concerns 'civil rights and obligations' or the establishment by a court of the merits of 'any criminal charges' against a person. The first option is, of course, more likely, as constitutional courts are generally not involved in assessing a particular criminal charge.

At the same time, there is the practice of the ECtHR, which recognizes the appeal to national constitutional courts as an effective mechanism of national legal protection<sup>20</sup>, which should be used before applying to the ECtHR in accordance with Part 1 of Art. 35 of the ECHR.

Non-recognition of the action of Art. 6 of the ECHR on the Constitutional Court of Ukraine

19 *Ruiz-Mateos v Spain* App no 12952/87 (ECtHR, 23 June 1993) <<http://hudoc.echr.coe.int/eng?i=001-57838>> accessed 14 April 2021; *Süßmann v Germany* 20024/92 (ECtHR, 16 September 1996) <<http://hudoc.echr.coe.int/eng?i=001-57999>> accessed 14 April 2021; *Pauger v Austria* App no 16717/90 (ECtHR, 28 May 1997) <<http://hudoc.echr.coe.int/eng?i=001-58047>> accessed 14 April 2021; *Pammel v Germany* App no 17820/91 (ECtHR, 1 July 1997) <<http://hudoc.echr.coe.int/eng?i=001-58045>> accessed 14 April 2021; *Trippel v Germany* App no 68103/01 (ECtHR, 4 December 2003) <<http://hudoc.echr.coe.int/eng?i=001-61509>> accessed 14 April 2021; *Voggenreiter v Germany* App no 47169/99 (ECtHR, 8 January 2004) <<http://hudoc.echr.coe.int/eng?i=001-61564>> accessed 14 April 2021; *Mežnarić v Croatia* App no 71615/01 (ECtHR, 15 July 2005) <<http://hudoc.echr.coe.int/eng?i=001-69726>> accessed 14 April 2021; *Milatova v the Czech Republic* App no 61811/00 (ECtHR, 21 June 2005) <<http://hudoc.echr.coe.int/eng?i=001-69426>> accessed 14 April 2021; *Švarc and Kavnik v Slovenia* App no 75617/01 (ECtHR, 8 February 2007) <<http://hudoc.echr.coe.int/eng?i=001-79375>> accessed 14 April 2021; *Oršuš and Others v Croatia* App no 15766/03 (ECtHR, 16 March 2010) <<http://hudoc.echr.coe.int/eng?i=001-97689>> accessed 14 April 2021; *Kübler v Germany* App no 32715/06 (ECtHR, 13 January 2011) <<http://hudoc.echr.coe.int/eng?i=001-102811>> accessed 14 April 2021; *Juričić v Croatia* App no 58222/09 (ECtHR, 26 July 2011) <<http://hudoc.echr.coe.int/eng?i=001-105754>> accessed 14 April 2021; *AK v Liechtenstein* App no 38191/12 (ECtHR, 9 July 2015) <<http://hudoc.echr.coe.int/eng?i=001-155824>> accessed 14 April 2021.

20 AL Derkach, *Relevant Questions of Human Rights Protection in the Constitutional Process in the Context of Global Challenges* (Feniks 2018) 146–148; V. Pleskach, 'The effectiveness of the constitutional complaint as a national remedy in the case law of the European Court of Human Rights' (2020) 1 Ukrainian Journal of Constitutional Law 38.

is a rather far-reaching position, as it concerns the access of citizens to the CCU and the standards of complaint handling. After all, according to this logic, if the Constitutional Court is considered to be not a judicial body but a political one, then it cannot be accused of violating the right to judicial protection and fair trial, in particular, in case of a delay by the Constitutional Court of Ukraine of considering complaints or violation of the standards of judicial review.

In fact, the political nature attributed to the Constitutional Court of Ukraine by the Supreme Court as something obvious is opposed in international practice to the independence of the judiciary. National practice in Europe is also moving towards denying the politics of constitutional courts. Thus, the German doctrine is based on the fact that the decisions of the Federal Constitutional Court are not political, and the Federal Constitutional Court is recognized as a body of justice.<sup>21</sup> The argument regarding the political nature of the CCU, which allegedly gives grounds to consider the dismissal of a CCU judge as an act of political responsibility (the position of the Supreme Court), does not stand up to any criticism in this regard. After all, the Supreme Court indirectly denies any independence and impartiality of CCU judges and puts them directly at the service of politicians, allowing politically motivated dismissals. Instead, the influence of CCU judges has always been prohibited in any way in all versions of the relevant provisions of the Constitution of Ukraine.

