

CONSTITUTIONAL DEVELOPMENT OF MODERN UKRAINE: WANDERING IN A CIRCLE? SOME ISSUES OF THE CONSTITUTIONAL SYSTEM FUNCTIONING

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INTRODUCTION

Constitutional development of modern Ukraine (after the proclamation of its state sovereignty) can hardly be called simple, linear, unambiguous and clearly progressive. Rather, it resembles wandering in a circle, which is reflected in the title of this section. In the text below, we will try to prove that this is the case, but, most importantly, we will find out the causes of this situation, identify the key problems and model the directions of their solution.

First of all, it is necessary to find out what is meant by the constitutional development of Ukraine. Today's legal science is dominated by two approaches to understanding this concept, which stem from the positivist and the naturalist types of legal thinking. The former one was more widespread in the Soviet era of legal science and assumes that constitutional development means any changes in the state-legal existence reflected in the constitutional text. The nature of such changes, their focus (whether it is centralization of power, protection of human rights or other goals) or whether they are regarded as minor are not taken into account. In other words, constitutional development is in fact synonymous with "political system development"¹, "state development"², accompanied by appropriate constitutional reforms, or "constitutional process"³.

The naturalist approach to understanding constitutional and legal phenomena stems from the original idea of the essence of constitution and its value as an effective means of guaranteeing individual freedom, fundamental human rights and freedom of civil society through the imposition of restrictions on state power, as well as state arbitrary and tyranny prevention⁴.

¹ Rozumnyj M. (2008) Rozvytok politychnoi systemy Ukrainy: vyklyky i zahrozy. [Development of Ukraine's Political System: Challenges and Threats] *Politychnyi menedzhment*, № 1, pp. 9–13.

² Tatsii V.Ya. (2014) Aktualni pytannia konstytutsiinoi reformy ta derzhavnogo rozvytku na suchasnomu etapi [Current Issues of Constitutional Reform and State Development at the Present Stage] *Pravo Ukrainy*, 2014, № 7, pp. 10–18.

³ Shemshuchenko Yu. S. (2014) Konstytutsiyni protses u nezalezhnii Ukraini [Constitutional Process in the Independent Ukraine] *Pravo Ukrainy*, 2014, № 7, pp. 19–24.

⁴ More about this: Boryslavska O.M. (2014) Metodolohichni pidkhody do rozuminnia sutnosti konstytutsionalizmu [Methodological Challenges Of Understanding The Essence Of Constitutionalism] *Naukovyi visnyk Khersonskoho derzhavnogo universytetu*, 2014, Issue 6-1, Vol. 1, pp. 70–74.

Therefore, the constitutional development of the state (including Ukraine) does not include all changes in state and legal systems which interfere with the text of the constitution, but only those aimed at implementing the key idea of constitution and constitutionalism, respectively.

We proceed from this approach and consider constitutionalism not as a purely theoretical construction, but as a practical model of the political system functioning⁵. Therefore, under the constitutional development of modern Ukraine we mean a movement aimed at forming a constitutionally restricted government and creating a constitutional system, the purpose of which is to guarantee individual freedom and fundamental human rights. Accordingly, the progressive development (as stated at the beginning of the section) can only be viewed as the one aimed at achieving the stated goals, which in itself is not easy. In the Ukrainian realities, this process is even more complicated because it occurs with the simultaneous establishment of Ukrainian statehood, the struggle for state sovereignty and territorial integrity of Ukraine.

1. Features and key issues of the constitutional development of Ukraine

As already stated, in view of the constitutional development of Ukraine, we mean its formation as a constitutional state. The famous British scientist Albert Dicey divided states into constitutional and unconstitutional in the late 19th century⁶. The analysis of the contemporary political and legal organization of the modern states in the world leads to the conclusion that today, in the political sense, the world is in fact divided into three camps: constitutional states in which state power is limited to guarantee individual fundamental rights (approximately one fourth of all states in the world), unconstitutional states with arbitrary power (about the same number), and transitional states (transit from arbitrary to constitutionally restricted government (about half of the states in the world). Constitutionalism is the ideological and doctrinal basis of the functioning of constitutional and transitional states, but while the former managed to put it into practice, the latter are only in the process of forming constitutionally restricted governments. The latter include Ukraine, which, having proclaimed independence, made its civilizational choice and in fact took the path of forming a constitutional state.

