

Note and Comment

THE CASE OF SKRYPKA AS THE EPITOME OF THE EFFECTIVENESS OF CONSTITUTIONAL COMPLAINTS IN UKRAINE

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ABSTRACT

Background: *The article thoroughly examines the efficacy of constitutional complaints within Ukraine, utilising the Skrypka case as a pivotal illustration. Through comprehensive scrutiny, the authors analysed factual circumstances, national legislative frameworks governing contentious legal issues, and judicial precedents pertinent to the Skrypka case. The authors' contention revolves around the primary role of a constitutional complaint in safeguarding an individual's violated constitutional rights, concurrently serving to fortify the constitutional order of the state.*

Methods: *To comprehensively understand the subject, the authors conducted an in-depth review of relevant court decisions, meticulously analysing the legal arguments presented by judges. Additionally, they examined the positions of knowledgeable scholars to identify and comprehend the current expert assessments and proposals.*

Results and Conclusions: *Through an in-depth review of judicial practices, the article delineates three predominant perspectives regarding the influence of decisions emanating from Ukraine's Constitutional Court subsequent to constitutional complaint reviews on the reevaluation of conclusive court decisions in specific cases: (1) The decisions of the Constitutional Court of Ukraine cannot impact contested legal relationships because these relationships existed prior to the adoption of these decisions by the Constitutional Court of Ukraine; (2) Review under exceptional circumstances is applicable only to decisions where the claims have been fully or partially satisfied (i.e., are subject to execution) but have not yet been enforced; (3) The decisions of the Constitutional Court of Ukraine are primarily significant as rulings of a general nature, establishing legal conclusions for resolving future cases.*

The article asserts that rectifying final court decisions owing to the use of unconstitutional statutes imposes stringent constraints, addressing only issues arising post the statutes' unconstitutional determination, excluding considerations predating such rulings, irrespective of the potential restoration of violated constitutional rights. Consequently, reestablishing a complainant's previous legal status via a constitutional complaint does not transpire. Therefore, a complainant, having exhausted alternative legal remedies and diligently formulated their case, cannot pursue substantive reconsideration of a final court decision, even if predicated on applying a law deemed unconstitutional per their complaint, contrary to explicit provisions within Ukrainian procedural legislation.

The article emphasises the imperative necessity for concerted revisions to Ukraine's Constitution and extant legal frameworks to attain a balanced, coherent, and unequivocal articulation of the legal ramifications ensuing from decisions rendered by Ukraine's Constitutional Court, encompassing those originating from constitutional complaints—an objective presently beyond reach.

1 INTRODUCTION

It has been over seven years since the amendments to Ukraine's Constitution regarding the judiciary came into effect.¹ These changes affirmed the evolution of the constitutional jurisdiction body's status, involving a substantial review and expansion of its powers. Notably, they introduced a new legal remedy, the constitutional complaint, to the national legal framework.

During this period, the bodies of the Constitutional Court of Ukraine, namely the Grand Chamber and the Senates, have considered and issued decisions in 45 cases initiated specifically through constitutional complaints.² While the importance and impact of these decisions on legislative, interpretative, and law application activities are unquestionable, they require systematic analysis.

These decisions unequivocally demonstrate the institutional capability of the Constitutional Court of Ukraine and underscore its fundamental role in upholding constitutional order within the state. Simultaneously, they emphasise the practical significance of constitutional complaints as vital legal instruments, safeguarding the constitutional rights of individuals. These complaints actualise the state's accountability for its actions, embodying the core functional purpose of constitutional complaints in legal regulation — serving as a means of legal protection for the violated constitutional rights of individuals.

1 Law of Ukraine no 1401-VIII of 02 June 2016 'On Amending the Constitution of Ukraine (as to justice)' [2016] Official Gazette of Ukraine 51/1799.

2 The statistical data are provided in accordance with the information available on the official website of the Constitutional Court of Ukraine as of 30 September 2023.

Constitutional Court of Ukraine <<https://ccu.gov.ua>> accessed 30 September 2023.

The seven-year timeframe provides a substantial period to draw thoughtful and well-founded conclusions regarding the state, trends, peculiarities, and issues associated with the practical use of constitutional complaints. It is reasonable and rational to do so, using the Skrypka case as an example, which, for various reasons, epitomises the effectiveness of a constitutional complaint in Ukraine.

2 FACTS OF THE CASE

In 1987, Anatolii Volodymyrovych Skrypka (hereinafter “the complainant”) was drafted as a conscript for training to eliminate the consequences of the Chernobyl Nuclear Power Plant disaster. The complainant was an individual who suffered due to the Chernobyl disaster and received a pension according to the Law of Ukraine ‘On the Status and Social Protection of Citizens Affected by the Chernobyl Disaster’ of February 1991, No. 796-XII (hereinafter ‘Law No 796-XII’)³ as a participant in the elimination of the consequences of the Chernobyl nuclear power plant disaster.

On 3 October 2017, the parliament of Ukraine passed the Law of Ukraine ‘On Amending Certain Legislative Acts of Ukraine Regarding Increasing Pensions’ No. 2148-VIII, which, among other things, revised the calculation of pensions for military personnel who participated in the elimination of the consequences of the Chernobyl disaster.⁴

In March 2018, the complainant applied to the territorial office of the Pension Fund of Ukraine (hereinafter ‘the Pension Fund Department’), requesting a recalculation of the pension in accordance with Law No. 796-XII, taking into account the relevant changes. The Pension Fund Department refused to recalculate the pension, stating that the complainant participated in eliminating the consequences of the Chernobyl disaster during military training, not during actual military service. Therefore, the applicant did not have the right to a pension recalculation under Law No. 796-XII with regard to the relevant amendments.