Political influence on CCU judges should be unequivocally assessed negatively. The political motivation for making decisions on the appointment of CCU judges (which, for example, is described by S. V. Riznyk<sup>22</sup>) should also go down in history as an unacceptable practice. Instead, the competitive principles of appointing CCU judges should be introduced. The need to improve the procedure for appointing CCU judges is particularly emphasized by the Venice Commission (paras. 71–81 of the Opinion of 10 December 2020 No. 1012/2020 CDL-AD (2020)039).<sup>23</sup>

As for the competence of the CCU, its characterization as a 'negative legislator' or even a 'positive legislator' should not mean the political nature of the court, but only demonstrate a special, constitutional jurisdiction. Moreover, the corresponding positioning (positive and negative legislator) is rather a legal metaphor, which is also not generally accepted. Thus, G. O. Khrystova claims that the decisions of the CCU on the constitutionality of legal acts cannot be recognized by normative legal acts, and the legal interpretative provisions contained in the decisions of the CCU have a supporting role.<sup>24</sup>

It is our deep conviction that the recognition of the out-of-court status of the Constitutional Court of Ukraine, as well as its political rather than legal nature, degrades the role of the CCU and does not contribute to the smooth functioning of the judicial mechanism for human rights protection. The way to create a separate constitutional court, which was chosen in Europe as a result of the victory of Hans Kelzen's arguments<sup>25</sup> over arguments by Karl Schmitt<sup>26</sup>, is hardly worth revising. Such a revision calls into question the very

21 N Akhtenberg et al., *State law of Germany: a shortened translation of the German seven-volume edition. Vol 1* (Institute of State and the law of the Russian Academy of Sciences 1994).

22 See: Riznyk (n 9) 133.

23 Venice Commission, CDL-AD (2020)039-e. Ukraine - Urgent opinion on the Reform of the Constitutional Court, endorsed by the Venice Commission on 11 December 2020 at its 125th online Plenary Session (11–12 December 2020) <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)039-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)039-e)> accessed 9 April 2021.

24 GO Khrystova, 'Legal nature of acts of the Constitutional Court of Ukraine' (PhD (Law) thesis, Kharkiv 2004).

25 G Kelzen, 'Who should be the guarantor of the constitution' in K Schmitt, *The state: law and politics* (Publishing House 'Territoria Budushego' 2013).

26 K Schmitt, 'Guarantor of the Constitution' in K Schmitt, *The state: law and politics* (Publishing House 'Territoria Budushego' 2013).

existence, authority and role of the Constitutional Court in the mechanism of the protection of human rights, as well as the legal force of its decisions, its own jurisdiction, its institutional independence, which is ensured by judicial status (according to Kelzen), creating uncertainty regarding its place in the judicial system by potential competition with the Supreme Court as the 'highest court in the judicial system of Ukraine' (Part 3 of Art. 125 of the Constitution in its current version).<sup>27</sup>

### 3 LEGITIMACY OF CONSTITUTIONAL COURTS AND CONSTITUENT POWER

According to P. Rosanvalon, the constituent power as a direct existence of the sovereignty of the people cannot be taken as the norm of democratic life.<sup>28</sup> At the same time, the scientist distinguishes the electoral people, the social people and the people as a principle. Constitutional courts guarantee the identity of democracy as a temporary institution. The need for such a pluralization of the temporal dimensions of democracy is only increasing in modern societies, which are increasingly threatened by short-lived dictatorships. The function of representation of principles thus acquires the strengthened value.<sup>29</sup>

The Venice Commission in paragraph 40 of the opinion CDL-AD (2016) 001 of 11–12 March 2016 concerning Poland stated: '...It is the constituent power, not the ordinary legislator, that entrusts the Constitutional Tribunal with the competence to ensure the supremacy of the Constitution.' A simple piece of legislation that threatens to make constitutional review impossible must itself be assessed for constitutionality before it can be applied by a court. Otherwise, an ordinary law that simply states that 'this abolishes constitutional control, enters into force immediately' could be the sad end of constitutional justice. The very idea of the supremacy of the constitution presupposes that such a law, which potentially threatens constitutional justice, must be controlled and, if necessary, annulled by the Constitutional Tribunal before it enters into force (paragraph 41 of the opinion).<sup>30</sup>

According to the Venice Commission, 'Ignoring the decision of the Constitutional Court is tantamount to ignoring the Constitution and the constituent authority, which gave the Constitutional Court the power to ensure this supremacy.'<sup>31</sup> Thus, according to the appropriate approach, it is the constituent power that manifests itself through the mouths of the constitutional courts, which determines a high degree of their legitimacy.<sup>32</sup>

S. V. Riznyk expresses the opinion that it is necessary to check the law on amendments to the Constitution of Ukraine on its own initiative during the first application of the Basic Law in the new wording within the meaning of Arts. 155 and 157 of the Constitution, as it is its 'natural duty arising from the very essence of constitutional jurisdiction.'<sup>33</sup> At the same time,

27 See details: OV Kuzmenko, HV Berchenko, 'Status of the Constitutional Court of Ukraine as a judicial body' (2020) 4 Prykarpattia Legal Bulletin 6.