Starting from the first political and legal documents that proclaimed state sovereignty and ending with the 1996 Constitution, Ukraine was gradually

⁵ *More about this:* Boryslavska O.M. (2018) *Yevropeiska model konstytutsionalizmu: systemno-aksiolohichniy analiz* [European model of constitutionalism: a system-axiological analysis] Kharkiv: Pravo, 2018.

⁶ Dicey A. V. (1982) *Introduction to the Study of the Law of the Constitution*. Indianapolis: Liberty Classics, 1982. pp. 110–117.

adopting a liberal-democratic ideology, which was to form the basis of this process (now it is reflected in the Basic Law).

However, the constitutional development of Ukraine cannot be called linear and progressive all the time. This, in particular, is evidenced by serious problems of the constitutional system of government: 1) repeated change of forms of government (1996, 2004, 2010, 2014); 2) questionable, in terms of legitimacy, the Constitution amending procedure (2004, 2010, 2014); 3) concentration of powers by the Head of State (2010–2013, 2019–2020); 4) crises in the Constitutional Court activities (2005–2006, 2016–2017).

Moreover, some of the listed problems were repeated with some cyclicity. For example, the mixed form of government, which was included in the 1996 Constitution, drifted towards the strengthening of the presidential power (2010), and then its formal weakening (2004, 2014). Constitutional amendments, the procedure for which is clearly set out in Section XIII of the Constitution, were introduced in violation in 2004, 2010 and 2014. In addition, regardless of the formally determined constitutional powers of the Head of State, the presidential power has been excessively concentrated during 2010–2013, a similar situation is observed today (2019–2020), etc.

Such a recurrence of the same mistakes in the development of Ukraine gives grounds to speak about the effect of “wandering in a circle”, which is opposite to the linear and progressive constitutional development of the state. Leaving this circle requires first of all understanding the essence of the current situation, finding out the causes of the existing problems and modelling their solutions. Since some of these issues have been the subject of separate publications, here we will focus on some of them.

1.1. Form of the government and power concentration by the Head of the state

Limitations of state power and prevention of state arbitrariness are directly related to the chosen option of separation of state power and form of government, respectively. With the adoption of the 1996 Constitution, Ukraine has chosen a mixed form of government, but it periodically fluctuates between its so-called “presidential-parliamentary” and “parliamentary-presidential” models. In this case, the fact that the content of the government (constitutional, internally restricted) rather than its form, as well as balance of the public power system, are much more valuable, is out of sight.

The fundamental idea of the separation of powers in a constitutional state is to limit state power in order to guarantee human rights and freedoms, prevent usurpation, excessive concentration and, accordingly, state arbitrariness. Therefore, the principle of separation of powers is the basis of the institutional design of a constitutional state. Having been reasoned by John

Locke⁷, James Harrington⁸, Charles-Louis Montesquieu, the idea of separation of powers has been evolving and developing, taking into account the peculiarities of social development. However, its focus on preventing arbitrariness through the establishment of legal restrictions on state power remained unchanged. As Montesquieu assumed, every person with power is inclined to abuse it and tries to exercise their authority for as long as possible. Therefore, it must be restrained by an appropriate organizational structure of state power, under which the legislative and executive powers cannot be united in one person or institution (otherwise there will be no possibility for guaranteeing freedom), and the judicial power must necessarily be separated from the power of the legislative and executive⁹.

In the modern interpretation, the concept of separation of state power mainly covers the following elements: 1) power is divided into three branches – legislative, executive, and judicial with a corresponding function of each of them; 2) each branch of government must be restricted in performing its function and should not interfere with the functions of other branches of state power; 3) the persons who make up the bodies of these branches of power must be separated from other branches of government and cannot simultaneously perform their functions. If these requirements are met, then each branch of government will act as a fuse for the arbitrariness of other branches of government¹⁰.

This doctrine is a kind of ideal model that has never been implemented into practice in such a “pure” form, but instead there are a number of options close to it. The practice of constitutional democracy is characterized by the existence of several successful options for the separation of powers, which are conditionally divided into rigid and flexible ones. This division is largely driven by the role of the president in the constitutional model of separation of powers.