In May 2018, the complainant filed a lawsuit against the Pension Fund Department. The Circuit Administrative Court of Sumskyi Region, by its decision of 13 June 2018, partially satisfied the claim by recognising the actions of the Pension Fund Department, refusing the complainant’s request for a pension re-calculation as a participant in the liquidation of the consequences of the Chernobyl nuclear disaster in accordance with Law No. 796-XII, as unlawful. It ordered the Pension Fund Department to recalculate the disability pension in accordance with Law No. 796-XII, taking into account the respective changes, and to pay

3 Law of Ukraine no 796-XII of 28 February 1991 ‘On the Status and Social Protection of Citizens Affected by the Chernobyl Disaster’ <<https://zakon.rada.gov.ua/laws/show/796-12#Text>> accessed 18 January 2024.

4 Law of Ukraine no 2148-VIII of 03 October 2017 ‘On Amending Certain Legislative Acts of Ukraine Regarding Increasing Pensions’ <<https://zakon.rada.gov.ua/laws/show/2148-19#n24>> accessed 18 January 2024.

the difference between the amount due and the pension actually paid for the corresponding period. However, the demands regarding recognising actions in addressing the appeal as discriminatory were denied.⁵

The Kharkiv Administrative Court of Appeal, by its judgment of 17 October 2018, overturned the decision of the Circuit Administrative Court of Sumskyi Region and denied the plaintiff's claims. The appellate court stated that the plaintiff did not meet all the criteria that would entitle him to a pension recalculation under Law No. 796-XII with the relevant amendments taken into account. Specifically, because the plaintiff participated in the elimination of the consequences of the Chernobyl disaster during military training and not during actual military service, he did not acquire the right to have his pension recalculated in accordance with Law No. 796-XII with the relevant amendments taken into account.⁶

The Supreme Court (in the composition of the panel of judges of the Cassation Administrative Court) denied the opening of cassation proceedings on the appellant's cassation complaint by its order of 23 November 2018.⁷

The complainant filed a constitutional complaint with the Constitutional Court of Ukraine regarding the constitutionality of the relevant provisions of Law No. 796-XII, taking into account the corresponding amendments, namely the provisions of the third part of Article 59 of Law No. 796-XII.

The complainant argued that according to these provisions, the legal regulations regarding the calculation of disability pensions do not apply to servicemen among the conscripts called up for military training to eliminate the consequences of the Chernobyl disaster. As a result, they receive a pension “three times lower than conscript soldiers,” which violates their constitutional rights.⁸

On 25 April 2019, the Constitutional Court of Ukraine declared that the provision denying the complainant the pension recalculation was unconstitutional.⁹ Decision No. 1-p(II)/2019 was issued under constitutional complaints filed by the complainant and Oleksiy Yakovych Bobyr, consolidated into a single constitutional proceeding.¹⁰

5 Case no 818/1793/18 (Circuit Administrative Court of Sumskyi Region, 13 June 2018) <<https://reyestr.court.gov.ua/Review/74724489>> accessed 18 January 2024.

6 Case no 818/1793/18 (Kharkiv Administrative Court of Appeal, 17 October 2018) <<https://reyestr.court.gov.ua/Review/77159099>> accessed 18 January 2024.

7 Case no 818/1793/18 (Administrative Court of Cassation of the Supreme Court, 23 November 2018) <<https://reyestr.court.gov.ua/Review/78077171>> accessed 18 January 2024.

8 Legal Summary of the Secretariat of the Constitutional Court of Ukraine no 21/630 of 30 January 2019 on the Constitutional Complaint of AV Skrypka <https://ccu.gov.ua/sites/default/files/docs/m_s_1_p2_2019_0.rar> accessed 18 January 2024.

9 Case no 3-14/2019(402/19, 1737/19), Decision no 1-p(II)/2019 (Constitutional Court of Ukraine, 25 April 2019) [2019] Official Gazette of Ukraine 42/1468.

10 Order no 6-yn(II)/2019 (Second Senate of the Constitutional Court of Ukraine, 15 April 2019) <https://ccu.gov.ua/sites/default/files/docs/m_s_1_p2_2019_0.rar> accessed 18 January 2024.

On 6 May 2019, the complainant appealed to the appellate court with a motion to review the decision of the Kharkiv Administrative Court of Appeal of 17 October 2018 under exceptional circumstances. The basis for this motion was rooted in the Constitutional Court of Ukraine's decision on 25 April 2019, No. 1-p(II)/2019, rendered after the consideration of constitutional complaints filed by the applicant and Oleksiy Yakovych Bobyr.