28 P. Rosanvalon, *Democratic legitimacy. Impartiality, reflexivity, closeness* (Kyiv-Mohyla Academy Publishing House 2009).

29 *ibid.*, 170-171.

30 Venice Commission, Opinion On Amendments To The Act Of 25 June 2015 On The Constitutional Tribunal Of Poland Adopted by the Venice Commission at its 106th Plenary Session (Venice, 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 9 April 2021.

31 Venice Commission, CDL-AD (2017)003, Spain - Opinion on the law of 16 October 2015 amending the Organic Law No. 2/1979 on the Constitutional Court, para 69 <[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 9 April 2021.

32 See more: HV Berchenko, 'Development of the constitution through its judicial interpretation and constituent power' (2020) 8 Actual problems of the state and law 18.

33 Riznyk (n 9) 355.



the non-application of the law on amendments to the Constitution by the CCU should take place in exceptional cases.<sup>34</sup>

The issue of legitimacy of the CCU was especially relevant in connection with the adoption of the decision of 27 October 2020 № 13-r/2020 (on the powers of the National Agency for Prevention of Corruption). In particular, the issue concerned how the Constitutional Court went beyond the constitutional submission.

As noted by the Venice Commission in its Opinion on the Draft Constitutional Court of Montenegro, CDL-AD (2008)030, para. 50<sup>35</sup>:

...a general power of the Court to start proceedings on its own initiative would make the Court a political actor and the Court could lose its independent position. Each decision to take up a case or not to do so could be criticised as a political choice. Consequently, the Court should be limited to act on its own initiative only in cases when it has to apply a norm of which it doubts the constitutionality

Earlier, Part 3 of Art. 62 of the Law ‘On the Constitutional Court of Ukraine’ of 16 October 1996 № 422/96-BP (the Law lost its power on the basis of Law № 2136-VIII of 13 July 2017) directly established the possibility for the CCU to declare other legal acts unconstitutional ‘affecting making a decision or giving an opinion on the case.’ At the same time, the current Law of Ukraine ‘On the Constitutional Court of Ukraine’ of 2017 does not directly regulate the issue of going beyond the constitutional submission by the Constitutional Court of Ukraine.

The problem of going beyond the submission is considered in detail in paragraphs 25–29 of the conclusion of the Venice Commission of 10 December 2020.<sup>36</sup> Analysing the abolition in the current Law of the right of the Constitutional Court of Ukraine to go beyond the submission, the Venice Commission concludes: ‘There is an assumption that the repeal of a provision indicates that the legislator made a conscious choice and that it was not made “recklessly”’. If this is the case, then the decision of the Court, apparently, exceeded the proper powers in Decision 13-r / 2020. To overcome any uncertainty in future proceedings, the parliament must specify this in the Law on the Constitutional Court.

Thus, based on the conclusion of P. Rosanvalon and the position of the Venice Commission, the constitutional courts have a separate legitimacy and in certain cases have the right to act independently on behalf of the constituent power, defending the constitution. At the same time, of course, in each case, going beyond the constitutional representation must be justified.

## 4 PROBLEMS OF REALIZATION OF THE INSTITUTE OF CONSTITUTIONAL COMPLAINT IN UKRAINE

Amendments to the Constitution of 2016 were characterized, in particular, by granting the Constitutional Court of Ukraine the right to consider constitutional complaints of individuals and to declare laws unconstitutional based on the results of the review. We agree

34 S Riznyk, ‘Problems of assessing the constitutionality of laws amending the Constitution of Ukraine’ (2019) 4 *Ukrainian Journal of Constitutional Law* 12.

35 [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2008\)030-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)030-e)

36 Venice Commission, Opinion No 1012/2020. Ukraine – Urgent Opinion On the Reform of the Constitutional Court Issued pursuant to Article 14a of the Venice Commission’s Rules of Procedure (10 December 2020) <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2020\)019-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)019-e)> accessed 9 April 2021.

with S. V. Riznyk on the impossibility of overestimating the potential of a constitutional complaint in Ukraine.<sup>37</sup> Today, several circumstances hinder the effective implementation of the institute of constitutional complaint in practice.

