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Research Article

THE DOCTRINE OF LIMITED GOVERNMENT IN THE LEGAL POSITIONS OF THE CONSTITUTIONAL COURT OF UKRAINE

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ABSTRACT

Background: *The essence of a constitutional system lies in two key aspects: limiting state power and ensuring the supremacy of rights, particularly the protection of human rights and freedoms. Without mechanisms to limit state power, the state inevitably encroaches on society and the private lives of individuals, threatening their rights and freedoms. The evolution of constitutional systems in liberal-democratic countries has been closely tied to strengthening civil society and developing tools for controlling state power. Historically, this evolution has moved from an absolute state, where the state was the sole owner and source of power, to a liberal-democratic state, where the state serves the people and civil society.*

Alongside this historical shift, there has been a transformation of individuals from being mere cogs in the machinery of state power to becoming citizens of a constitutional state, demanding that the state exercise restraint to safeguard individual freedom. One of the central ideas of constitutionalism is the principle of limited government. This article aims to analyse the legal positions of the Constitutional Court of Ukraine concerning the doctrine of limited government. In particular, it explores how the Court interprets key elements of this doctrine, such as the rule of law, the separation of powers, the rights of individuals and citizens, and the doctrine of constituent power. These and other related issues form the core of the research presented in this article.

Methods: *The study employed several methods to examine the doctrine of limited government, its elements, and the legal positions related to this issue. The system-structural method was used to characterise the concept and content of the doctrine of limited government and its key elements, including the principle of the rule of law, the principle of separation of powers, the rights of individuals and citizens, and the doctrine of constituent power. The logical-legal method facilitated an understanding of the perspectives of scholars on the formation and development of the doctrine of limited government, as well as their*

views on the content of its elements. Additionally, legal methods such as examining constitutional texts, primary legislation, and case law were employed to analyse the legal positions of the Constitutional Court of Ukraine.

Results and Conclusions: *The study examines the historical development and current state of the concept of limited government, exploring its connections with the doctrine of constituent power, the principle of the rule of law, the concept of human rights and freedoms, and the principle of the separation of powers. The primary conclusion is that the legal positions of the Constitutional Court of Ukraine regarding the doctrine of limited government, a key pillar of modern Ukrainian constitutionalism, have been systematically reviewed. It has been established that the Constitutional Court of Ukraine has consistently affirmed the essential elements of the doctrine of limited government from its inception. These elements form the doctrine of constituent power and the fundamental principle of constitutionalism, emphasising the necessity of limiting state power to safeguard human rights and freedoms. Furthermore, the Court upholds the view that the organisation and exercise of state power based on the division into legislative, executive, and judicial branches is not an end in itself but is intended to ensure the protection of individual rights and freedoms.*

1 INTRODUCTION

In the context of creating the foundation of a legal state in Ukraine, it is very important to draw constitutional scholars' attention to a multifaceted analysis of the limits of state intervention in the affairs of society and a specific individual. After all, one of the main ideas of constitutionalism is the idea that state power should act only within the limits defined and allowed to it by free citizens. As V. Rechytsky rightly observes, in the conditions of constitutionalism, it is not the state that should teach citizens proper behaviour, but citizens should indicate to the state the direction of its activity that is useful for them. Otherwise, under the guise of a constitution, citizens would risk receiving only a means of lowering the standards of their civil, political and personal freedom.[1]

The key principle of a liberal-democratic government is the idea of limiting power, as this is the most important principle for the functioning of a democratic legal state. It involves the exercise of the constituent power of the Ukrainian people, separating powers into legislative, executive, and judicial branches, and the principle of the rule of law. Additionally, it establishes the limits of state activity to protect the rights and freedoms of individuals and citizens. The practical implementation of this principle is essential for preventing the

1 Vsevolod Rechytskyi, 'Political and Legal Commentary on the Decision of the Constitutional Court of Ukraine in the Case of the Constitutional Submission of the Zhashkiv District Council of the Cherkasy Region Regarding the Official Interpretation of the Provisions of the First and Second Parts of Article 32, the Second and Third Parts of Article 34 of the Constitution of Ukraine' (*Human Rights in Ukraine: Information Portal of the Kharkiv Human Rights Protection Group*, 3 February 2012) <http://khpg.org/index.php?id=1328294578> accessed 25 June 2024.

concentration of power and its abuse, ultimately guaranteeing the recognition, observance, and protection of human rights and freedoms.

The principle of limiting state power is applicable where the rule of law prevails; the constitution is recognised as the supreme law of the state and society and holds the highest legal authority. The law is enacted by the legislative (representative) body, while the executive branch primarily implements it within the boundaries set by the Constitution and the law. Judicial bodies operate independently and autonomously within their competence, and a system of checks and balances exists among the branches of government. Human rights are upheld and protected.

The Constitutional Court of Ukraine plays a crucial role in defining the content of the doctrine of limited government and ensuring its implementation in state practice as the body responsible for constitutional oversight and the official interpretation of the Basic Law of Ukraine.

2 THEORETICAL FOUNDATIONS OF THE DOCTRINE OF LIMITED GOVERNMENT

The idea of limited government, or very close to it, the idea of the rule of law,[2] from which modern constitutionalism grew, arose in the Middle Ages under the influence of several factors. By the twelfth century, the law of the Catholic Church significantly influenced the principle of the rule of law and limited government since it was the autonomy of the church from the state that helped to establish a legal system based on the principles of reason. Initially, the law had to be embodied in real institutions, which were "by the nature of things" endowed with autonomy from the state and, therefore, capable of limiting its arbitrariness. In 12th-century Europe, the Catholic Church was just such an institution.[3]

Later, the English philosopher J. Locke, in his fundamental work "Two Treatises on Government," specifically points out the limits of the state, in particular, the legislative power of any state in any form of government.[4] First, these are published established laws that should not be changed on a case-by-case basis. The law must exist for everyone: the rich and the poor, the favourite at court and the peasant at the plough. Second, the goal of laws should be to achieve the common good. Power is limited by the public good. Third, property taxes cannot be raised without the consent of the people themselves or through

2 Tetiana Slinko and others, 'The Rule of Law in the Legal Positions of the Constitutional Court of Ukraine' (2022) 5(1) Access to Justice in Eastern Europe 165, doi:10.33327/AJEE-18-5.1-n000099.