The Second Administrative Court of Appeal, by its judgment of 27 August 2019, revoked the judgment of the Kharkiv Administrative Court of Appeal and partially granted the motion for review under exceptional circumstances. The court ordered the Pension Fund Department to recalculate the disability pension for the complainant under Law No. 796-XII, taking into account the decision of the Constitutional Court of Ukraine of 25 April 2019 No. 1-p(II)/2019. The Second Administrative Court of Appeal noted that the right to a pension recalculation according to Article 59, part 3 of Law No. 796-XII has been recognised for the complainant since the date of the Constitutional Court of Ukraine's decision of 25 April 2019 No. 1-p(II)/2019.¹¹

In September 2019, the complainant appealed to the Supreme Court with a cassation complaint against the judgment of the Second Administrative Court of Appeal. In the complaint, the complainant requested the annulment of this judgment and the issuance of a new judgment, fully satisfying the request for a review of the decision of the Kharkiv Administrative Court of Appeal under exceptional circumstances. The complainant argued that the judgment of the Second Administrative Court of Appeal contradicts the Decision of the Constitutional Court of Ukraine of 25 April 2019 No. 1-p(II)/2019 and renders the request for a review of the court decision under exceptional circumstances ineffective.

By its order of 7 October 2019, the Supreme Court initiated cassation proceedings based on the complainant's cassation appeal.¹² On 7 July 2023, the Supreme Court, sitting as the Joint Chamber of the Administrative Court of Cassation, annulled the judgment of the Second Administrative Court of Appeal of 27 August 2019 and rejected the request for a review of the decision of the Kharkiv Administrative Court of Appeal under exceptional circumstances. The judgment of the Kharkiv Administrative Court of Appeal of 17 October 2018 has been upheld.¹³

11 Case no B/851/5/19 (Second Administrative Court of Appeal, 27 August 2019) <<https://reyestr.court.gov.ua/Review/83942090>> accessed 18 January 2024.

12 Case no 818/1793/18 (Administrative Court of Cassation of the Supreme Court, 07 October 2019) <<https://reyestr.court.gov.ua/Review/84805145>> accessed 18 January 2024.

13 Case no 818/1793/18 (Joint Chamber of the Administrative Court of Cassation of the Supreme Court, 07 July 2023) <<https://reyestr.court.gov.ua/Review/112096007>> accessed 18 January 2024.

3 LEGAL FRAMEWORK AND THEORETICAL ANALYSIS

As mentioned, the introduction of the constitutional complaint in Ukraine was a consequence of the constitutional reform regarding justice in 2016.¹⁴ Prior to that, throughout the Constitutional Court of Ukraine's twenty-year activity, individuals and legal entities were not granted the right to address issues of conformity to the Constitution of Ukraine through any legal means. The only available avenue for them until 30 September 2016 – the effective date of the amendments to the Constitution of Ukraine¹⁵ – was the form of appeal (constitutional appeal), allowing them to petition only for the official interpretation of the Constitution and statutes. Although the exercise of the right to a constitutional appeal was affected by its ambiguous application, primarily by the courts, decisions of the Constitutional Court of Ukraine on these appeals did not influence final judicial decisions. This is because the official interpretation of the Constitution and statutes provided by the Constitutional Court of Ukraine has never been acknowledged as a basis for the review of final court decisions by procedural legislation.

The statements above do not diminish the Constitutional Court of Ukraine's significant role in confirming and safeguarding constitutional rights before the 2016 reform. However, they clarify why a constitutional appeal was not considered an effective remedy for constitutional rights in connection with a specific case.

The introduced form of constitutional complaint in Ukraine allows the resolution of issues solely concerning the constitutionality of a statute (a law of Ukraine). Therefore, it should be classified as a normative complaint. Moreover, it is justifiable to argue that this represents a unique constitutional complaint for which there are currently no equivalents. This is because the subject of constitutional adjudication initiated through a constitutional complaint excludes individual legal acts, including final court decisions, as well as sub-legislative normative legal acts. This rationale supports categorising the introduced constitutional complaint in Ukraine as specifically statutory rather than normative.¹⁶

14 Article 55 of the Constitution of Ukraine was amended with a new part, according to which everyone shall be guaranteed the right to lodge a constitutional complaint to the Constitutional Court of Ukraine on grounds defined in this Constitution and under the procedure prescribed by law. Furthermore, the Constitution of Ukraine has been enriched with a new article, Article 151-1, stipulating that the Constitutional Court of Ukraine decides on conformity to the Constitution of Ukraine (constitutionality) of a law of Ukraine upon constitutional complaint of a person alleging that the law of Ukraine applied in the final court decision in his or her case contradicts the Constitution of Ukraine. A constitutional complaint may be lodged after exhaustion of all other domestic legal remedies.

15 Constitution of Ukraine no 254 k/96-BP of 28 June 1996 <<https://zakon.rada.gov.ua/laws/show/254k/96-bp#Text>> accessed 18 January 2024.

16 SV Riznyk, *Constitutionality of Legal Acts: Essence, Evaluation Methodology and Providing System in Ukraine* (Ivan Franko National University of Lviv 2020) 416-7.

Another notable aspect introduced by the constitutional complaint is the acknowledgement, as outlined in the Law of Ukraine 'On the Constitutional Court of Ukraine',¹⁷ of the rights of individuals, regardless of their citizenship status, and private legal entities to lodge constitutional complaints. However, this right is not recognised for legal entities of public law, which includes those established by the executive decree of the President of Ukraine, a state authority, an authority of the Autonomous Republic of Crimea, or a local self-government body.

Simultaneously, a complaint submitted to the Constitutional Court of Ukraine is distinctly and unequivocally linked to a particular court case. This linkage arises from the fact that the assessment of the conformity of the law applied in a person's final court decision to the Constitution of Ukraine can only be determined through the complaint filed by that person.