First of all, this is a significant percentage of refusals to initiate proceedings on constitutional complaints. The court often refuses to open constitutional proceedings in cases on the grounds given in paragraph 4 of Part 1 of Art. 62 of the Law 'On the Constitutional Court of Ukraine', i.e. inadmissibility of the constitutional complaint. Moreover, the most common reason for refusing to open proceedings in the case is the inadmissibility of the constitutional complaint in connection with non-compliance with paragraph 6 of Part 2 of Art.55 of the Law on 'substantiation' of the complaint.<sup>38</sup>

At the same time, paradoxically, the ineffectiveness of a constitutional complaint as a means of protecting the rights of the individual is most evident in cases where the law or certain provisions of the law will be declared unconstitutional based on the results of the complaint. The review of the decision in a specific case of a person who appealed to the CCU does not take place for formal reasons.<sup>39</sup>

One of the first decisions based on the results of consideration of the constitutional complaint was the decision of the Second Senate of the CCU № 4-r(II)/2019 of 5 June 2019. The CCU declared the right of the National Anti-Corruption Bureau of Ukraine (NABU) to file lawsuits regarding the invalidity of agreements unconstitutional, as only the prosecutor's office has the right to file such lawsuits in accordance with the Constitution on behalf of the state.

Part 3 of Art. 320 of the Commercial Procedural Code of Ukraine (similar rules are in other procedural codes) provides for the possibility of reviewing the court decision in connection with exceptional circumstances. This provision replaced the old version of the procedural codes, which allowed for a review of court decisions on newly discovered circumstances as a result of the CCU's recognition of laws as unconstitutional.<sup>40</sup>

As for the invalidity of agreements on NABU lawsuits, the current position of commercial courts up to the Commercial Court of Cassation within the Supreme Court is not to review court decisions, as there are no grounds for this. That is, all agreements that were declared invalid will remain so, because, in the opinion of the courts, the decision of the CCU has no retroactive effect (decision of the Commercial Court of Cassation of the Supreme Court in case № 910/24263/16 of 27 August 2019<sup>41</sup>, decision of the Central Commercial Court of Appeal of 13 June 2019 in case № 904/8354/16<sup>42</sup>). The obstacle to the review of court decisions

37 Riznyk (n 9) 407.

38 For more details, see: H Berchenko, E Tkachenko, 'The right to appeal with an individual constitutional complaint in Ukraine: theoretical and practical aspects' (2018) 12 Ukrainian Law. 92; D Terletsky, A Ezerov, 'Exercise of the right to a constitutional complaint: analysis of the practice of the Constitutional Court of Ukraine' (2018) 5 Bulletin of the Constitutional Court of Ukraine 74.

39 See: H Berchenko, 'The right of NABU to go to court with claims for invalidation of transactions is unconstitutional: is it possible to reconsider a court decision?' (2019) 47 Accountant 14; HV Berchenko, 'The effectiveness of the constitutional complaint through the prism of review of court decisions in exceptional circumstances' in *Current challenges and current issues of judicial reform in Ukraine: Proceedings of the IV International scientific-practical conference* (Chernivtsi National University 2020) 178–180.

40 See more: Y Barabash, "Means of protection of rights vs legal certainty" as a dilemma of the domestic official constitutional doctrine in the context of the functioning of the institution of individual complaint' (2020) 4 Ukrainian Journal of Constitutional Law 48.

41 Decision of the Commercial Court of Cassation of the Supreme Court in case № 910/24263/16 of 27 August 2019 <<http://reyestr.court.gov.ua/Review/84008715>> accessed 9 April 2021.

42 Decision of the Central Commercial Court of Appeal of 13 June 2019 in case № 904/8354/16 <<http://reyestr.court.gov.ua/Review/82400552>> accessed 9 April 2021.

was the reference to the presumption of the constitutionality of the provisions of the law, which means that the law is valid until it is declared unconstitutional. This, according to the logic of the courts, follows from the text of Part 2 of Art. 152 of the Constitution of Ukraine. That is, the decision of the CCU has no retroactive effect and is valid only for the future.

The Northern Commercial Court of Appeal used another argument, clearly feeling the weakness of the above-mentioned argument against the retroactive effect. In the decision of 2 October 2019, in case № 910/131/17<sup>43</sup>, it stated that the decision to declare the contracts invalid is executed from the moment it enters into force. That is, all decisions to declare the contract invalid are executed at the time of entry into force of the decision. It is the fact of enforcement that directly precludes the review of a court decision in accordance with a direct instruction of the Commercial Procedure Code. S. Shevchuk also proposed to create a mechanism at the legislative level to restore the rights to already executed court decisions.<sup>44</sup> Instead, D. Terletsy believes that the reservation on the execution of a court decision provides 'reasonable safeguards to maintain the necessary balance between public and private interest'.<sup>45</sup>