3 Vsevolod Rechytskyi, 'The idea of limited government as a political and legal doctrine' (*Human Rights in Ukraine: Information Portal of the Kharkiv Human Rights Protection Group*, 25 January 2013) <https://khpg.org/1359118799> accessed 25 June 2024.

4 John Locke, *Two Treatises on Government* (Socium 2014).

their representatives. Fourth, the legislative body must not and cannot transfer legislative power to anyone else or delegate it to anyone other than those to whom it has been entrusted by the people.

Permanent laws, which must be known to all and be the same for all, act as a tool for limiting the supreme power and the implementation of justice. According to J. Locke, the material limit of the activity of the supreme power is property for the sake of preserving and protecting people united in the state.[5]

The work of W. Humbolt, a representative of German classical humanism, "The Limits of State Action,"[6] is specially devoted to the problem of the limits of the spread of state power. It contains opinions about "the most favourable position for a person in the state" and the scope of state activity, which means "everything that it (the state) is able to do for the good of society." Notably, the ideas of von Humboldt became the basis for the emergence of the theories of the minimal state and negative freedom. He distinguishes between the public and private spheres (civil society activity), focusing on the system of national public institutions (created "from below" by individuals themselves) and state bodies, as well as the concepts of natural and positive law and the legal status of a person and a citizen.

According to Humboldt, the rule of limiting state activity is "...any desire of the state to interfere in the private affairs of citizens, if these affairs do not directly violate the rights of others, is unacceptable."[7] This conclusion follows from the goals of the state, which can be twofold: the state "may seek to promote the happiness of citizens or only to prevent evil that can be inflicted on citizens by nature or people."[8] The means that are allowed or not allowed to be used by the state are determined by its goals.

Humboldt is a firm supporter of the "minimum state" concept. He is utterly irreconcilable to the idea and fact of state care for the positive welfare of citizens. Such intervention in "private life," according to Humboldt, distorts the natural foundations of man. State-imposed uniformity turns people into machines, "weakens the strength of the nation," deprives a person of the opportunity to feel a surge of feelings and energy from his/her own actions. What is imposed from outside by the state is perceived by a person as something mechanical and foreign, fostering the growth of arbitrary among civil servants and the emergence of bureaucracy. For Humboldt, the state serves merely as a means of achieving the goal for which a person enters society. Since the state system is "always connected with the limitation of freedom, it cannot be looked upon otherwise than as an

5 Jean-Fabien Spitz, 'Locke's Contribution to the Intellectual Foundations of Modern Constitutionalism' in Denis Galligan (ed), *Constitutions and the Classics: Patterns of Constitutional Thought from Fortescue to Bentham* (OUP 2014) 163, doi:10.1093/acprof:oso/9780198714989.003.0006.

6 Wilhelm von Humboldt, *The Limits of State Activity* (Socium 2009).

7 ibid 138.

8 ibid 152.

'evil', even if it is a necessary one."[9] Civil society, in contrast, is an alternative to the state. Therefore, the latter should in every way contribute to the formation of communities that could somehow replace state activity.

The well-known English sociologist and philosopher of the 19th century, H. Spencer, was also a supporter of the minimal state. In his opinion, the state cannot have other duties except to maintain justice. Any other activity of the state will inevitably lead to a direct or indirect restriction of the freedom of the individual greater than it is required by justice. The sociologist stressed that state paternalism has a negative effect on the development of the character of citizens, educating everyone according to the same model, whereas the diversity of characters is one of the main conditions for progress and development of passive behaviour in citizens. Furthermore, he argued that an individual's adaptation to life's demands is an important condition for the development and improvement of both an individual and society as a whole.[10]

Spencer believed that all achievements of material and spiritual culture stem from private activity and that government intervention not only fails to bring any benefit but is often harmful. For him, civil society represents both the goal and means of limiting power.

A similar perspective was held by the renowned French researcher of democracy, A. Tocqueville, who, in his work "Democracy in America", drew attention to the danger of monopolisation of power – whether by the state and civil society. In his opinion, the state almost always shows a tendency to self-growth and expansion of its sphere of influence by the very fact of a long stay in power. Such a state absorbs civil society, treating it not as an end in itself but as a means to its own goals.

In the interests of the development of civil society, the state should impose limits on itself, not allowing arbitrariness and excessive interference in the private sphere. A. Tocqueville noted two mechanisms of restraining state despotism: the implementation of the principle of separation of powers in the political sphere and the development of public associations – scientific, literary, educational, religious, and others – which should not be controlled by state power. These associations, he argued, act as insurmountable barriers to despotism, representing an "independent public eye" that exercises control over the state.[11]

That is, the concept of limited government stems from the fact that individuals living in a freedom-loving and democratic society do not recognise that the state alone has the right to define and formulate their subjective rights.

In the 20th century, most constitutionalist scholars (supporters of liberalism) pointed out that under the conditions of a constitutional state, power (state) should perform only three functions: as an arbitrator, i.e. resolve conflicts between citizens in accordance with

9 ibid 185.