Additionally, according to Article 55 of the Law of Ukraine 'On the Constitutional Court of Ukraine', a person must specify in their complaint which of their human rights safeguarded by the Constitution of Ukraine, in their opinion, have been violated due to the application of the law by the court. Therefore, a constitutional complaint may safeguard the complete spectrum of a person's constitutional rights, including social and economic rights. However, this evaluation must be conducted within Article 22 of the Constitution of Ukraine, which establishes the non-exhaustive nature of constitutionally recognised rights and freedoms.

Indeed, the functional purpose of a constitutional complaint transcends the singular protection of constitutional rights and should be construed in a broader context – as a mechanism essential for upholding the constitutional order within the state. This role includes the affirmation of fundamental values and principles, such as holding the state accountable for its actions, preventing the curtailment of existing rights and freedoms during the enactment or amendment of laws, and ensuring their alignment with the Constitution of Ukraine. The profound implications stemming from the Constitutional Court of Ukraine's rulings on constitutional complaints, including these significant aspects, are unequivocal. However, the dual functional role of a constitutional complaint in legal regulation, while crucial, should not diminish its primary purpose – namely, serving as a legal instrument to safeguard the specific constitutional rights of a person. As “the subject of any constitutional complaint involves both private and public interests...”,¹⁸ it pertains to both the public and private rights of a specific person.

Accordingly, a person's submission of a constitutional complaint is directly motivated by their aspiration to protect their constitutional rights, which are perceived to be violated due to the application of an unconstitutional law in a specific judicial case. Consequently, it is

17 Law of Ukraine no 2136-VIII of 13 July 2017 'On the Constitutional Court of Ukraine' <<https://zakon.rada.gov.ua/laws/show/en/2136-19#Text>> accessed 18 January 2024.

18 Mykhailo Savchyn, 'Doctrinal Issues of Introduction of the Constitutional Complaint in Ukraine' (2018) 12 Law of Ukraine 50, doi:10.33498/louu-2018-12-039.

indisputable that persons, having exhausted alternative legal remedies within the national framework, resort to the body of constitutional jurisdiction primarily to pursue the restoration of their infringed constitutional rights in the future. This process includes reviewing the final court decision in their case and seeking compensation from the state for the damages incurred due to the application of an unconstitutional law in Ukraine.

This conclusion is entirely consistent with (1) the conditions of admissibility of a constitutional complaint¹⁹ and (2) the legislatively recognised right to appeal to the court with a request for a review of a court decision due to the established unconstitutionality of the law of Ukraine applied by the court in the case's resolution.

The existing procedural legislation (Art. 361, pt. 5, s. 1 of the Code of Administrative Procedure of Ukraine;²⁰ Art. 320, pt. 3, s. 1 of the Commercial Procedure Code of Ukraine;²¹ Art. 423, pt. 3, s. 1 of the Civil Procedure Code of Ukraine;²² Art. 459, pt. 3, s. 1 of the Criminal Procedure Code of Ukraine²³) recognises the court's application of an unconstitutional law of Ukraine in a case as a valid basis for the review of final court decisions under exceptional circumstances. This review is admissible in all cases except those falling under criminal proceedings, contingent upon the condition that the final court decision remains unexecuted.²⁴

Implementing the exceptional circumstances mechanism for reviewing court decisions and establishing the determined unconstitutionality of a legal act or its specific provision following the 2017 procedural reform is entirely justified. “The purpose of the exceptional circumstances mechanism is to facilitate the reconsideration of court decisions rendered with significant violations that substantially impacted the case's outcome. ... Consequently,

19 According to Article 77 (1) of the Law of Ukraine ‘On the Constitutional Court of Ukraine’ a constitutional complaint shall be deemed as admissible subject to its compliance with Articles 55 and 56 of this Law and where: 1) all domestic legal remedies have been exhausted (subject to the availability of a legally valid judicial judgment delivered on appeal, or, where the law provides for cassation appeal, – of a judicial judgment delivered on cassation); 2) Not more than three months have passed from the effective date of a final judicial judgment that applies the law of Ukraine (specific provisions thereof).

20 Code of Administrative Procedure of Ukraine no 2747-IV of 06 July 2005 <<https://zakon.rada.gov.ua/laws/show/2747-15#Text>> accessed 18 January 2024.

21 Commercial Procedure Code of Ukraine no 1798-XII of 6 November 1991 (as amended by Law no 2147-VIII of 03 October 2017) <<https://zakon.rada.gov.ua/laws/show/1798-12#Text>> accessed 18 January 2024.

22 Civil Procedure Code of Ukraine no 1618-IV of 18 March 2004 (as amended by Law no 2147-VIII of 03 October 2017) <<https://zakon.rada.gov.ua/laws/show/1618-15#Text>> accessed 18 January 2024.

23 Criminal Procedure Code of Ukraine no 4651-VI of 13 April 2012 (as amended by Law no 2147-VIII of 03 October 2017) <<https://zakon.rada.gov.ua/laws/show/4651-17#Text>> accessed 18 January 2024.