Let us also turn to the practice of administrative courts, where we will also see obstacles to reviewing court decisions in exceptional circumstances. For example, the Supreme Court, composed of a panel of judges of the Administrative Court of Cassation, considers that 'a decision that has entered into force, which denied the claim, does not provide for enforcement' (decision of 3 June 2019, administrative proceedings №K/9901/13822/19<sup>46</sup>), therefore, it turns out that it is impossible to review it at all in exceptional circumstances after the law is declared an unconstitutional decision by the decision of the CCU. The same position was confirmed by the Supreme Court composed of the Joint Chamber of the Administrative Court of Cassation in the decision of 19 February 2021.<sup>47</sup>

The review provision could hypothetically be involved if the CCU directly gave retroactive effect to its decision. However, this is literally impossible, as in accordance with Part 2 of Art. 152 of the Constitution of Ukraine and Art. 91 of the Law 'On the Constitutional Court of Ukraine', the CCU has no right to establish the unconstitutionality of the law and its invalidity from an earlier date than the date of the decision of the CCU.

If the court applied an unconstitutional law, and the decision of the CCU on the unconstitutionality of the law already existed at the time of the court's decision, then the option of reviewing it in exceptional circumstances is absurd. In this case, the court simply ignored the decision of the CCU, violating the law. A judge cannot (and does not have the right to) fail to know about the position of the CCU *a priori* and its decision that ignores such a position of the CCU will be illegal, the observance of which must be checked by the appellate and cassation instances.

43 Decision of the Northern Commercial Court of Appeal in case № 910/131/17 of 2 October 2019 <<http://reyestr.court.gov.ua/Review/84846085>> accessed 9 April 2021.

44 'Speech of the Chairman of the Constitutional Court of Ukraine S Shevchuk at the scientific-practical conference "Constitutional rights of man and citizen and guarantees of their provision"' (2018) 5 Bulletin of the Constitutional Court of Ukraine 95.

45 D Terletsy, 'Legally significant consequences of decisions of the Constitutional Court of Ukraine in criminal proceedings' (2020) 4 Ukrainian Journal of Constitutional Law 109.

46 Decision of the Supreme Court, composed of a panel of judges of the Administrative Court of Cassation of 3 June 2019 in administrative proceedings №K/9901/13822/19 <<http://reyestr.court.gov.ua/Review/82194237>> accessed 9 April 2021.

47 Resolution of the Supreme Court composed of the Joint Chamber of the Administrative Court of Cassation of 19 February 2021 in administrative proceedings № K/9901/29652/19 <<https://reyestr.court.gov.ua/Review/95010526>> accessed 9 April 2021.

Taking the position, as claimed by the courts, that the decision of the CCU is not retroactive, the question arises: why is the relevant provision for review of the court decision in connection with the unconstitutionality (constitutionality) of the law enshrined in the procedural codes, what is its meaning? Maybe it is not necessary at all?

According to V. Pleskach, the review of court decisions is carried out 'in order to terminate the execution of the decision of the court of general jurisdiction, which was adopted on the basis of unconstitutional law'.<sup>48</sup> At the same time, obviously, some differentiation is needed in this matter depending on the specifics of procedural proceedings.

Y. G. Barabash proposes to differentiate the approaches to be applied in civil and commercial proceedings, as well as in the framework of the application of the Code of Administrative Procedure. If restrictions on review are appropriate in the first two cases, the administrative rights of the complainant should be restored in administrative proceedings, regardless of the enforcement of the judgment (unless the rights are not subject to restoration). As for the criminal process, the decisions of the CCU on the principle of *ex tunc* should occur in almost every case.<sup>49</sup>

Thus, we have a rather systematic and serious problem of reviewing court decisions as a result of declaring the provisions of laws unconstitutional. This nullifies the efforts of the subjects of the constitutional complaint, as they can be satisfied only with the contribution to the development of the legal system for the future. As rightly noted by Y. G. Barabash, a person has almost no chance to return to their case in general court.<sup>50</sup> V. Pleskach, however, emphasizes that the effect will be present in cases of ongoing violations.<sup>51</sup>

We must also mention the institution of an interim provisional and protective measure, which is an executive document that is directly recognized in the Law 'On the Constitutional Court of Ukraine' (Art. 78). The interim measure was applied only once on 16 April 2019 on the constitutional complaint of a citizen Dermenzha. Also, this case has been criticized. O. Vodyannikov believes that this institution was borrowed from Rule 39 of the Rules of Procedure of the European Court of Human Rights, and therefore the CCU was used incorrectly.<sup>52</sup>

Currently, the Constitutional Court itself is considering a constitutional complaint regarding the compliance of the Constitution of Ukraine (constitutionality) with the provisions of paragraph 1 of part three of Art. 320 of the Commercial Procedural Code of Ukraine.<sup>53</sup> This complaint is about the unconstitutionality of procedural legislation, making it impossible to review court decisions. However, there is a possibility that the courts simply misinterpret the provisions of procedural law and the CCU is sufficient to provide the relevant provisions of a conformal (in accordance with the Constitution) interpretation (this is directly allowed by Part 3 of Art. 89 of the Law 'On the Constitutional Court of Ukraine') and not recognize the provisions themselves as unconstitutional.