10 Herbert Spencer, *Synthetic Philosophy* (Nika-Center 1997) 278.

11 Alexis de Tocqueville, *On Democracy in America* (Vsesvit 1999) 356.

objective laws; as police, i.e. protect citizens from criminals; and as the army, i.e. protect citizens from external enemies.[12] R. Nozick calls such a state a "night watchman,"[13] while A. Rand defines the state as a mechanism to place the repressive use of physical force under objective control – namely, the control of objectively defined laws.[14]

K. Popper also expresses an interesting opinion on the constitutional functions of the state: "I demand that the state protect not only me, but also others. I demand that it protects my freedom and that of all the people around me. I do not want to live at the mercy of those who have heavier fists and who are better armed. I want to distinguish between aggression and defence, and I want defence to be supported by the organised power of the state. I am quite ready for the state to limit my freedom of action to some extent, provided that I am guaranteed some of the remaining freedom, because I know that some limitation of freedom is necessary for me. However, I demand that they do not forget about the main goal of the state - the freedom of only those citizens who do not harm others should be protected."[15]

L. Mises similarly warns of the inadmissibility of broad authorities: "If we abandon the principle according to which the state should not interfere in matters concerning the lifestyle of an individual, we ultimately come to the point that we begin to regulate his/her life in detail. The personal freedom of the individual is abolished."[16]

An important condition for implementing the constitutional idea of limited government and preventing the abuse of power is the integration of the principle of separation of powers (system of checks and balances) within the state mechanism. Effective control over power is equally important for safeguarding individual freedom. The broader the sphere of influence of state power, the narrower the sphere of individual freedoms, and vice versa. Under the conditions of constitutionalism, each member of civil society must be free in his/her own political choice, which implies respecting the freedom of others and ensuring everyone has the right to control the policy of the state, the president, the government, all other authorities and officials, both at the centre and at the places.[17]

It is important to highlight that scholars generally regard limited government as a core aspect of constitutionalism. In the context of continental European countries, the notion of limiting state power consists of two key components. The first is the requirement for public authorities to act within the bounds of the law, though they may also have the capacity to amend these laws. The second involves imposing constraints on legislative power, which throughout history has been influenced by natural law, customary law, and human rights,

12 Milton Friedman, *Capitalism and Freedom* (Dukh i Litera 2010) 153.
13 Robert Nozick, *Anarchy, State and Utopia* (Wiley-Blackwell 2013) 49.
14 Ayn Rand, Nathaniel Branden and Alan Greenspan, *Capitalism: The Unknown Ideal* (Al'pina 2011).
15 Karl R Popper, *The Open Society and its Enemies,* vol 1: The spell of Plato (Osnovy 1994) 148.
16 Ludwig von Mises, *Liberalism: The Classical Tradition* (Bibliotech Press 2005) 56.
17 Vsevolod Rechytskyi, *Freedom and state* (Folio 1998) 106.

among other factors.[18] In democratic societies, the concept of the rule of law is closely tied to the idea of a lawful state, aiming to ensure that the supremacy of law and the constitution is both realised and applied. The organisation of state power shifts from centralisation and concentration towards a model based on the separation and balance of powers. Furthermore, pluralism in its various forms is institutionalised and protected.[19]

3 KEY ELEMENTS OF THE DOCTRINE OF LIMITED GOVERNMENT

The modern understanding of the doctrine of limiting power in European constitutional law suggests that constraints can, in fact, enable more effective governance. This perspective, central to liberal constitutionalism, argues that by limiting the arbitrary authority of government officials, a constitution can increase the state's capacity to address specific issues and mobilise resources for the common good. Rather than merely preventing tyranny, constitutions play a constructive role by directing state power toward socially beneficial goals, preventing issues such as social disorder, unaccountability, political instability, and the misuse of power. Constitutions are multifunctional instruments, and it would be an oversimplification to reduce their role solely to prevent tyranny. Like an athlete who hones techniques to harness raw energy, a state's ability to concentrate its efforts where necessary is enhanced by constitutional constraints, which also prevent the dispersion of power where it is not needed.[20]

The main substantive principles of the modern doctrine of limitation of power are:

First, one of the key elements of the doctrine is the constitutional consolidation and practical implementation of the principle of people's rule. After all, we cannot talk about a constitutional system and a democratic regime in a country in which the country's population has not turned into a nation and cannot exercise control over state power. Indeed, if we turn to the history of the origin of the idea of limiting power, it arose as the most effective means of protecting human rights from state power. This idea manifested itself precisely through the constitutional recognition of the people's sovereignty.[21]

18 O Boryslavska, 'The Essence of Constitutionalism: Constitutionalism as an Ideology, Doctrine and Practice of Limited Government' (2015) 61 Bulletin of Lviv University. Legal series 247.

19 Marius Andreescu, 'The Limits of State Power in a Democratic Society' (2016) 5(6) Journal of Civil and Legal Sciences 213, doi:10.4172/2169-0170.1000213.

20 Jon Elster, *Ulysses Unbound* (CUP 2000) doi:10.1017/CBO9780511625008; Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (The University of Chicago Press 1997); Martin Krygier, 'Rule of Law' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) ch 9; Martin Loughlin, *The Idea of Public Law* (OUP 2003) doi:10.1093/acprof:oso/9780199274727.001.0001; David Stark, Laszlo Bruszt and Peter Lange, *Postsocialist Pathways:Transforming Politics and Property in East Central Europe* (CUP 1998).