24 The Criminal Procedure Code of Ukraine, which does not contain such a provision, constitutes the sole exception to this rule. In other words, the possibility of reviewing legally binding court decisions in criminal proceedings is not contingent upon their execution.

the mechanism for reviewing court decisions under exceptional circumstances is designed to rectify errors committed by the state, rather than by the judiciary.²⁵

Notwithstanding the potential imposition of considerably stricter constraints, it is unwarranted to assert that procedural legislation mandates an unconditional review of all final court decisions in which the court applied a legal act (or its provisions) subsequently deemed unconstitutional. Conversely, the conditions for initiating proceedings under exceptional circumstances are normatively circumscribed in terms of time, the scope of persons involved, and, as a general rule, reservations concerning the execution of final court decisions. In essence, reasonable safeguards are instituted to preserve a requisite balance between public and private interests.²⁶

When assessing the effectiveness of a constitutional complaint, considering its legitimate purpose and primary functional role, it is essential to note that the Constitutional Court of Ukraine does not have the authority to initiate a review of the final court decision in the complainant's case or determine the question of compensation for damages caused by the application of an unconstitutional law. In this context, it is important to note that the authority vested in the Grand Chamber of the Constitutional Court of Ukraine, aimed at securing constitutional complaints to prevent irreversible consequences that may arise from the execution of final court decisions, represents an exception (though, as of September 2023, the interim order has been issued only in one case upon the constitutional complaint of A.V. Dermendzhy).²⁷

The above statement does not imply that a constitutional complaint is inevitably ineffective in Ukraine as a means of legal protection for constitutional rights. Instead, the Constitutional Court of Ukraine is authorised solely to halt violations of constitutional rights by laws that, once declared unconstitutional, lose their validity and cannot be applied. It is necessary to agree with the opinion that “in essence, the Court, by its decision on the complaint, can only create conditions for the review of the court decision in the

25 A Yezerov, 'Unconstitutionality of the Law as a Basis for Review of Court Decisions in Exceptional Circumstances in Administrative Proceedings' (2020) 3 Bulletin of the Constitutional Court of Ukraine 118-9.

26 Dmytro Terletskiy, 'The Effect of Decisions Passed by the Constitutional Court of Ukraine over Time: Theoretical and Practical Aspects' in M Smokovych and other (eds), *Legal Consequences of Determining a Normative Act Unconstitutional for the Protection of Human Rights in Administrative Justice Process: Collection of the Workshop Materials*, Kyiv, 31 July 2020 (Pravo 2020) 82; Dmytro S Terletskiy, 'The Case of Skrypka as an Epitome of the Effectiveness of Constitutional Complaint in the National Legal Order' in SV Kivalov (ed), *European Benchmarks for Ukraine's Development in the Context of War and Global Challenges of the 21st Century: Synergy of Scientific, Educational, and Technological Solutions: Materials of the International scientific and practical conference*, Odesa, 19 May 2021 (Jurydyka 2021) vol 1, 272.

27 'The Constitutional Court of Ukraine has Issued an Enforcement Order' (*Constitutional Court of Ukraine*, 16 April 2019) <<https://ccu.gov.ua/novyna/konstytucynny-sud-ukrayiny-vydav-zabezpechualnyy-nakaz>> accessed 18 January 2024.

complainant's case, providing an opportunity to restore violated fundamental rights.²⁸ The restoration of the complainant's previous legal status, including reconsideration of their case by the court, as well as the reinstatement of proceedings and compensation for damages, are intricately linked within the systemic and functional context of other legal methods of protecting rights. Courts of general jurisdiction can implement these remedies.

It is important to emphasise that despite the consistently high academic interest in the phenomenon of a constitutional complaint in Ukraine and a series of notable studies by well-known legal scholars,²⁹ there is currently no consensus within the scientific and expert community regarding the ways to address the situation that has arisen.

4 COURTS' PRACTICE

The judicial practice of general jurisdiction courts, as outlined above, is a vital benchmark for evaluating the effectiveness of a constitutional complaint as a legal remedy to protect the constitutional rights of individuals that have been violated.

A thorough examination of judicial practice allows for a reasonable assertion of the widespread dominance of specific legal conclusions concerning the impact of decisions made by the Constitutional Court of Ukraine upon constitutional complaints on the review of final court judgments in specific cases. For a comprehensive understanding, it is important to note that administrative courts, including the Administrative Court of Cassation within the Supreme Court, currently play a leading role in shaping these legal conclusions. However, this should not be construed as evidence of restricting the applicability of such legal conclusions solely to the realm of administrative jurisdiction. Instead, it alludes to an alternative, more pragmatic explanation. This situation is primarily explained by the fact that Decision No. 1-p(II)/2019, the first decision of the Constitutional Court of Ukraine on constitutional complaints, is directly related to administrative jurisdiction. Accordingly, the administrative courts were the first to engage in the review of final court decisions under such exceptional circumstances.

28 Yuri Barabash, "Means for the Protection of Rights vs Legal Certainty" as a Dilemma of the Domestic Official Constitutional Doctrine in the Context of Functioning of the Institute of Individual Constitutional Complaint' (2020) 4 Ukrainian Journal of Constitutional Law 51, doi:10.30970/jcl.4.2020.2.