48 Pleskach (n 10) 46.

49 Barabash (n 30) 57.

50 YG Barabash, 'The role of academic thought in the formation of the official constitutional doctrine' in *Mutual achievements of the European Commission "For Democracy through Law" and constitutional justice and the problem of interpretation in constitutional proceedings*: a collection of materials and abstracts of the International Online Conference (Kyiv, Vaite, 2020) 44.

51 Pleskach (n 10) 46.

52 O Vodyannikov, 'Interim provisional and protective measure of the CCU: something went wrong' (LB.ua, 19 April 2019) <[https://lb.ua/blog/oleksandr\\_vodennikov/424996\\_zabezpechuvalniy\\_nakaz\\_ksu\\_shchos.html](https://lb.ua/blog/oleksandr_vodennikov/424996_zabezpechuvalniy_nakaz_ksu_shchos.html)> accessed 9 April 2021.

53 All the complaints to the CCU are placed on its website, see <[http://www.ccu.gov.ua/sites/default/files/16\\_195\\_2020.pdf](http://www.ccu.gov.ua/sites/default/files/16_195_2020.pdf)> accessed 19 April 2021.

In our opinion, the review of court decisions, as a result of the satisfaction of constitutional complaints, needs to be improved at the legislative level. It is necessary to form an adequate approach to the 'non-enforcement' of court decisions and to outline the range of cases covered by the provision on review of court decisions in exceptional circumstances in connection with the recognition of the law as unconstitutional. Thus, D. Terletsy sees a conflict between the provisions of Part 2 of Art. 152 of the Constitution of Ukraine and the provisions of procedural laws, advocating for its resolution by a single legislative body.<sup>54</sup> A. Ezerov insists on the need for a legislative solution to the problem, in order to, despite the long-term effect of the decisions of the CCU, guarantee the person the right to a fair resolution of the dispute.<sup>55</sup>

By the way, it is possible that given the current practice of the Supreme Court, questions will have to be asked about amendments to Part 2 of Art. 152 of the Constitution of Ukraine, in order to directly allow such a review for a person who has filed a constitutional complaint. However, there is a debate about the range of subjects to which the reverse action should apply.

In connection with the need to recognize the admissibility of the retroactive effect of the decisions of the CCU, E. V. Chernyak proposes to supplement Art. 152 of the Constitution of Ukraine with part 3 of the following content: 'Judicial acts based on the norms of laws that are declared unconstitutional are reviewed by the court in each case at the request of citizens whose rights and freedoms have been violated.'<sup>56</sup>

By the way, it is worth mentioning the 'prejudicial' decisions of the CCU, the right to indicate which in the CCU was provided by Art. 74 of the Law 'On the Constitutional Court of Ukraine' of 6 October 1996 № 422/96-VR (already expired) and which in practice meant the retroactive effect of the CCU decision in time<sup>57</sup>, i.e. acts declared unconstitutional shall cease to be valid from the moment of the adoption of these acts<sup>58</sup>. The CCU itself did not see any obstacles in the text of the constitution during the operation of the relevant provision of the CCU in terms of such a retroactive effect and from time to time used the relevant right. The same part 2 of Art. 152 of the Constitution before the amendments in 2016, as now, did not directly indicate the possibility of reverse decisions of the CCU (the novelty of 2016, in fact, was only to give the CCU the right to postpone the entry into force of its decisions in time 'for the future'). Nevertheless, the retroactive effect of decisions until 2016, despite the lack of direct permission in the Constitution of Ukraine, was formalized by the already mentioned 'prejudicial' nature.

In addition, Part 3 of Art. 152 of the Constitution of Ukraine remains 'dead'. The Law on Compensation for Damage Caused by the Application of an Unconstitutional Law, which requires the adoption of Part 3 of Art. 152 of the Constitution of Ukraine, still does not

54 D Terletsy, 'Execution of decisions of the Constitutional Court of Ukraine on unconstitutionality of legal acts or their provisions' in *Mutual achievements of the European Commission 'For Democracy through Law' and constitutional justice bodies and problems of interpretation in constitutional proceedings: collection of materials and abstracts of the International Online Conference* (Kyiv, Vaitė, 2020) 83.