21 Dmytro Filipskyi, 'The Forms of Restriction of State Power' (2022) 1 Visegrad Journal on Human Rights 24.

Constituent power first finds its manifestation through the decision of a community of people to create a new state. Later, the adoption of the constitution and the introduction of amendments – either through meetings or direct voting – became the forms of its implementation. It should be emphasised that the concept of constituent power has a long history and was built on relevant concepts that owe their appearance to the emergence of constitutionalism in the world, such as the U.S. Declaration of Independence in 1776 and the revolutionary events, primarily in France in the 18th century. These events were connected primarily with the process of adopting the constitution and making amendments to it. Today, the concept of constituent power is defined as the organisational and procedural process by which a constitution is adopted or revised through democratic and open procedures.[22]

Second, an important element of the doctrine of limitation of power is the principle of the rule of law, that is, the limitation of state power by law. If we start with Albert Dicey's classic work "Introduction to the Study of Constitutional Law" and turn to the modern understanding of the principle of the rule of law, its key element is the prohibition of state arbitrariness.[23] It found its embodiment through the constitutional rules of legality, according to which the authority of public authorities must be determined by the prescriptions of the law. In the constitutional system of Ukraine, this rule was implemented through the provision of Art. 6 of the Constitution, in which it is established that the bodies of legislative, executive and judicial power exercise their powers within the limits established by the Basic Law and in accordance with the laws of Ukraine. Additionally, Art. 19 extends this provision to include local self-government bodies.

Third, the principle of separation of powers is an important constitutional tool for limiting state power. After all, the concentration of power creates a lack of control in the activities of state authorities and their irresponsibility to society. In the Basic Law of Ukraine, this principle is enshrined in Art. 6. The essence of the principle of separation of powers presupposes the existence of relatively independent and independent branches (directions)

22 HV Berchenko, 'Constituent Power and Entry into Force of the Constitution of Ukraine' (2020) 4 Bulletin of Zaporizhzhya National University, Legal Sciences 20; HV Berchenko, 'Constituent Power: Evolution and Modern Interpretations' (2020) 45 Scientific Bulletin of the International Humanitarian University 26; Hryhorii Berchenko, 'Judicial Interpretation as Informal Constitutional Changes: Questions of Legitimacy in the Aspect of the Doctrine of Constituent Power' (2024) 7(2) Access to Justice in Eastern Europe 39, doi:10.33327/AJEE-18-7.2-a000203; HV Berchenko, 'The Concept of "Institutional Power" in Modern Ukrainian Scientific Discourse' (2020) 31(6) Academic notes of VI Vernadsky Taurida National University, Series: Legal Sciences 13, doi:10.32838/TNU-2707-0581/2020.6/03; Hryhorii Berchenko and others, 'Preliminary Judicial Control of Amendments to the Constitution: Comparative Study' (2022) 5(4) Access to Justice in Eastern Europe 159, doi:10.33327/AJEE-18-5.4-n000435.

23 Iurii Barabash and Bohdan Mokhonchuk, 'The Principle of The Law-Governed State in the Constitutional Doctrine of Ukraine' in AO Selivanov (ed), *A New Way to Law* (Logos 2021) 49; Slinko and others (n 2).

of power – legislative, executive and judicial – and the establishment of such relationships between them that would make it impossible to usurp all or most of the state power in the hands of one state body, and even more so, in the hands of one person.

The first official recognition of this principle is associated with the French Declaration of the Rights of Man and Citizen of 1789, Art. 16 of which proclaimed: "Any society in which the guarantee of rights and the separation of powers is not ensured has no constitution."

Proponents of the separation of powers theory, the founding fathers of the United States – O. Hamilton, D. Madison, and J. Jay – in "The Federalist," confidently proved that "the powers possessed by one department should not be directly or indirectly exercised by one of the other two" and that "it is inordinate the all-encompassing prerogative of the hereditary executive power, and also supported by the hereditary legislative power, represents a huge danger to the freedom and independence of the people".[24] The usurpation of all power by the legislature leads to the same tyranny as the usurpation of rule by the executive. As such, it is not surprising that, for the first time at the constitutional level, these ideas were embodied in the first three articles of the U.S. Constitution of 1787.[25]

As M.Tsvyk rightly observes, the main requirements of the separation of powers are the separation and independence of separate types of state bodies, each with its own functional characteristics, a clear definition of its special powers and legal forms of activity, and mutual influence, mutual balancing, mutual deterrence and mutual control.[26] But the personification of the branches of power does not mean their complete isolation. To ensure their balance, each branch of government is given special powers to influence the activities of other branches. The existence of a system of so-called checks and balances is connected with the implementation of these powers. With its help, the mutual influence of all branches of government is carried out, and the balance between them is maintained.

Fourth, an important means of limiting state power is its limitation by human rights. A human right is the demand of a subject (its bearer) directed at public authorities or other institutions endowed with similar functions and powers to ensure the protection of their free choice in matters related to access to material and spiritual benefits in order to satisfy certain needs and interests.[27] The idea that human rights as a universal and liberal idea essentially determines the content of the entire system of state authorities has become particularly important and is enshrined in Art. 3 of the Constitution of Ukraine. The axiom here is that state power comes from human rights and freedoms, and their main purpose is to limit the state. As A. Chaillot and R. Uitz rightly note in this regard, "the original purpose of fundamental rights is to limit the actions of the authorities. Rights are constitutionally

24 Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (Penguin Books 1987) 349.
25 Filipskyi (n 21) 26; András Sajó, *Self-Limitation of Power: (Short Course of Constitutionalism)* (Jurist 2001).
26 MV Tsvyk, 'Actual Problems of the Organization of Power in Ukraine' (1995) 30 Problems of Legality 23.
27 Mykhaylo Savchyn, *Constitution: People and Institutions: (SWOT-Comment)* (Yurinkom Inter 2024) 445.

enshrined inalienable freedoms backed by a negative guarantee in the form of a ban on state intervention... Fundamental rights protect society from the whims of the dominant majority, that is, from its prejudices and authoritarianism."[28]