29 ibid 47; Yu Barabash and H Berchenko, 'The Effectiveness of Individual Constitutional Complaint as a Means of Protecting the Rights of Individual in Ukraine' (2021) 5 Bulletin of the Constitutional Court of Ukraine 9; Hryhorii Berchenko, Andriy Maryniv and Serhii Fedchyshyn, 'Some Issues of Constitutional Justice in Ukraine' (2021) 4(2) Access to Justice in Eastern Europe 128, doi:10.33327/AJEE-18-4.2-n000064; Viacheslav Pleskach, 'Effectiveness of the Constitutional Complaint as a Domestic Remedy in the Practice of the European Court of Human Rights' (2020) 1 Ukrainian Journal of Constitutional Law 38, doi.org/10.30970/jcl.1.2020.4; Riznyk (n 16); Savchyn (n 18) 39; Yezerov (n 25) 112.

(1) The decisions of the Constitutional Court of Ukraine cannot impact contested legal relationships because these relationships existed prior to the adoption of these decisions by the Constitutional Court of Ukraine.³⁰

Certainly, within this interpretation of the temporal impact of decisions by the Constitutional Court of Ukraine, utilising the established unconstitutionality of a legal act, whether in whole or in part, as grounds for a substantive review of a final court decision under exceptional circumstances is impossible. This is due to the fact that the pertinent legal relationships and the final court decision itself, even if not executed when applying for a review, will consistently predate any judgment made by the Constitutional Court of Ukraine.³¹

In 2020, the Grand Chamber of the Supreme Court, reviewing the verdict under exceptional circumstances, established a fundamentally different approach to determining the temporal effect of decisions by the Constitutional Court of Ukraine. The judgment of the Grand Chamber of the Supreme Court of 18 November 2020 (Case No 4819/49/19) states that the decision of the Constitutional Court of Ukraine has a direct

30 Case no 747/1151/16-a (Administrative Court of Cassation of the Supreme Court, 09 November 2018) <<https://reyestr.court.gov.ua/Review/77798946>> accessed 18 January 2024; Case no 755/4893/18 (755/18431/15-a) (Administrative Court of Cassation of the Supreme Court, 19 November 2018) <<https://reyestr.court.gov.ua/Review/77968276>> accessed 18 January 2024; Case no 537/2348/16-a (Administrative Court of Cassation of the Supreme Court, 27 November 2018) <<https://reyestr.court.gov.ua/Review/78159477>> accessed 18 January 2024; Case no 826/562/16 (Administrative Court of Cassation of the Supreme Court, 22 January 2019) <<https://reyestr.court.gov.ua/Review/79388058>> accessed 18 January 2024; Case no 820/2462/17 (Administrative Court of Cassation of the Supreme Court, 23 January 2019) <<https://reyestr.court.gov.ua/Review/79509410>> accessed 18 January 2024; Case no 804/3790/17 (Administrative Court of Cassation of the Supreme Court, 25 July 2019) <<https://reyestr.court.gov.ua/Review/83244148>> accessed 18 January 2024; Case no 2a-1131/11/1470 (Administrative Court of Cassation of the Supreme Court, 02 August 2019) <<https://reyestr.court.gov.ua/Review/83413323>> accessed 18 January 2024; Case no 808/2492/18 (Administrative Court of Cassation of the Supreme Court, 17 December 2019) <<https://reyestr.court.gov.ua/Review/86387767>> accessed 18 January 2024; Case no 814/1274/17 (Administrative Court of Cassation of the Supreme Court, 23 December 2019) <<https://reyestr.court.gov.ua/Review/86552326>> accessed 18 January 2024; Case no 620/614/20 (Administrative Court of Cassation of the Supreme Court, 30 March 2021) <<https://reyestr.court.gov.ua/Review/95904413>> accessed 18 January 2024; Case no 200/941/20-a (Administrative Court of Cassation of the Supreme Court, 25 November 2021) <<https://reyestr.court.gov.ua/Review/101370586>> accessed 18 January 2024; Case no 280/5907/19 (Administrative Court of Cassation of the Supreme Court, 04 August 2022) <<https://reyestr.court.gov.ua/Review/105577762>> accessed 18 January 2024; Case no 640/14168/20 (Administrative Court of Cassation of the Supreme Court, 13 September 2022) <<https://reyestr.court.gov.ua/Review/101370586>> accessed 18 January 2024.

31 Dmytro Terletskiy, 'Legally Significant Implications of the Decisions of the Constitutional Court of Ukraine in Criminal Proceeding' (2020) 4 Ukrainian Journal of Constitutional Law 109, doi:10.30970/jcl.4.2020.6.

(perspective) effect, meaning it applies to legal relationships that arose or continue after its adoption (except in cases where the Constitutional Court of Ukraine directly establishes otherwise in the text of the decision³²) (para. 34).³³

Despite its true novelty, this legal conclusion did not result in far-reaching consequences. In particular, the Court Chamber on cases related to the protection of social rights in the Administrative Court of Cassation in the judgment of 21 March 2023 (Case No 240/7411/21) referenced the legal conclusion of the Grand Chamber of the Supreme Court dated 18 November 2020. Nevertheless, it stated that considering the direct temporal effect of the Constitutional Court of Ukraine's decisions, the extension of the legal position expressed in such a decision to relations that arose before the date of its adoption contradicts part 2 of Article 152 of the Constitution of Ukraine (para. 35).³⁴ It should be noted that the judgment of the Court Chamber lacks any attempt to analyse whether the disputed relations in the case are still ongoing and, if they have ceased, when this occurred.

