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The Institute of Constitutional Justice and the Balance of Power in a Democratic State

1. Introduction

According to a comparative analysis of the system of checks and balances enshrined in the domestic Constitution with the experience of developed European countries, formally they are fully consistent with the traditions of the latter. At the same time, the repeated aggravation of relations between the branches of government, which escalated into systemic political crises and were not always resolved by legal means, indicate the lack of an effective constitutional mechanism for resolving them. Strengthening the role of parliament without a politically structured society, a developed party system and a democratic political culture has highlighted the problem of ensuring constructive interaction between branches of government. In this sense, the problem of determining the mechanisms of influence of the institute of constitutional justice on the processes of balancing power, which became the research task of this publication. Problems of constitutional justice are reflected in many works, including the works of a number of authoritative scholars, in particular: S. Avakyan, S. Bobotov, M. Vitruk, V. Gergeliynyk, M. Gultay, S. Shevchuk, M. Kozyubra, V. Kolisnyk, O. Mironen-

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ko, T. Mikheeva, A. Selivanov, O. Skripnyuk, P. Stetsiuk, T. Khabrieva, V. Shapoval, V. Chirkin, and many others. Nevertheless, the problem of determining the mechanisms of influence of the institution of constitutional justice on the processes of balancing power in a democratic state has enough debatable and unresolved issues.

The purpose of the article is to determine the mechanisms of influence of the institution of constitutional justice on the processes of balancing power in a democratic state and to formulate conclusions on the basic principles of reforming the domestic constitutional model of relevant legal relations.

2. Features of existing models of constitutional justice

The issue of the tasks of the bodies of constitutional jurisdiction belongs to the category of debatable, both in view of the differences in its national models and taking into account the subjectivity of the preferences of certain researchers. At the same time, the vast majority of scholars base their conclusions primarily on the peculiarities of the institutional and legal design of constitutional justice in a country. For a long time, the classification prevailed in domestic science, according to which it was accepted to distinguish four groups of countries with different systems of constitutional control and supervision: 1) countries where the constitutionality of legal acts can be reviewed by courts of general jurisdiction from lower to higher courts, Denmark, Japan); 2) countries where only the Supreme Court of the state (Australia, Bolivia, India, Switzerland) can declare a law unconstitutional; 3) countries in which special constitutional courts have been established (Austria, Germany, Cyprus, Turkey); 4) countries where constitutional control is exercised by a special non-judicial body (for example, the Constitutional Council in France). Today, a mostly simplified classification prevails, but even reducing the number of basic models to two – American and European, does not simplify the process of interpreting the content of this phenomenon.

Traditionally, the dividing line between the American and European models is based on the method of legal determination of the place of constitutional justice bodies in the system of separation of powers. If in countries with the American model of constitutional control, such activi-

ties are carried out within the judiciary, while for countries with the European model, where constitutional justice is carried out by specialized bodies, it is important to determine the relationship of constitutional jurisdiction with the judiciary. a debate as to whether they coincide or whether constitutional justice is an independent, fourth form of government.

A study of the scientific literature reveals that the bodies of constitutional justice and courts of general jurisdiction in the countries of the Romano-Germanic legal family mostly have both common and distinctive features. Thus, both the norms on the possibility of initiating proceedings at the request of authorized persons and the general principles of justice are common. The latter traditionally include the principles of the rule of law, independence, collegiality, equality of judges, publicity, completeness and comprehensiveness of cases and the validity of decisions taken, which are inherent in both institutions.

A significant number of domestic scholars at one time characterized the Constitutional Court of Ukraine as a judicial body or a body belonging to the judiciary. Simultaneously with the amendments to Article 124 of the Constitution of Ukraine in 2016, as a result of which the provision on the administration of justice by the Constitutional Court of Ukraine was excluded from Section VIII of Justice, it is obvious that there are fewer formal arguments for such a position.