The essence of the rigid model of state power separation, which was first successfully implemented in the United States of America, is to maximize the separation and autonomy of branches of state power, in which the president directly heads the executive, manages and, moreover, embodies it¹¹. In the

⁷ Locke John (2009) *Tsili politychnoho suspilstva ta vriaduvannia* [Of the Ends of Political Society and Government]. O. Protsenko and V. Lisovyi. Liberalizm: Liberalna tradytsiia politychnoho myslennia vid Dzhona Lokka do Dzhona Roulza. Antolohiia. 2-he vydannia (pereroblene). Kyiv: Smoloskyp, 2009, pp. 638–643 (in Ukrainian).

⁸ Harrington James (1992) *The Commonwealth of Oceana and A System of Politics*. Cambridge University Press, 1992, pp. 206–208.

⁹ Monteske Sh.L. (1999) *O dukhe zakonov* [The Spirit of Laws]. M: Mysl, 1999, pp. 137–139 (in Russian).

¹⁰ Vile M.J.C. *Constitutionalism and the Separation of Powers*. 2nd ed., Indianapolis: Liberty Fund, 1998. P. 5–19.

¹¹ Howell William G., (2013) *Thinking About the Presidency: The Primacy of Power*, Princeton: Princeton University Press, 2013.

United States, the system of separation of powers is constructed in such a way that branches of state power constantly compete with each other, thus restraining each other and forming a system of counterbalances¹². Only a small number of modern constitutional systems is based on the rigid model of separation of powers (if to take into account constitutional states with a universally recognized high level of democracy and the rule of law, except for the United States – they are present only in Uruguay and Costa Rica).

The model of flexible separation of powers implies the interconnection and interdependence of the legislative and executive branches of state power; their limitation in a constitutional democracy is guaranteed by the constitutional jurisdiction (in Continental Europe) or an independent court (United Kingdom). In the United Kingdom, for example, the mechanism of division of the state power is based on the supremacy of the parliament, while the legislature and the executive work in tandem. Therefore, the key task of the court is to restrain parliamentary supremacy and to prevent the arbitrariness of the parliamentary majority, which, in addition to passing laws, forms the government and controls its activities. As regards republics, in conditions of a flexible separation of state power, the President is primarily assigned the function of state representation, although he does not exclude the real powers in the sphere of executive power.

The model of a flexible separation of powers is also inherent in mixed forms of government (semi-presidential republics). They are characterised by such features of parliamentary form of government as a parliamentary way of forming a government, parliamentary accountability of the government, the dependence of parliamentary authority on the existence of a parliamentary majority (a formal feature – the president’s right to dissolve the parliament in the absence of it) and others. The involvement of the president, more or less, into the formation of the government does not deny the dependence of this process on the parliament. Such a flexible model of separation of state power is implemented in Ukraine.

As a rule, in constitutional doctrine, “pure” forms of government are associated with the risks of usurpation of power or, at least, its excessive concentration by the heads of state in presidential republics or ruling parties and their leaders in parliamentary ones¹³. Indeed, there are many such examples in history and in modern political and legal practice. That is why,

¹² Kriner Douglas L. and Reeves Andrew (2015), *The Particularistic President: Executive Branch Politics and Political Inequality*, New York: Cambridge University Press, 2015, pp. 16.

¹³ Stacey Richard, Sujit Choudhry (2014) *Semi-Presidential Government in the Post-Authoritarian Context. The Center for Constitutional Transitions Meeting the Challenges of Emerging Constitutional Democracy Working Paper Series*, URL: <https://ssrn.com/abstract=3025979>

the introduction of mixed forms of government is seen as a method of avoiding the threats that pure forms potentially carry. Logically, in the conditions of constitutional democracy, they should neutralize the excessive powers of the parliamentary majority or the head of state.

Thus, according to Duverger, the mixed government is characterized by three distinctive features: 1) a popularly elected president; 2) the president has substantial constitutional authority; 3) there is also a cabinet of ministers and a prime minister dependent on the confidence of the parliamentary majority¹⁴. Accordingly, the dual influence on the formation of the government by the president and parliament, as well as the double responsibility of the government, are intended to balance the power of the president, the legislature and the executive, as well as to restrain them from excessive concentration of powers and related abuses.

However, the experience of modern states shows that such a scheme does not always work in practice. On the contrary, the mixed form of government creates a number of problems that Ukraine also faces. The most acute and widespread are potential conflict and the threat of over-concentration of power by the head of state and / or political party to which he belongs.