Similarly, the Administrative Court of Cassation, in its judgment of 27 September 2023 (Case No 260/1656/22), ruled that the decisions of the Constitutional Court of Ukraine possess solely direct (perspective) temporal effect, changing specific provisions of the law of Ukraine (legislative regulation) instead of the Verkhovna Rada of Ukraine. This guarantees the constitutional principle of the separation of powers, ensures the stability of social and administrative relations in Ukraine, and prevents unforeseen consequences (para. 61).³⁵ For this very reason, the legal positions of the Constitutional Court of Ukraine cannot be applied to legal relations that existed before the Constitutional Court issued the respective decision. As in the previous case, the Administrative Court of Cassation overlooked whether the disputed relations are still ongoing and, if they have ceased, when this occurred.

In other words, the courts seek to bypass the distinction between the direct and prospective effects of decisions of the Constitutional Court of Ukraine. Instead, they unjustifiably equate them, arguing against the retroactive effect of decisions of the Constitutional Court of Ukraine. An unexpected positive outcome of such an approach, however, is that the courts consistently emphasise that the legal regulation of legal relations arising after the adoption of the decision of the Constitutional Court of Ukraine must be carried out with mandatory

32 It is imperative to underscore that, in accordance with Article 152 (2) of the Constitution of Ukraine, laws, other acts, or their separate provisions declared unconstitutional lose legal force from the day the Constitutional Court of Ukraine adopts the decision on their unconstitutionality, unless otherwise stipulated by the decision itself, but not earlier than the day of its adoption. Due to the mentioned reason, the act cannot lose its legal force before the day on which the respective decision is adopted by the Constitutional Court of Ukraine.

33 Case no 4819/49/19 (Grand Chamber of the Supreme Court, 18 November 2020) <<https://reyestr.court.gov.ua/Review/93081749>> accessed 18 January 2024.

34 Case no 240/7411/21 (Administrative Court of Cassation of the Supreme Court, 21 March 2023) <<https://reyestr.court.gov.ua/Review/109856868>> accessed 18 January 2024.

35 Case no 260/1656/22 (Administrative Court of Cassation of the Supreme Court, 27 September 2023) <<https://reyestr.court.gov.ua/Review/113768001>> accessed 18 January 2024.

consideration of the respective decision of the Constitutional Court of Ukraine. A noteworthy legal conclusion is presented in the decision of the Administrative Court of Cassation of 18 May 2023, in case No. 420/24821/21, stating that "...damages cannot be inflicted after the Constitutional Court of Ukraine has declared an act unconstitutional... Harm arises before its [decision's] issuance when the act was still in force and had not yet been recognised as unconstitutional" (para. 60).³⁶

It is also important to note that despite having the relevant powers, the Constitutional Court of Ukraine usually avoids determining the execution procedure in its decisions, including decisions on constitutional complaints. In this context, an illustrative and exceptional case is the decision of 21 July 2021 No. 4-p(II)/2021.³⁷ In this decision, the Constitutional Court of Ukraine explicitly stated that it does not apply to legal relations that arose when the provision of the law of Ukraine became unconstitutional and continue to exist after the day of the Constitutional Court of Ukraine's adoption of this Decision.

(2) Review under exceptional circumstances is applicable only to decisions where the claims have been fully or partially satisfied (i.e., are subject to execution) but have not yet been enforced.³⁸ In turn, court decisions in which the plaintiff's claims have been denied cannot be deemed unenforced, as such decisions do not require compulsory execution. Consequently, they are not eligible for review under exceptional circumstances. Guided by this reasoning, the Supreme Court rejected the application for reconsideration under exceptional circumstances of the final court decision in the Skrypka case.³⁹

The legal conclusion consistently adhered to by the courts holds particular practical significance. Indeed, in the vast majority of cases, the review of final court decisions is motivated by the desire to reconsider cases where the court, applying the subsequently recognised unconstitutional law of Ukraine, has denied the plaintiff's claims. Accordingly, in public law disputes, such a legal conclusion precludes the exceptional review of court decisions regarding appeals by individuals and legal entities against rulings, actions, or inaction of authorities. It should be noted that the Administrative Cassation Court

36 Case no 420/24821/21 (Administrative Court of Cassation of the Supreme Court, 18 May 2023) <<https://reyestr.court.gov.ua/Review/110951140>> accessed 18 January 2024.

37 Case no 3-107/2020(221/20), Decision no 4-p(II)/2021 (Constitutional Court of Ukraine, 21 July 2021) [2021] Official Gazette of Ukraine 65/4138.

38 Case no 808/1628/18 (Joint Chamber of the Administrative Court of Cassation of the Supreme Court, 19 February 2021) <<https://reyestr.court.gov.ua/Review/95010526>> accessed 18 January 2024; Case no 140/2217/19 (Joint Chamber of the Administrative Court of Cassation of the Supreme Court, 21 December 2022) <<https://reyestr.court.gov.ua/Review/107984435>> accessed 18 January 2024; Case no 420/4196/20 (Administrative Court of Cassation of the Supreme Court, 30 May 2023) <<https://reyestr.court.gov.ua/Review/111267362>> accessed 18 January 2024.