In countries where the European model of constitutional justice is applied, by its status the body of specialized constitutional control is one of the highest constitutional bodies, endowed with special features that characterize its autonomous position. Thus, the appointment of judges is carried out by political bodies of the state (at least two branches of government). Not only professional judges but also other persons, including those who are not lawyers, are often admitted to this body. Unlike other bodies of constitutional control, which carry out this activity along with other functions, constitutional control is the main function of this body. The Institute of Constitutional Justice has a special form of activity – constitutional proceedings (quasi-judicial bodies also operate within special procedural rules), as well as significant organizational independence, which is expressed in its right to adopt regulations, elect the chairman of the court and others. The jurisdiction of these courts

extends to the institutions of legislative, executive, and often judicial power. They have the exclusive power to make final decisions, especially in the area of reviewing the constitutionality of regulations, as even a negative act (for example, the repeal of a law by parliament due to its unconstitutionality) can become subject to constitutional review. The decisions of these bodies have a strong legal basis, which compensates for the weakness of their legitimate basis, and in the vast majority of countries are final and binding².

These specific characteristics of the institute of constitutional justice gave grounds for spreading in the scientific literature an approach based on the recognition of this state body as an independent branch of government, rather than a supplement to other branches of government. In countries with the Austrian model, constitutional justice is often referred to as the fourth type of power, along with the legislative, executive and judicial branches. In recent years, these countries have been marked by a significant increase in the status of political branches of government and, if their dominance is out of control, this can lead to abuse. Constitutional justice, as a controlling branch of power that historically emerged later, has the ability to effectively control political power while remaining independent of the judiciary³. Being outside the three branches of government, it ensures that they exercise their powers and thus occupies an autonomous place in relation to the legislative, executive and judicial branches and has the task of ensuring the balance of the three branches of government.

The well-known French constitutionalist L. Favore states in this regard that in most countries that have adopted the Kelzen model, constitutional justice is outside the three branches of government, ensuring that they respect their powers⁴. In contrast to departmental and administrative control, which is conducted by bodies that perform other functions, the institutions of control power occupy an independent and

² Jackson V., Tushnet M. *Comparative Constitutional Law*. New York: Foundation Press, 1999. P. 455–543.

³ Cappelletti M. *The Expanding Role of Judicial Review in Modern Societies. The Role of Courts in Society*. Chapter 7. Boston : Dordrecht, Lancaster, 1988. P. 91.

⁴ Kovler A.J., Chirkin V.E., Yudin Yu. K. (1996). *Comparative constitutional law*. Moskva: Manuscript. p. 16.

special place, which has received a noticeable expression in the legislation. This democratic institution plays a serious preventive role, when, acting clearly, it encourages not only public authorities, but also every member of society to legal, constitutional action⁵.

Describing judicial constitutional control together with general control as an organizational and legal form of state activity and other forms of constitutional control, J. Ovsepyan singles out the following features:

- 1) this kind of institution of social, state control is carried out by permanent state bodies;
- 2) it is a form of state control, built on a professional basis, and the highest among specialized forms of control activities;
- 3) judicial constitutional control – control law enforcement activity based on the predominance of jurisdictional means;
- 4) in comparison with the general state control, the judicial constitutional control extends not only to the sphere of management, but, first of all, covers rule-making and legislative activity;
- 5) it is a specialized mechanism of protection of the normative act of the highest legal force – the Constitution of the state;
- 6) it is the highest (after parliamentary and referendum) form of constitutional control⁶.

3. Constitutional justice and political influence

In domestic legal science, there is also a discussion on the possibility of referring the Constitutional Court of Ukraine to the so-called control, or supervisory-control branch of government, along with the institutions of the prosecutor's office, ombudsman, Accounting Chamber and some other bodies. According to proponents of this view, constitutional justice in Ukraine has the nature of control power, as the effective operation of the principle of separation of powers in the state requires an independent arbitrator who would have the authority to implement the mechanism of checks and balances. As an argument in support of this position,

⁵ Arutyunyan G.G. (1999). Constitutional Court in the system of state power (comparative analysis). Erevan: Nzhaz, p. 17.

⁶ Ovsepyan Zh.I. (1992). Judicial constitutional review in foreign countries. Legal protection of constitutions. Rostov-na-Donu: Litera-D, p. 45–46

the provisions of the theoretical works of N. Kelzen on the need for a fourth power, which should be power not in all its relief characteristics, but which would only act as a safeguard or “negative legislator” in the mechanism of state power, because the presence of three fundamental branches of government, which represent a single state power, does not exclude the possibility of the existence of functionally independent control and supervisory institutions and is determined by the need for democratic forms of control and supervision.