That is, from the point of view of the Western concept of liberalism, human rights are a kind of requirement for the state to take or refrain from certain actions. Human rights are a means of combating the abuse of state power. If the institution of self-limitation of state power through the application of the principle of separation of powers works "from the inside," then human rights are a necessary external factor that ensures control over the activities of state power "from the outside". Human rights are fundamental to the effectiveness of public administration. As S. Maksymov rightly points out, human rights, though not absolute or unlimited, arise independently of legal institutions and are only recognised in legislation (in a broad sense) as an expression of a person's moral dignity. They are aimed at maintaining the most important values of human life and establishing a person as the most important social value.[29]

The notion that human rights are a means of limiting state power was embodied in Art. 22 of the Constitution of Ukraine, which states that constitutional rights and freedoms are guaranteed and cannot be revoked. This provision, on the one hand, establishes the state's obligation to guarantee constitutional rights and freedoms, primarily the right to life, and on the other hand, to refrain from adopting any acts that would lead to the cancellation of constitutional rights and freedoms, and therefore human right to life.[30]

4 THE DOCTRINE OF LIMITED GOVERNMENT IN THE LEGAL POSITIONS OF THE CONSTITUTIONAL COURT OF UKRAINE

The Constitutional Court of Ukraine has consistently referred to the principle of limiting state power. In its Decision No. 5-r/2019 dated 13 June 2019, the Court emphasised that the Constitution of Ukraine contains several key provisions regarding the exercise of state power. These provisions establish that human rights and freedoms, along with their guarantees, shape the content and direction of state activity. The state is accountable to individuals for its actions, and its primary duty is to affirm and protect human rights (Art. 3). Additionally, state power cannot be usurped (Art. 5), and it is exercised through the division of legislative, executive, and judicial powers, with each branch functioning within the limits prescribed by the Constitution and laws of Ukraine (Art. 6). The Constitution, as the supreme legal authority, ensures that laws and other legal acts align with its norms, and it

28 András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (OUP 2017) 459.

29 S Maksymov, 'Universality of Human Rights' (2013) 1 Philosophy of Law and General Theory of Law 116.

30 *Case no 1-33/99 (Death Penalty Case)* Decision no 11-rp/99 (Constitutional Court of Ukraine, 29 December 1999) [2000] Official Gazette of Ukraine 4/126.

has direct effect (Art. 8). Furthermore, state bodies and local governments, as well as their officials, are required to act strictly within the scope of their constitutional powers and responsibilities (Art. 19). These interconnected constitutional provisions reflect the fundamental idea of constitutionalism, namely, the necessity to limit state power to safeguard human rights. They also oblige state authorities to operate exclusively within the constitutional goals set forth by Ukraine's Constitution. The exercise of state power, particularly through its division into legislative, executive, and judicial branches, along with a system of checks and balances, ensures the stability of the constitutional system and prevents the usurpation of power by any one branch or group, thereby safeguarding the people's right to shape the constitutional framework (subpara. 3.1 of the para.5 of the reasoning section).[31]

In another decision, No. 6-r/2019, dated 20 June 2019, the Court reaffirmed that under Art. 19 of the Constitution, state authorities and local government bodies, along with their officials, must act within the limits of their constitutional powers. This principle ensures that the rule of law prevails in the exercise of state power and reinforces the separation of powers. The division of state functions into legislative, executive, and judicial branches, along with the system of checks and balances, is designed to uphold the stability of the constitutional system and prevent any form of power usurpation, thereby safeguarding the exclusive right of the people to define and modify the constitutional order in Ukraine (para. 5 of the motivational part).[32]

Since its inception, the Constitutional Court of Ukraine has consistently supported the doctrine of constituent power, a key concept in Western constitutionalism. This doctrine holds that the Ukrainian people are the creators of the Constitution. For instance, in Decision No. 4-zp dated 3 October 1997 (concerning the entry into force of the Constitution), the Court highlighted that the Constitution, as the state's Basic Law, is an expression of the constituent power vested in the people.[33] This constituent power is superior to established powers, such as legislative authority, and the Constitution itself recognises the principle of separation of powers and defines the structure of established governmental powers. The adoption of the Constitution by the Verkhovna Rada of Ukraine reflected the exercise of constituent power by the parliament on behalf of the people. In Decision No. 5-r/2019, dated 13 June 2019, the Court reiterated that the Constitution

31 *Case no 1-17/2018(5133/16) (case of the National Commission for State Regulation in the Fields of Energy and Utilities)* Decision no 5-r/2019 (Constitutional Court of Ukraine, 13 June 2019) [2019] Official Gazette of Ukraine 56/1949.

32 *Case no 1-152/2019(3426/19) (regarding the constitutionality of the Decree of the President of Ukraine "On the Early Termination of the Powers of the Verkhovna Rada of Ukraine and the Appointment of Extraordinary Elections")* Decision no 6-r/2019 (Constitutional Court of Ukraine, 20 June 2019) [2019] Official Gazette of Ukraine 57/984.

33 *Case no 18/183-97 (concerning the Entry Into Force of the Constitution of Ukraine)* Decision no 4-zp (Constitutional Court of Ukraine, 3 October 1997) [1997] Official Gazette of Ukraine 42/59.

represents the sovereign will of the Ukrainian people, who are the true source of power. The Constitution, as an act of constituent power, outlines the principles of the state system, defines the scope and limits of state authority, and establishes the mechanisms for exercising state power (subpara. 3.1 of the motivational part).[34]

Moreover, the Court emphasised that one of the Constitution's essential functions is to limit state power, a secondary derivative of the constituent power of the people. By stating that people exercise power through state authorities, the Constitution establishes that only the people can determine which state bodies are authorised to act on their behalf.