39 Case no 818/1793/18 (Joint Chamber of the Administrative Court of Cassation of the Supreme Court, 07 July 2023) (n 13) para 10.

attempted several times to deviate from such a legal conclusion.⁴⁰ However, despite the sound reasoning, these attempts were not supported and did not succeed.⁴¹

However, the final word on this matter may rest with the Constitutional Court of Ukraine. As of January 2024, there are currently several cases involving constitutional complaints in the proceedings of the First and Second Senates of the Constitutional Court of Ukraine. These cases challenge provisions of the Code of Administrative Procedure of Ukraine, which allow for the review of final court decisions under exceptional circumstances, contingent upon the condition that the final court decision remains unexecuted.⁴²

In this context, we support the opinion, argued in relation to a similar provision in the Commercial Procedure Code of Ukraine, that "... it is more appropriate to assert not unconstitutionality but the incorrect interpretation of procedural legislation by the courts. The Constitutional Court of Ukraine has ample leeway to provide a conformed interpretation in line with the Constitution of Ukraine for the relevant provisions (directly permitted by Article 89(3) of the Law) and refrain from declaring the provisions themselves as unconstitutional."⁴³ The interpretive criterion, through which achieving a conformed interpretation with the provisions of the Constitution of Ukraine seems possible, is the characterisation of the disputed legal relations in the respective case as ongoing.

(3) The decisions of the Constitutional Court of Ukraine are primarily significant as rulings of a general nature, establishing legal conclusions for resolving future cases, rather than as grounds for reviewing a case with a retrospective application of a new legal position that alters the legal certainty already established by the final court judgment in the case.⁴⁴

In other words, the substantive review of final court decisions due to the established unconstitutionality of the law applied by the court is perceived by the judiciary as a clear threat to legal certainty. It is crucial to note that this conclusion is applied by courts in all

40 Case no 808/1628/18 (Administrative Court of Cassation of the Supreme Court, 20 February 2020) <<https://reyestr.court.gov.ua/Review/87758201>> accessed 18 January 2024.

41 Case no 808/1628/18 (Joint Chamber of the Administrative Court of Cassation of the Supreme Court, 19 February 2021) (n 38).

42 'The Court will examine for constitutionality a specific provision of the Code of Administrative Procedure of Ukraine regarding the review of court decisions under exceptional circumstances, provided that the court decision remains unexecuted' (*Constitutional Court of Ukraine*, 6 December 2023) <<https://ccu.gov.ua/novyna/sud-pereviryt-na-konstytucijnist-okreme-polozhennya-kodeksu-administratyvnoho-sudochynstva>> accessed 18 January 2024.

43 Barabash and Berchenko (n 29) 15.

44 Case no 922/1391/18 (Commercial Court of Cassation of the Supreme Court, 29 October 2019) <<https://reyestr.court.gov.ua/Review/85327051>> accessed 18 January 2024; Case no 4819/49/19 (Grand Chamber of the Supreme Court, 18 November 2020) (n 33); Case no 320/4700/20 (Administrative Court of Cassation of the Supreme Court, 31 January 2023) <<https://reyestr.court.gov.ua/Review/108696095>> accessed 18 January 2024; Case no 466/6062/21 (Second Chamber of the Civil Court of Cassation of the Supreme Court, 16 June 2023) <<https://reyestr.court.gov.ua/Review/111742179>> accessed 18 January 2024.

cases, irrespective of any connection with a constitutional complaint, including whether the complainant is the subject of the right to file a constitutional complaint. This legal conclusion was precisely applied by the Supreme Court in the composition of the Joint Chamber of the Cassation Administrative Court in the Skrypka case.⁴⁵

5 CONCLUDING REMARKS

The analysis of judicial practice indicates that the review of final court decisions due to the unconstitutionality of the law applied by the court is unequivocally and strictly limited to resolving issues that arose after the establishment of the law's unconstitutionality. Importantly, this review does not extend to the period before the law of Ukraine was deemed unconstitutional and does not guarantee the restoration of violated constitutional rights. This provides reasonable grounds to assert that restoring the complainant's previous legal status through a constitutional complaint does not occur. Therefore, a subject exercising the right to a constitutional complaint, having exhausted other legal remedies, diligently complied with the requirements in filing and substantiating the constitutional complaint, cannot achieve a substantive review of the final court decision in their own case, wherein a Ukrainian law or its provision, recognised as unconstitutional following their complaint, was applied by the court, despite the explicit provision for such a possibility in Ukraine's procedural legislation.

This conclusion is supported by numerous court decisions made as a result of proceedings under exceptional circumstances. It is very indicative that courts have recently identified a number of compelling reasons explaining why the unconstitutionality of the law of Ukraine or other legal acts applied by the court in final court decisions does not, cannot, and must not necessitate a substantive review of such decisions. However, to this day, the courts have not identified any reasons explaining when the unconstitutionality of the law of Ukraine or other legal acts applied by the court in final court decisions can and must necessitate a substantive review of such decisions. A notable example of this practice is the Skrypka case, in which the Constitutional Court of Ukraine issued its first historic decision under his constitutional complaint (together with the complaint of Bobyr).

After systemically and rationally assessing all the factors that have led to such a judicial practice, it is our conviction that without coordinated changes to the Constitution of Ukraine and the existing legislation, achieving a balanced, clear, and unambiguous determination of the legal consequences of decisions of the Constitutional Court of Ukraine, including decisions under constitutional complaints, is unattainable.

45 Case no 818/1793/18 (Joint Chamber of the Administrative Court of Cassation of the Supreme Court, 07 July 2023) (n 13) para 10.

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