By analogy, the proclamation of the rule of law without the formation of a controlling entity that could really uphold that rule could be compared to the proclamation of human rights, without the creation of courts that could protect and restore these rights. According to I. Koliushko and J. Zhurba, the constitution is strong when the constitutional court is strong, and a strong constitution is one of the most important guarantees for the successful development of the state. The role of the constitutional court in the state is often characterized as a struggle for constitutionality. The struggle is because the authorities are always inclined to try to go beyond the constitutional powers, if there is such an opportunity and benefit from it. However, the role of the constitutional court is precisely to prevent violations of the constitution by the authorities. Thus, political power and the constitutional court are always, so to speak, at different poles. And at the moment when the constitutional court begins to serve the government, we can put an end not only to the actions of the rule of law, but also law in general⁷. The direct evidence that the Constitutional Court of Ukraine is entrusted with the function of protecting the Constitution, in addition to its own powers to decide on the conformity of the Constitution of Ukraine and its official interpretation, is that the Constitutional Court is a mandatory participant in the procedure of amending it. Article 159 of the Constitution pre-constitutional control over the laws amending the Constitution of Ukraine, which is an important feature of the constitutional status of the domestic body of constitutional jurisdiction compared to the bodies of constitutional control of European countries.

⁷ Koliushko I, Zhurba Ya. Constitutionalism or mockery of the Constitution? *Ukrainska pravda*. 30.09.2010 r. Retrieved from: <https://www.pravda.com.ua/articles/2010/09/30/5431397/>

Analyzing the problem of protection of constitutional norms, some authors note that by carrying out negative legislation, the body of constitutional justice implements the function of balance in relation to its other branches, without undermining their independent functioning. It is a task to control and help to communicate with public authorities, without losing its own restraint and focus exclusively on legal issues, thus avoiding direct interference in political processes⁸.

It should be noted, however, that in exercising these powers, the constitutional justice bodies are often faced with the threat of their politicization and transformation into a positive legislator⁹. Constitutional justice can be described as the activity of limiting power and resolving conflicts, which allows us to trace a clear link between it and politics. Given that the basis of any dispute between the highest bodies of state power is the political issue itself, which may develop into a question of the balance of power, the arbitration function of the institution of constitutional justice is characterized by some researchers as one of the main¹⁰.

This is evidenced by the analysis of the practice of Central and Eastern Europe in a difficult period of democracy, when the problem of conflict between the branches of government was actually central to them. The literature on this occasion identifies several possible options for the development of the political crisis, in particular: 1) the conflict of the constitutional justice body with the parliament, which is resolved in favor of the executive; 2) conflict of the constitutional justice body with the executive in favor of the parliament; 3) the functioning of the body of constitutional justice as a relatively independent arbitrator in a dispute between two other branches of government. Unlike the first two options, which indicate political bias and motivation of the body of constitutional justice, only the third is based on positive law.

⁸ Blankenagel A. (2004). The role and significance of the principle of separation of powers. Constitutional Court as a guarantor of the separation of powers: collection of reports. Moskva: Institut prava i publichnoy politiki, p. 10.

⁹ Dzhangiryan Zh. D. (2003). Towards a Discussion on the Division of Powers and the Unity of Power: The Experience of Armenia. Moskva: Izd-vo «Kogito-Centr», p. 54

¹⁰ Mihajlova M. V. (2002). On some aspects of the activities of the Constitutional Court of Moldova. Konstitucionnoe pravo zarubezhnyh stran. №4/2002. p. 35.