First of all, it should be noted that with a mixed form of government, presidential power may be even stronger than in a presidential republic, because, in addition to powers in the executive branch, the head of state has significant leverage over the legislative power (this, incidentally, can partly explain the existing commitment to this model in the post-Soviet states). Therefore, in conditions where the president has his own parliamentary majority, he gains virtually unlimited control over the executive branch, as well as serious levers of influence on other elements of the constitutional system (the bodies, the formation and / or appointment of leaders of which is shared between the president and parliament to balance it). And when the president and the parliamentary majority are representatives of opposing political forces (the so-called “coexistence” state), the chances of conflict of mixed forms of government are high.

The Constitution of Ukraine, in the wording of 1996, introduced a mixed form of government with the predominance of presidential power. Not only was the Head of State a representative of the state and the Supreme Commander-in-Chief, but he also had considerable serious powers in the sphere of executive power, as well as powers to influence the parliament (including its dissolution). Under different political circumstances, this form of government has manifested itself in different ways, but in the period

¹⁴ Duverger M. (1980) A new political-system model: semi-presidential government. *European Journal of Political Research*, № 8(2), pp. 165–187.

2010–2013 it was reflected in the usurpation of power in the hands of President Yanukovych, whose political party had a majority in parliament.

Introduced by the constitution of Ukraine in the 2004 version, the mixed form of government with preference for parliamentary forms (as well as returning to it in 2014) solved this problem only at first glance and made it possible to achieve only a short-term goal – to partially limit the power of the head of state in specific political realities existing at that time. The mixed form of government is fundamentally dependent on existing political conditions, and its potential, as noted, provides for several options for implementation in practice.

During the period from 2005 to 2010, when the president and prime minister were representatives of different political parties, such a feature of the mixed form of government as conflict manifested itself quite clearly. A prime example of this is, in particular, the period of presidency of Viktor Yushchenko with Yulia Tymoshenko as Prime-minister, (2005, 2007–2010), when the President and the Prime-minister blocked each other's activities by using institutions of countersigning¹⁵, challenging legal acts to the Constitutional Court, early termination of powers, etc.

After the presidential and parliamentary elections in 2019 which led to the power of V. Zelensky and his political party, which gained the majority in the parliament, another negative feature of the mixed form of government emerged – the threat of concentration of powers by the head of state. Relying on a majority in the legislature, the President actually formed a government (although under the Constitution, these powers are vested in Parliament), replaced the Prosecutor General, the head of the Security Service of Ukraine, and heads of several other bodies of state power.

At the same time, the head of state introduced for consideration by the newly elected parliament (on the second day of its functioning) seven bills on amendments to the Constitution of Ukraine, which, if adopted, would in their totality lead to a significant strengthening of the presidential power (appointing heads of the State Bureau of Investigation, National Anti-corruption Bureau, introducing full discretion to create regulatory bodies¹⁶ etc.) and simultaneously

¹⁵ Kobryn V.S. (2016) Problemy praktychnoho funktsionuvannia instytutu kontrasyhnuvannia aktiv hlavy derzhavy v Ukraini [Problems of Practical Functioning of the Institute of Contraigning the Acts of the Head of State in Ukraine]. *Visnyk Natsionalnoho universytetu "Lvivska politekhnika"*. *Yurydychni nauky*, 2016, № 845, S. 200–205 (in Ukrainian).

¹⁶ Draft on the Amending of the art. 106 of the Constitution of Ukraine № 1014 (29.08.2019) (on the establishing the powers of the President of Ukraine to form 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) URL: https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66250 (in Ukrainian)

weakening the role of parliament (reducing the number of MPs in Ukraine¹⁷, expanding the list of grounds for early termination of powers of parliamentarians¹⁸). In addition, among the first laws passed, the Verkhovna Rada of Ukraine of the 9th convocation also adopted Law on Amendments to Article 80 of the Constitution of Ukraine concerning elimination of the People's Deputies of Ukraine inviolability¹⁹.

The next step was the introduction of a rather controversial draft of the bill on judicial reform, which foresees halving the number of judges of the newly formed Supreme Court (the mentioned bill caused a negative reaction not only of the legal experts, but also of the Council of Europe and the European Union bodies²⁰). All these legislative and constitutional initiatives were carried out against the backdrop of the first political steps of the newly elected head of state, including the dissolution of Parliament three months before the termination of his powers²¹.