One of the key functions of the Constitution of Ukraine is its role in restricting state power. The Constitution limits the state's ability to unjustifiably interfere in individuals' private lives and the activities of civil society institutions, as well as restraining the usurpation and monopolisation of power. This is achieved primarily through the principle of the separation of powers among the legislative, executive, and judicial branches, ensuring that each branch operates within the constitutional and legal boundaries established by the Constitution of Ukraine (Art. 6, pt. 2 of Art. 19).[35] These provisions, in conjunction with other parts of the Constitution, reflect the fundamental principle of constitutionalism, which aims to limit state power to safeguard human rights and freedoms. They also obligate those in power to act solely in accordance with the purposes outlined in the Constitution.[36] The Constitutional Court of Ukraine has consistently upheld the legal stance that the powers of the President and the Verkhovna Rada (Ukraine's highest political authorities) are exclusively defined by the Constitution, prohibiting the creation of laws that would grant them additional powers.[37]

34 *Case no 1-17/2018(5133/16)* (n 31).

35 Constitution of Ukraine no 254 k/96-BP of 28 June 1996 (amended 1 January 2020) <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 25 June 2024.

36 See: *Case no 1-17/2018(5133/16)* (n 31) subpara 3.1(6), motivational pt; *Case no 2-249/2019(5581/19) (on the compliance of the Draft Law on Amendments to Article 106 of the Constitution of Ukraine (on consolidating the powers of the President of Ukraine to establish independent regulatory bodies, the National Anti-Corruption Bureau of Ukraine, appoint and dismiss the Director of the National Anti-Corruption Bureau of Ukraine and the Director of the State Bureau of Investigation) (reg no 1014) with the requirements of Articles 157 and 158 of the Constitution of Ukraine)* Conclusion no 7-v/2019 (Constitutional Court of Ukraine, 16 December 2019) [2020] Official Gazet of Ukraine 4(2)/226, para 9(2), motivational pt.

37 See: *Case no 1-14/2003 (case of Activity Guarantees of a People's Deputy of Ukraine)* Decision no 7-рп/2003 (Constitutional Court of Ukraine, 10 April 2003) [2003] Official Gazette of Ukraine 17/789; *Case no 1-15/2004 (case of the Coordination Committee)* Decision no 9-rp/2004 (Constitutional Court of Ukraine, 7 April 2004) [2004] Official Gazette of Ukraine 16/1122; *Case no 1-6/2007 (case of Dismissal of a Judge from an Administrative Position)* Decision no 1-rp/2007 (Constitutional Court of Ukraine, 16 May 2007) [2007] Official Gazette of Ukraine 40/1589, 48/1992; *Case no 1-35/2009 (regarding the Constitutionally Established Procedure for Entry into Force of the Law)* Decision no 17-rp/2009 (Constitutional Court of Ukraine, 7 July 2009) [2009] Official Gazette of Ukraine 55/1921; *Case no 3-234/2018(3058/18) (regarding the Constitutionality of clause 13 of the first part of Article 17 of the Law of Ukraine "On the National Anti-Corruption Bureau of Ukraine")*

Furthermore, the doctrine of limited government includes the Court's conclusion that the separation of state power into legislative, executive, and judicial branches is not an end in itself but is intended to protect the rights and freedoms of citizens.[38] The principle of separation involves not only a division of powers but also their interaction through a system of checks and balances, ensuring cooperation as a unified state authority. This principle only holds meaning when all branches act within a unified legal framework. Strict adherence to the Constitution and laws by all branches guarantees the proper functioning of the separation of powers, fostering unity and serving as a vital condition for stability and peace within the state (subpara. 4.1(2–4) of the motivational part).[39] Each branch of state power must belong to one of the three categories—legislative, executive, or judicial—or have a special status defined by the Constitution (subpara. 3.2 of the motivational part).[40]

At the same time, a democratic constitution also serves to limit the power of the people. The Constitutional Court has noted that while the people possess the sovereign right to exercise constituent power, they must do so within the constitutional framework (para. 20 of the motivational part).[41] For example, the procedure for adopting a new version of the Constitution or making amendments through popular initiative, as outlined in the 2012 Law on the All-Ukrainian Referendum, was declared unconstitutional.

The doctrine of inherent powers, closely linked to the principle of limiting authority, is often applied by constitutional justice bodies concerning presidential powers in presidential or mixed republics. In Ukraine, as in most developed countries, there is no explicit normative provision for so-called "inherent powers."[42] Art. 106 (31) of the Constitution states that the President exercises powers defined by the Constitution of Ukraine. Therefore, the President

Decision no 4-p (II)/2019 (Constitutional Court of Ukraine (Second Senate), 5 June 2019) [2019] Official Gazette of Ukraine 53/1850; *Case no 1-9/2020(197/20) (regarding the constitutionality of the Decree of the President of Ukraine "On the appointment of A Sytnyk as the Director of the National Anti-Corruption Bureau of Ukraine")* Decision no 9-r/2020 (Constitutional Court of Ukraine, 28 August 2020) [2020] Official Gazette of Ukraine 75/2410; *Case no 1-19/2020(345/20) (regarding the constitutionality of certain provisions of the Law of Ukraine "On the National Anti-Corruption Bureau of Ukraine")* Decision no 11-r/2020 (Constitutional Court of Ukraine, 16 September 2020) [2020] Official Gazette of Ukraine 81/2633.

38 *Case no 1-40/2003 (case of amendments to Articles 29, 59, 78 and others of the Constitution of Ukraine)* Conclusion no 1-v/2003 (Constitutional Court of Ukraine, 30 October 2003) [2003] Official Gazette of Ukraine 48/2535.