In this regard, A. Medushevsky's point of view on the traditional conflict between positive law and natural law, which has reached the highest level in the post-communist countries of Central and Eastern Europe, is interesting. It is as a result of this conflict, according to the author, that the implementation of a pure Kelsen model of the constitutional court (as a guarantor of the constitution) is questionable in this region in the conditions of political crises. The author explains this position, in particular, by the prevailing normative interpretation of positive law and the threat of transforming the body of constitutional jurisdiction into a technical expert of the formal constitutionality of laws, which does not analyze the normative prescription from the standpoint of democratic legal ideal. In the countries of Central and Eastern Europe, where the constitutional courts have for some time been at the center of political crises and have acted as arbiters on fundamental issues of transition, the question has arisen: to what extent in political crises it was necessary to create such a model of constitutional justice? destructive nature during the constitutional reforms, which were purely political in nature? After all, under such conditions, the constitutional judiciary found itself in an ambiguous position: on the one hand, they were hostages of the previous totalitarian ideology and model of nominal constitutionalism, and on the other – an active force of constitutional modernization aimed at transforming this tradition and adopting Western constitutionalism. The essence of the dilemma faced by the constitutional courts of these countries was the need to choose between a formal legal solution to the problem (based on imperfect constitutional law of the transition period) and its solution in terms of democratic legal principles. The second position, often less substantiated from the formal-normative point of view, nevertheless essentially corresponded more to the tasks of legal modernization, as it aimed at: the need to address the general principles of liberal democracy; taking into account the relationship of legal decisions with their social and political consequences; making a positive impact on reforms through legal policy¹¹. In our opinion, this points to the important mission of the constitutional justice authorities to find a fine

¹¹ Medushevskij A. (1999). Kelsen's model of constitutional justice and constitutional change in Eastern Europe. *Konstitucionnoe pravosudie v postkommunisticheskikh stranah: sb. dokladov*. Moskva: Centr konstitucionnyh issledovanij MONF, p. 13–42.

line between the positive, natural law and political influence of different branches of government in a conflict.

4. The Constitutional Court of Ukraine and the separation of powers

The special status of the Constitutional Court of Ukraine among the branches of state power in Ukraine allows drawing certain analogies with the status of some other subjects of power, and first of all the President of Ukraine. After all, according to Art. 102 of the Constitution of Ukraine, the President of Ukraine is the guarantor not only of state sovereignty, territorial integrity of Ukraine, human and civil rights and freedoms, but also observance of the Constitution of Ukraine.

Such a system is in line with the practice of many semi-presidential republics, where the president is constitutionally assigned the status of head of state, political arbiter, guarantor of the highest social and state values (Armenia, Georgia, Portugal, Romania, France, Croatia), while the president's approach to the executive can only from a systematic analysis of constitutional norms that determine its powers and principles of interaction with parliament and government. To characterize such a dualistic model of executive organization, such formulations as "dual center of executive power", "complex center of executive power", "two-headed executive power", "exercise of executive power by the president and the government" and others are often used.

Thus, the President of Ukraine is in fact also entrusted with the function of ensuring the balance of power, but the nature of the tasks performed in the appropriate sense compared to the body of constitutional jurisdiction is different. The dualism of the executive branch should be primarily focused on constructive cooperation between the President and the government. The positive experience of other countries shows that with the effective organization of the executive branch, dualism serves as a kind of safeguard against crises, a factor in ensuring stability. If the dualism of executive power generates confrontations and political crises, then the reasons should be sought not in the internal shortcomings of this phenomenon, but in the incorrect implementation of the mechanism of organization of dualistic executive power, distortion of

its essence. As M. Kozyubra notes, “the head of state in countries with dualistic executive power in the conditions of multiparty system in the country and multi-party composition of parliament often plays the role of arbiter between political forces, especially in forming a government in the absence of a monopoly party. “One-headed” executive power, according to many foreign constitutionalists, is dangerous because of the possible excessive concentration of power in the hands of parliament (or rather – the parliamentary majority) and the government. Another thing is that the dualism of executive power in Ukraine is distorted by the fact that there is not one center of government, which should be the government, but two or even three such centers. Indeed, this is an abnormal phenomenon and needs to be addressed in the process of constitutional reform”¹².