It should be mentioned that a constitutional state with a mixed republican form of government can function successfully only if constitutional and administrative jurisdiction functions effectively and independently. It is them that guarantee the prevention of the arbitrariness of the President, the Parliament and the executive authorities. Those countries in which the constitutional and administrative jurisdictions are strong (for example, France) are less prone to excessive concentration of power by the head of state and the ruling party; in other cases, on the contrary. In Ukraine, unfortunately, constitutional and administrative jurisdictions do not constantly, independently and effectively, perform their functions of balancing the constitutional system, as will be discussed below.

¹⁷ Draft Law No. 1017 of 29.08.2019 on Amendments to art. 76 and 77 of the Constitution of Ukraine (concerning reducing the constitutional composition of the Verkhovna Rada of Ukraine and introducing a proportional electoral system) URL: https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66257

¹⁸ Draft Law No. 1027 of 29.08.2019 on Amendments to Article 81 of the Constitution of Ukraine (concerning additional grounds for early termination of the powers of the People's Deputy of Ukraine) URL: https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66257

¹⁹ Law of Ukraine No. 27-IX on Amendments to Article 80 of the Constitution of Ukraine (concerning inviolability of the People's Deputies of Ukraine) URL: <https://zakon.rada.gov.ua/laws/show/27-20>

²⁰ Opinion On Amendments To The Legal Framework Governing The Supreme Court And Judicial Governance Bodies Adopted By The Venice Commission At Its 121st Plenary Session (Venice, 6-7 December 2019) URL: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)027-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)027-e)

²¹ On the early termination of powers of the Verkhovna Rada of Ukraine and the appointment of snap elections: Presidential Decree. # 303/2019 of May 21, 2019 URL: <https://zakon.rada.gov.ua/laws/show/303/2019>

1.2. Effective activity of the Constitutional Court and independence of the Judiciary

The value of a Constitutional Court (or other body of constitutional jurisdiction) in a constitutional state is related to its functions. Thus, Constitutional courts not only decide on the unconstitutionality of legal acts and conduct the interpretation of the Constitution, the protection of constitutional rights and freedoms, which are the main areas of the constitutional jurisdiction activities, but also perform other functions important to ensure balance within the constitutional system, in particular, settle competencies and other disputes between the Federation and its subjects, election disputes, cases of bringing to justice the state officials, etc.

When it comes to states with mixed forms of government, to which Ukraine belongs, an important task of the Constitutional Courts (within their common mission to ensure constitutional democracy) is to prevent the arbitrariness of the president and parliament (parliamentary majority).

Therefore, the activities of the Constitutional jurisdiction bodies are related to the functioning of the mechanism of separation of state power, and the cases they resolve most often concern the higher bodies of state power and higher officials. That is why the effective exercise by the body of Constitutional Jurisdiction of its functions is possible only in the case of the guarantee and practical assurance of its independence and political neutrality, as well as its credibility as an independent arbitrator. Otherwise, the very existence of such an institution is devoid of content.

It was Hans Kelsen who was the first to consider the independence of the Constitutional Court as a necessary feature without which it could not carry out its functions. Analysing the Austrian reform of 1929, when the executive dissolved the composition of the Constitutional Court, formed by the Parliament and appointed new judges (who were its supporters), Kelsen noted, "It was the beginning of a political evolution that would inevitably lead to fascism and is responsible for the fact that Austria's annexation by the Nazis met with no resistance"²².

Coming back to the activities of the Ukrainian Constitutional Court, we should say that it can hardly be called unambiguously effective, and it takes its place in the constitutional system as a truly independent and politically impartial arbitrator. The periods of relative independence and efficiency were interrupted by 1) rather contradictory decisions, which called into question such impartiality (for example, the decision of the Constitutional Court on the

²² Hans Kelsen (1942) Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution, *The Journal of Politics*, № 4(2), p. 188.

possibility of being elected to the third term of office of the President²³), and 2) change in the Court's judicial position on the issue which it has already resolved, without any justification for such a change (for example, the decision of the Constitutional Court of 2008 on the possibility of membership of only parliamentary factions in the parliamentary coalition²⁴ and a decision of 2019 authorizing individual membership in the coalition²⁵).

In addition, the work of the Court was generally blocked for some periods. For example, from October 2005 to August 2006, the Verkhovna Rada of Ukraine did not initially appoint its own quota for the judges of the CCU and refused to take the oath of judges of the CCU (under the current legislation it was a condition for the commencement of powers of a judge). Therefore, due to incomplete composition the Court could not exercise its powers.