39 *Case no 1-8/2008 (case of the Rules of Procedure of the Verkhovna Rada of Ukraine)* Decision no 4-rp/2008 (Constitutional Court of Ukraine, 1 April 2008) [2008] Official Gazette of Ukraine 28/904.

40 *Case no 1-17/2018(5133/16)* (n 31).

41 *Case no 1-1/2018(2556/14) (regarding the constitutionality of the Law of Ukraine "On All-Ukrainian Referendum")* Decision no 4-r/2018 (Constitutional Court of Ukraine, 26 April 2018) [2018] Official Gazette of Ukraine 41/1460.

42 Tetiana Slinko and others, *Public Law: Modern Doctrines in Judicial and Law Enforcement Practice: Educational Manual for Master's Degree Students of Higher Education (2nd [Master's] Level), Field of Knowledge 08 "Law", Specialization 081 "Law"* (Pravo 2023) 58-9.

cannot possess powers not specified in the Constitution. This position has been repeatedly affirmed by the Constitutional Court of Ukraine, emphasising that the President's powers are exhaustively defined by the Constitution, precluding the adoption of laws that establish additional powers, rights or duties. Notable rulings include the Constitutional Court's decisions on 10 April 2003 (No. 7-rp, concerning guarantees for the activities of Members of Parliament), 7 April 2004 (No. 9-rp, regarding the Coordination Committee), 16 May 2007 (No. 1-rp, concerning the dismissal of judges from administrative positions), 7 July 2009 (No. 17-rp/2009, on the constitutional procedure for laws coming into effect), and 15 September 2009, (No. 21-rp/2009, regarding the constitutionality of certain provisions of the Law of Ukraine on Television and Radio Broadcasting).

In the areas of foreign policy leadership, national security, and defence, the situation is somewhat different. In a decision dated 15 January 2009, No. 2-rp/2009, the Constitutional Court recognised the President's right, based on the Constitution's provision on the direct effect of its norms, to apply measures influencing the activities of entities engaged in foreign policy to safeguard Ukraine's national interests and security. Specifically, the Court upheld the constitutionality of a procedure requiring prior approval of candidates for positions specified in the Presidential Act as a means of executing the President's constitutional authority over foreign policy leadership.

A similar ruling was issued concerning the defence sector. According to the Constitutional Court, the President of Ukraine, endowed with constitutional powers over national security and defence, may approve a list of positions requiring coordination with the President. The Court explicitly stated that "the head of state not only determines the general direction of the country's foreign policy according to the principles set by the Verkhovna Rada of Ukraine but also applies appropriate measures to influence the activities of foreign policy actors to ensure Ukraine's national interests and security" (subpara. 3.1 (6) of the motivational part).[43] Consequently, the Constitutional Court deemed constitutional a Presidential Decree on prior approval of appointments to positions in the Ministry of Foreign Affairs. Similarly, the Court validated the requirement for Presidential approval of personnel appointments, as well as plans and schedules for military exercises and training, as stipulated in a Presidential Decree, as such actions fall within the President's constitutional powers (subpara. 2.4 of the motivational part).[44]

The doctrine of inherent powers was also addressed in a separate opinion by Justice V.V. Lemak concerning the Constitutional Court's decision of 16 September 2020, No. 11-r/2020. Justice Lemak argued that, under the "inherent powers" doctrine, the President of Ukraine

43 *Case no 1-2/2009 (regarding the constitutionality of the Decree of the President of Ukraine "On Some Issues of Managing the State's Foreign Policy Activities")* Decision no 2-rp/2009 (Constitutional Court of Ukraine, 15 January 2009) [2009] Official Gazette of Ukraine 5/139.

44 *Case no 1-3/2009 (regarding the constitutionality of the Decree of the President of Ukraine "On Some Issues of Implementing Leadership in the Spheres of National Security and Defense")* Decision no 5-rp/2009 (Constitutional Court of Ukraine, 25 February 2009) [2009] Official Gazette of Ukraine 17/534.

may exercise other powers derived from the President's constitutional role, provided these powers are lawful and do not contradict constitutional principles such as the separation of powers, democracy, and respect for human rights. He cautioned, however, that the "inherent powers" doctrine must not be interpreted too broadly or arbitrarily, as this could lead to manipulation of constitutional norms, posing a threat to the Constitution's essence.[45]

At the same time, in matters of personnel appointments, the Constitutional Court chose not to formulate a doctrine of inherent presidential powers, instead taking a formal and textual approach to constitutional interpretation. The Court underscored the unconstitutionality of granting the President the authority to appoint or dismiss the Director of the National Anti-Corruption Bureau of Ukraine. This stance is reflected in the Constitutional Court's decision regarding the constitutional submission of 50 Members of Parliament on the constitutionality of certain provisions of the Law on the National Anti-Corruption Bureau of Ukraine (16 September 2020, No. 11-r/2020)[46] and in the decision on the constitutional submission of 51 Members of Parliament regarding the constitutionality of the Presidential Decree appointing A. Sytnyk as Director of the National Anti-Corruption Bureau of Ukraine (28 August 2020, No. 9-r/2020).[47]

5 CONCLUSIONS

One of the main ideas of modern constitutionalism is the principle of limited government. In a legal democratic state, it is not the government that should dictate to civil society how to act or teach citizens proper behaviour. Instead, society and each citizen should direct the state toward actions that are beneficial to them. Otherwise, society and citizens might find themselves with an absolute state masquerading as a constitution, encroaching on the sphere of society and private life, and undermining standards of civil freedom.

The modern concept of the doctrine of limited government involves several key elements. First, it requires the obligation of public authorities to act in accordance with the law, which does not preclude these authorities from changing the law. Second, it imposes limitations on legislative power, which, in different historical periods, have been based on natural law, customary law, and human rights.