The key difference of the Constitutional Court of Ukraine in this respect, as a subject of relations between the branches of power, is much greater, and even in fact – the maximum distance from each of these branches. This situation is guaranteed by the mechanism of formation of this institution, as the model implemented in Ukraine provides that the President of Ukraine, the Verkhovna Rada of Ukraine and the Congress of Judges of Ukraine appoint six judges of the Constitutional Court. Equal participation of the judiciary along with the legislative and executive in the formation of the constitutional justice body is not an unalterable model, because in many Central and Eastern European countries another procedure is applied: the formation of the Constitutional Court by the President and Parliament (Albania, Slovakia, Slovenia, Czech Republic), or only Parliament (Poland)¹³. In Ukraine, some researchers, in the process of discussing the ways of constitutional reform, have repeatedly expressed the view on the inexpediency of participation in the Congress of Judges of Ukraine and the judiciary in general in the process of forming the Constitutional Court of Ukraine. Thus, I. Koliushko once noted that giving the Congress of Judges the right to elect judges of the

¹² On the question of the form of government in Ukraine: the search for a model. Interview of leading legal scholars to the editor-in-chief of the magazine “Law of Ukraine”. *Pravo Ukrainy*. № 10/2009. p. 36.

¹³ Bulba O. (2008). Some aspects of the implementation of the principle of separation of powers in Central and Eastern Europe. *Pravo Ukrainy*. № 4/2008. p. 154.

Constitutional Court of Ukraine is in fact the introduction of a quota for professional judges of general jurisdiction in the Constitutional Court of Ukraine. Given that the administration of justice by judges of courts of general jurisdiction is too different from that of a judge of the Constitutional Court of Ukraine, this has led these authors to question whether such representation of professional judges in the Constitutional Court of Ukraine is appropriate and whether it contributes to professionalism of the Constitutional Court. In this regard, it was proposed to change the procedure for appointing CCU judges so that only the Parliament and the President appoint 9 judges (half of the Constitutional Court of Ukraine) from among the open list of candidates for CCU judges formed by the Qualification Commission of Constitutional Court Judges¹⁴.

In our opinion, the key factor in involving the judiciary in the procedure of forming a body of constitutional jurisdiction is not the similarities / differences of their tasks, but the need for equal representation of this branch of government in the activities of the institution. After all, the balancing role obviously requires maximum impartiality, which can be ensured only within the model of equal representation. Such a model becomes especially relevant when the legislature, executive and president are representatives of the same political force, when the body of constitutional jurisdiction actually remains the only entity capable of resisting the possible intentions of the respective forces to "control" the judiciary. The validity of this argument in domestic constitutional practice was proved by the Decision of the Constitutional Court of Ukraine of 11.03.2020 № 4-r / 2020 in the case of the constitutional petition of the Supreme Court on the constitutionality of certain provisions of the laws of Ukraine "On Judiciary and Status of Judges" of June 2 2016 № 1402-VIII, "On Amendments to the Law of Ukraine" On the Judiciary and the Status of Judges "and some laws of Ukraine on the activities of judicial authorities" of October 16, 2019 № 193-IX, "On the High Council of Justice" of December 21 2016 № 1798-VIII, when the domestic body of constitutional jurisdiction recognized as inconsistent with the

¹⁴ Koliushko I. (2013). Comments and proposals to the draft concept of amendments to the Constitution of Ukraine, taken as a basis by the Constitutional Assembly on June 21, 2013 (fragments). *Konstytutsiina reforma : zbirnyk materialiv Tsentru polityko-pravovykh reform za 2007–2013 roky*. Kyiv, p. 155,158.

Constitution of Ukraine a number of provisions of the Law of Ukraine "On the Judiciary and the Status of Judges" as amended by the Law of Ukraine of 16.10.2019 № 193-IX, which provided for a twofold reduction in the composition of the Supreme Court, and managed to become the subject of sharp public controversy. The relevant circumstances clearly proved the extremely important role of the Constitutional Court of Ukraine in balancing the branches of government and protecting the separation of powers. At the same time, the special status of the bodies of constitutional justice, along with the institutional provision of their maximum distance from any single branch of government, is also guaranteed by the requirements of professionalism of their staff and a certain degree of independence from electoral sentiment.