Moreover, in some cases, the Constitutional Court avoided resolving conflicts within the system of separation of powers, when it was expected to defend the principles of constitutional democracy, justifying it by formal provisions or by the doctrine of "political question". The latter holds that "some questions in their nature are fundamentally political, and not legal, and if a question is fundamentally political ... then the court will refuse to hear that case. It will claim that it doesn't have jurisdiction. And it will leave that question to some other aspect of the political process to settle out"²⁶.

For example, during the political crisis in 2007 (referred to in this study above as the President-Prime Minister's fight-rivalry), the CCU declined to decide on the constitutionality of the Cabinet of Ministers of Ukraine decree approving the Ministry of the Interior Regulations (which was the very

²³ Judgment of the Constitutional Court of Ukraine No. 22-rp / 2003 December 25, 2003 in the case on the constitutional submissions of 53 and 47 people's deputies of Ukraine on the official interpretation of the provisions of part three of Article 103 of the Constitution of Ukraine (case concerning the term of office of the President of Ukraine) URL: <https://zakon.rada.gov.ua/laws/show/v022p710-03> (in Ukrainian)

²⁴ Judgment of the Constitutional Court of Ukraine No. 16-rp / 2008 of 17 September 2008 in the case of the constitutional submission of 105 People's Deputies of Ukraine on the official interpretation of the provisions of Articles 83, 7, 9 of the Constitution of Ukraine (the case of a coalition of deputy factions in the Verkhovna Rada of Ukraine) URL: <https://zakon.rada.gov.ua/laws/show/v016p710-08> (in Ukrainian)

²⁵ Judgment of the Constitutional Court of Ukraine No. 11-rp / 2010 of 6 April 2010 in the case on the constitutional submission of 68 people's deputies of Ukraine regarding the official interpretation of the provisions of part six of Article 83 of the Constitution of Ukraine, part four of Article 59 of the Verkhovna Rada of Ukraine Regulations direct participation in forming a coalition of parliamentary factions in the Verkhovna Rada of Ukraine URL: <https://zakon.rada.gov.ua/laws/show/v011p710-10> (in Ukrainian)

²⁶ John E. Finn (2016). Civil Liberties and the Bill of Rights. *The Teaching Company. Part I: Lecture 4: The Court and Constitutional Interpretation* (p. 55). URL: <https://www.thegreatcourses.com/courses/civil-liberties-and-the-bill-of-rights.html>

important issue not only in political life but in the interpretation of the existing separation of powers system)²⁷.

Another example of such a situation was the actual self-removal of the Constitutional Court of Ukraine from resolving the question of the constitutionality of the dissolution by the President of Ukraine of the Verkhovna Rada of the VIII convocation. Thus, it was stated in the decision of the Constitutional Court of Ukraine that *the people* should resolve the said constitutional conflict by holding early parliamentary elections²⁸.

All this has led, on the one hand, to a feeling of uncertainty that the Constitutional Court will be able to effectively resist attempts to usurp power or to prevent state arbitrariness, and, on the other hand, to very scrupulous public attention to the body of Constitutional Jurisdiction activities and to every decision it takes. This, in turn, has provoked the problem of the dependence of the Constitutional Court on public opinion, which is quite skilfully formed by politicians. As Professor Dieter Grimm rightly remarked, “The existence of a constitutional court alone, however, is not sufficient to guarantee that politicians respect the constitution. Just as constitutionalism is an endangered achievement constitutional adjudication is in danger as well. Politicians, even if they originally agreed to establish judicial review, soon find out that its exercise by constitutional courts is often burdensome for them. Constitutions put politics under constraints and constitutional courts exist in order to enforce these constraints”²⁹.

Therefore, an important task for today is to ensure the real independence of the Constitutional Court of Ukraine and its impartiality in the exercise of powers. It is worth noting that the judicial reform of 2016 already envisaged changes that would have a positive impact on the status of the Constitutional Court of Ukraine and its independence. It concerns, in particular, the introduction of competitive bases for the selection of candidates for the posts of judges of the Constitutional Court. However, the legislative procedures aimed at implementing these principles need serious improvement. The low level of authority of the Constitutional Court of Ukraine as a result of its ambiguous activity over many years is one of the greatest obstacles to the

²⁷ Judgment of the Constitutional Court of Ukraine No. 20-y / 2007 of 28 March 2007 URL: <http://www.ccu.gov.ua/docs/1150> (in Ukrainian)