55 A Ezerov, 'Constitutional complaint and exceptional circumstances for review of cases' <<https://supreme.court.gov.ua/supreme/pres-centr/zmi/811129/>> accessed 9 April 2021.

56 EV Chernyak, *Protection of the Constitution of Ukraine and the constitutions of foreign countries: a constitutional and comparative analysis* (Lira-K Publishing House 2020); E Chernyak, 'Application by a court of the provisions of the Constitution of Ukraine as norms of direct action and the right to review a court decision as a result of establishing the constitutionality of a law, other legal act or their individual provisions as a means of protecting fundamental rights and freedoms' (2020) 4 Ukrainian Journal of Constitutional Law 123.

57 See: Y Barabash, 'Prejudicial decisions of the Constitutional Court of Ukraine: problematic issues of theory and practice' (2020) 6 *Pravo Ukrainy* 45; A Savchak, 'Prejudicial decisions of the Constitutional Court of Ukraine: theoretical and legal aspect' (2011) 2 *Public law* 27.

58 Khrystova (n 14) 125.

exist.<sup>59</sup> At the same time, even in the absence of a law, there are already examples in judicial practice of compensation for such damage (see, for example, the decision of the Third Administrative Court of Appeal of 3 March 2021 in case № 340/4092/20<sup>60</sup>). According to Y. G. Barabash, it is necessary to provide a compensatory mechanism in case it is impossible to reconsider the person's decision. As an option, it is proposed that the amount of money allocated to damages should be determined by the court, which is authorized to consider the application for review of the decision in exceptional circumstances.<sup>61</sup> A. Ezerov also supports the legislative regulation of the relevant procedure.<sup>62</sup> D. Terletsy, supporting the adoption of a special law, does not exclude the application of the provisions of the Civil Code of Ukraine to the relevant legal relations.<sup>63</sup>

Note that Part 3 of Art. 152 of the Constitution implicitly allows the decision of the CCU *ex tunc* in terms of compensation for damage, because by the opposite interpretation (the effect of the decision only 'for the future') it completely loses its meaning (unconstitutional law simply ceases to apply and cannot cause any harm). Thus, the general conclusion about the complete and absolute constitutional prohibition of the retroactive effect of the decisions of the CCU in time seems superficial and unconvincing.

From these positions, of course, the Law 'On the Constitutional Court of Ukraine' needs to be improved in terms of the mechanism of the execution of CCU decisions. After all, today this mechanism consists of three short sentences contained in Arts. 97–98 of Chapter 14 of the Law, which do not explain the effect of CCU decisions in time, and do not specify the procedure for the execution of CCU decisions, etc.

## 5. CONCLUDING REMARKS

It can be concluded that the constitutional judiciary in Ukraine is at a difficult stage of its development. This is due both to the model of the constitutional complaint itself (it is exclusively normative) and to the practice that is being formed. The reason for inefficiency can also be called doctrinal unpreparedness for the implementation of a constitutional complaint, because, in fact, despite the large number of works on this issue, the practical aspect was insufficiently thought out.

Both the institutional component and the regulatory framework of the CCU itself need to be significantly improved. We are referring specifically to the Law 'On the Constitutional Court of Ukraine' in terms of the interim provisional and protective measure, the implementation of the decisions of the CCU, their actions in time, and specific mechanisms for the restoration of individual rights. In pursuance of the Constitution of Ukraine, a legislative mechanism for compensation for damage caused by unconstitutional acts of public authorities needs to be developed. The provisions of procedural law, regarding the review of court decisions in exceptional circumstances as a result of declaring laws unconstitutional, need to be adjusted.

59 See more in Barabash (n 30) 55.

60 The decision of the Third Administrative Court of Appeal of 3 March 2021 in case № 340/4092/20 <<https://reyestr.court.gov.ua/Review/95276261>> accessed 9 April 2021.