Thus, the model of separation of powers provided by the current Constitution of Ukraine and the mixed form of government in general sufficiently guarantee the democratic development of Ukraine. When choosing the current model of mixed form of government, it is important to combine the elements of parliamentary and presidential form of government, taking into account specific political and socio-economic realities, as well as problems that have emerged during the eleven years of Ukraine's 1996 Constitution. Dualism in the executive branch, which provides for a mixed form of government, should promote the development of democratic traditions of cooperation between higher authorities, prevent the usurpation of power by both the parliamentary majority and the President, introduce elements of mutual control of political actors, which ultimately as a result, should make the activities of the government open and transparent to society. At the same time, it is important to minimize the manifestations of destruction that the dualism of executive power brings to the work of the entire mechanism of state power¹⁵. At the same time, the Constitutional Court of Ukraine must be a real guarantor of the Constitution and an arbiter in relations between the highest bodies of state power.

¹⁵ Koliushko I., Kyrychenko Yu. (2013). Problems of effectiveness of the Constitution of Ukraine and improvement of its content. *Konstytutsiina reforma : zbirnyk materialiv Tsentru polityko-pravovykh reform za 2007–2013 roky*. Kyiv, p. 19.

Conclusions

The study allows us to some conclusions. The special status of constitutional justice bodies within the continental model, in particular the status of the Constitutional Court of Ukraine between branches of government, is due to the important mission of constitutional justice bodies to find a fine line between positive, natural law and political influence of different branches of government. The corresponding task allows to make certain analogies with the status of some other subjects of power. Yes, although in Ukraine the President according to Art. 102 of the Constitution of Ukraine, is a guarantor of compliance with the Constitution of Ukraine, as a consequence, also performs the function of ensuring the balance of power, but the nature of the tasks in the appropriate sense compared to the body of constitutional jurisdiction they are different. If the functional status of the president is focused mainly on ensuring constructive interaction of political forces with the executive branch, the tasks of the institution of constitutional justice are more universal. The key difference of the Constitutional Court of Ukraine in this respect, as a subject of relations between the branches of power, is much greater, and even in fact – the maximum distance from each of these branches. This situation is guaranteed by the mechanism of formation of this institution, as the model implemented in Ukraine provides that the President of Ukraine, the Verkhovna Rada of Ukraine and the Congress of Judges of Ukraine appoint six judges of the Constitutional Court. Such a model has proven its effectiveness in practice, as the key factor in involving the judiciary in the procedure of forming a body of constitutional jurisdiction is not the similarities / differences of their tasks, but the need for equal representation of this branch in the relevant institution. The balancing role obviously requires maximum impartiality, which can only be ensured within the model of equal representation. Such a model becomes especially relevant when the legislature, executive and president are representatives of the same political force, when the body of constitutional jurisdiction actually remains the only entity capable of resisting the possible intentions of the respective forces to “control” the judiciary. At the same time, the special status of the bodies of constitutional justice,

along with the institutional provision of their maximum distance from any single branch of government, is also guaranteed by the requirements of professionalism of their staff and a certain degree of independence from electoral sentiment.

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Summary

The article is devoted to the study of the mechanisms of influence of the institute of constitutional justice on the processes of balancing power in a democratic state and formulating conclusions on the basic principles of reforming the domestic constitutional model of relevant legal relations.

The author states that the special status of constitutional justice bodies within the continental model, in particular the status of the Constitutional Court

of Ukraine between branches of government, is due to the important mission of constitutional justice bodies to find a fine line between positive, natural law and political influence of different branches of government. The corresponding task allows to make certain analogies with the status of some other subjects of power. The key difference between the Constitutional Court of Ukraine, as a subject of relations between the branches of government, is much greater, and even in fact – the maximum distance from each of these branches. Such a model becomes especially relevant when the legislature, executive and president are representatives of the same political force, when the body of constitutional jurisdiction actually remains the only entity capable of resisting the possible intentions of the respective forces to “control” the judiciary. At the same time, the special status of the bodies of constitutional justice, along with the institutional provision of their maximum distance from any single branch of government, is also guaranteed by the requirements of professionalism of their staff and a certain degree of independence from electoral sentiment.

Keywords: constitutional jurisdiction, system of checks and balances, separation of powers, branches of state power, Constitutional Court of Ukraine