According to this concept, the main elements of constitutional limitation of state power are as follows. First, there is the constitutional enshrinement and practical implementation of

45 Separate Opinion by Justice VV Lemak regarding Decision no 11-r/2020, Case no 1-19/2020(345/20) (Constitutional Court of Ukraine, 16 September 2020) [2020] Official Gazette of Ukraine 81/2633.

46 *Case no 1-19/2020(345/20)* (n 37).

47 *Case no 1-9/2020(197/20) (regarding the constitutionality of the Decree of the President of Ukraine "On the Appointment of A Sytnyk as Director of the National Anti-Corruption Bureau of Ukraine")* Decision no 9-r/2020 (Constitutional Court of Ukraine, 28 August 2020) [2020] Official Gazette of Ukraine 75/2410.

the principle of popular sovereignty, particularly the implementation of the doctrine of constituent power in the context of adopting and amending the Constitution. Second, the principle of the rule of law, meaning the limitation of state power by law, is central. This component is realised through constitutional rules of legality, according to which the powers of public authorities must be defined by the Constitution and laws. Third, the principle of separation of powers entails the existence of relatively independent and separate branches of power – legislative, executive, and judicial – and the establishment of relationships between them that prevent the usurpation of all or most of the state power by a single state organ, let alone a single person. Lastly, the limitation of power by human rights is fundamental. State power derives from human rights and freedoms, and its main purpose is to limit the state. Human rights are a kind of demand for the state to act or refrain from certain actions and thus serve as a means of combating the abuse of state power.

A key role in defining the content of the doctrine of limited government and ensuring its implementation in state practice is played by the Constitutional Court of Ukraine as the body of constitutional control and the official interpreter of the Basic Law of Ukraine. From the very beginning, this constitutional jurisdiction body has consistently upheld the doctrine of constituent power, a principle known in Western constitutionalism, which asserts the creator of the Constitution of Ukraine is the people. It also emphasises that "an important function of the Constitution of Ukraine is to limit state power as secondary and derivative from the constituent power of the people."

Furthermore, the rules of constitutional legality reflect the fundamental constitutionalism principle of the necessity to limit state power to ensure human rights and freedoms and obligate subjects endowed with state power to act solely in accordance with the objectives established by the Constitution of Ukraine and so forth.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ДОКТРИНА ОБМЕЖЕНОГО ПРАВЛІННЯ У ПРАВОВИХ ПОЗИЦІЯХ КОНСТИТУЦІЙНОГО СУДУ УКРАЇНИ

Тетяна Слінько, Євгеній Ткаченко*, Любомир Летнянчин та Сергій Федчишин

АНОТАЦІЯ

Вступ. *Сутність конституційного ладу полягає у двох основних аспектах: обмеження державної влади та забезпечення верховенства прав, зокрема захисту прав і свобод людини. Без механізмів обмеження державної влади держава неминуче втручається в життя суспільства і приватне життя людини, загрожуючи її правам і свободам. Еволюція конституційних систем у ліберально-демократичних країнах була тісно пов'язана зі зміцненням громадянського суспільства та розвитком інструментів контролю над державною владою. Історично ця еволюція пройшла шлях від абсолютної*

держави, де держава була єдиним власником і джерелом влади, до ліберально-демократичної держави, де держава служить народу та громадянському суспільству.

Разом із цим історичним зрушенням відбулася трансформація індивідів із простих гвинтиків у механізмі державної влади в громадян правової держави, які вимагають від держави стриманості для захисту індивідуальної свободи. Однією з центральних ідей конституціоналізму є принцип обмеженості правління. Метою статті є аналіз правових позицій Конституційного Суду України щодо доктрини обмеженого правління. Зокрема, досліджується, як Суд тлумачить ключові елементи цієї доктрини, такі як верховенство права, поділ влади, права людини і громадянина, а також доктрина установчої влади. Ці та інші пов'язані з ними питання становлять основу дослідження в цій статті.

Методи. *Для вивчення доктрини обмеженого правління та її елементів, а також для аналізу правових позицій, пов'язаних із цим питанням, було використано низку методів. За допомогою системно-структурного методу охарактеризовано поняття і зміст доктрини обмеженого державного правління та її ключові елементи, зокрема принцип верховенства права, принцип поділу влади, права людини і громадянина, доктрину правової держави, установчу владу. Логіко-правовий метод сприяв усвідомленню поглядів науковців на становлення та розвиток вчення про обмежене державне правління, а також їхні погляди на зміст його елементів. Крім того, для аналізу правових позицій Конституційного Суду України були використані правові методи, такі як дослідження конституційних текстів, первинного законодавства та судової практики.*

Результати та висновки. *У статті було розглянуто історичний розвиток і сучасний стан концепції обмеженого правління, досліджено її зв'язки з доктриною установчої влади, принципом верховенства права, концепцією прав і свобод людини та принципом поділу влади. Результатом дослідження є систематизований розгляд правових позицій Конституційного Суду України щодо доктрини обмеженого правління, яка є ключовою опорою сучасного українського конституціоналізму. Встановлено, що Конституційний Суд України з самого початку послідовно підтверджував істотні елементи доктрини обмеженого державного правління. Ці елементи утворюють доктрину установчої влади та фундаментальний принцип конституціоналізму, який підкреслює необхідність обмеження державної влади для захисту прав і свобод людини. Крім того, Суд дотримується думки, що організація та здійснення державної влади на основі поділу на законодавчу, виконавчу та судову гілки влади не є самоціллю, а має на меті забезпечити захист прав і свобод особи.*

Ключові слова: *Конституційний суд, обмежене правління, конституціоналізм, обмеження державної влади, права людини, установча влада, верховенство права, поділ влади.*