61 Barabash (n 30) 56.

62 Ezerov (n 46).

63 Terletsy (n 45) 84.

## REFERENCES

1. Akhtenberg N et al, *State law of Germany: a shortened translation of the German seven-volume edition. Vol 1* (Institute of State and the law of the Russian Academy of Sciences 1994).
2. Barabash Y, 'Means of protection of rights vs legal certainty' as a dilemma of the domestic official constitutional doctrine in the context of the functioning of the institution of individual complaint' (2020) 4 Ukrainian Journal of Constitutional Law 48.
3. Barabash Y, 'Prejudicial decisions of the Constitutional Court of Ukraine: problematic issues of theory and practice' (2020) 6 Pravo Ukrainy 45.
4. Barabash YG, 'The role of academic thought in the formation of the official constitutional doctrine' in *Mutual achievements of the European Commission "For Democracy through Law" and constitutional justice and the problem of interpretation in constitutional proceedings: a collection of materials and abstracts of the International Online Conference* (Kyiv, Vaite, 2020) 44.
5. Berchenko H, 'The right of NABU to go to court with claims for invalidation of transactions is unconstitutional: is it possible to reconsider a court decision?' (2019) 47 Accountant 14.
6. Berchenko H, Tkachenko E, 'The right to appeal with an individual constitutional complaint in Ukraine: theoretical and practical aspects' (2018) 12 Pravo Ukrainy 92.
7. Berchenko HV, 'Development of the constitution through its judicial interpretation and constituent power' (2020) 8 Actual problems of the state and law 18.
8. Berchenko HV, 'The effectiveness of the constitutional complaint through the prism of review of court decisions in exceptional circumstances' in *Current challenges and current issues of judicial reform in Ukraine: Proceedings of the IV International scientific-practical conference* (Chernivtsi National University 2020) 178–180.
9. Chernyak E, 'Application by courts of the provisions of the Constitution of Ukraine as norms of direct action and the right to review a court decision as a result of establishing the constitutionality of a law, other legal act or their individual provisions as a means of protecting fundamental rights and freedoms' (2020) 4 Ukrainian Journal of Constitutional Law 123.
10. Chernyak EV, *Protection of the Constitution of Ukraine and the constitutions of foreign countries: a constitutional and comparative analysis* (Lira-K Publishing House 2020).
11. Derkach AL, *Relevant Questions of Human Rights Protection in the Constitutional Process in the Context of Global Challenges* (Feniks 2018) 146–148.
12. Ezerov A, 'Constitutional complaint and exceptional circumstances for review of cases' <<https://supreme.court.gov.ua/supreme/pres-centr/zmi/811129/>> accessed 9 April 2021.
13. Izarova I, Independent judiciary: experience of current reforms in Ukraine as regards appointment of judges in *Judicial Management Versus Independence of Judiciary* ed. by K Gajda-Rosczyńska and D Szumilo-Kulczycka (Walters Kluwer, 2018).
14. Kelzen G, 'Who should be the guarantor of the constitution' in K Schmitt, *The state: law and politics* (Publishing House 'Territoria Budushego' 2013).
15. Khotynska-Nor OZ, *Theory and Practice of Judicial Reform* (Alerta 2016).
16. Khrystova GO, 'Legal nature of acts of the constitutional court of Ukraine' (PhD (Law) thesis, Kharkiv 2004).
17. Kuzmenko OV, Berchenko HV, 'Status of the Constitutional Court of Ukraine as a judicial body' (2020) 4 Prykarpattia Legal Bulletin 6.
18. Pleskach V, 'The effectiveness of the constitutional complaint as a national remedy in the case law of the European Court of Human Rights' (2020) 1 Ukrainian Journal of Constitutional Law 38.

19. Riznyk S, 'Problems of assessing the constitutionality of laws amending the Constitution of Ukraine' (2019) 4 *Ukrainian Journal of Constitutional Law* 12.
20. Riznyk SV, *Constitutionality of normative acts: essence, evaluation methodology and support system in Ukraine* (Ivan Franko Lviv National University 2020)
21. Rosanvalon P, *Democratic legitimacy. Impartiality, reflexivity, closeness* (Kyiv-Mohyla Academy Publishing House 2009).
22. Savchak A, 'Prejudicial decisions of the Constitutional Court of Ukraine: theoretical and legal aspect' (2011) 2 *Public law* 27.
23. Schmitt K, 'Guarantor of the Constitution' in K Schmitt, *The state: law and politics* (Publishing House 'Territoriiia Budushego' 2013).
24. Shepitko MV, *Crimes in the field of justice: evolution of views and scientific approaches to the formation of countermeasures* (Pravo 2018)
25. Terletsky D, 'Execution of decisions of the Constitutional Court of Ukraine on unconstitutionality of legal acts or their provisions' in *Mutual achievements of the European Commission 'For Democracy through Law' and constitutional justice bodies and problems of interpretation in constitutional proceedings*: collection of materials and abstracts of the International Online Conference (Kyiv, Vaite, 2020) 83.
26. Terletsky D, 'Legally significant consequences of decisions of the Constitutional Court of Ukraine in criminal proceedings' (2020) 4 *Ukrainian Journal of Constitutional Law* 109.
27. Terletsky D, Ezerov A, 'Exercise of the right to a constitutional complaint: analysis of the practice of the Constitutional Court of Ukraine' (2018) 5 *Bulletin of the Constitutional Court of Ukraine* 74.
28. Zalesny Y (ed), *Constitutional justice in the camps of Eastern Europe: problems of theory and practice* (Norm 2020).