²⁸ Judgment of the Constitutional Court of Ukraine No. 6-p / 2019 of 20 June 2019 in the case on the constitutional submission of 68 people’s deputies of Ukraine concerning the conformity of the Constitution of Ukraine (constitutionality) with the Decree of the President of Ukraine “On early termination of powers of the Verkhovna Rada of Ukraine and the appointment of early elections” URL: <http://ccu.gov.ua/docs/2770> (in Ukrainian)

²⁹ Dieter Grimm (2011) Constitutional Adjudication and Constitutional Interpretation: between law and politics, *NUJS Law Review*, № 4(1), pp. 15–29.

development of constitutional statehood, since a number of adopted acts are still often interpreted not as protection of the supremacy of the Constitution and its values but as certain political interests.

Real independence is also necessary for the entire judicial system, which is an important element of the constitutional system of government. It performs the functions of protecting human rights and freedoms, as well as exercising control over the legality and constitutionality of the activities of public authorities and, therefore, guaranteeing the system of separation of state power as a whole. Ultimately, the balance between freedoms and human rights, the interests of society and the responsibilities of the state is achieved through the activities of the judiciary.

The judiciary can only perform these functions holding its independence, which should be the primary task of the on-going judicial reform. Taking into account the experience of Post-socialist states that have undergone such changes, special attention should be paid to preventing further dependence of the judiciary (from executive bodies conducting various reviews of the judges and their “relevance to the position of a judge”, prosecutors, other law enforcement agencies, the parliament and political parties).

2. Reasons for the existing Ukrainian constitutional development problems and measures for solving them

Analysing the problems of constitutional development of Ukraine and its constitutional system, it is important to find out their causes.

Apparently, there are many reasons that can be divided into two groups: 1) the reasons inherent in post-socialist states (most of such states have similar problems with the separation of powers, the independence of the court, and the activity of constitutional jurisdiction); 2) those that are specific to Ukraine (its geopolitical position, struggle for independence, territorial integrity, causes of historical and national-cultural character, etc.). Both of them should be considered and developed, and ways to solve them should be found.

An analysis of the constitutional development of Eastern European countries with many years of socialist experience shows that the problems described above are not unique to Ukraine. Of course, Western states that have deep constitutional traditions and extensive experience in the functioning of constitutional systems, developed peculiar tools for preventing the usurpation of power, as well as means and mechanisms for overcoming the constitutional and political conflicts. In contrast, the post-socialist states had to not only reform their public systems at the end of the 20th century, but also to change the ideology, as well as improve legal consciousness and constitutional culture, which are important conditions for its implementation in practice.

In general, post-socialist states have a number of common problems with the functioning of the constitutional systems of government. First of all, there are difficulties in implementing the principle of separation of state power, which sometimes gets a kind of “skew” in one direction or another.

In Romania, for example, which has a mixed form of government, there are ongoing conflicts between the head of state and the head of executive power. Naturally, it is the case for the Constitutional Court to resolve such disputes, however, it himself became an object of political influence. Political pressure on the constitutional jurisdiction bodies is the most widespread and at the same time serious problem of this group of states, as well as issue of guaranteeing the independence of the judiciary (Romania, Hungary, Poland).

The mentioned problems in post-socialist states and their homogeneity show that the functioning of a constitutional state requires not only the transfer of elaborated options of the separation of powers to the national soil, but also the implementation of other elements of constitutional democracy, especially the ideology of constitutionalism.

The ideology of constitutionalism is perceived at the levels of legal consciousness and legal culture, which is also important for the functioning of the constitutional system of government. The absence of a sense of constitutional limitation in the heads of state, the heads of governments, and representatives of the parliamentary majority inevitably leads to an imbalance in the constitutional system and the crisis of constitutionalism. All these problems are inherent to Ukraine as well.

In addition to the problems common to the former countries of the socialist camp, Ukraine also has its own special ones that complicate its constitutional development. The most important of them, as we consider, are the lack of a single and unchallenged state-national identity reflected in constitutional identity, difficult geopolitical situation related to voluntary abandonment of nuclear weapons, and problems of protection of state sovereignty and territorial integrity of Ukraine from armed aggression. Ukraine is still in search of its own national identity, which is often interpreted differently by political elites that come to power.

Constitutional identity, based on the national identity of the state, is quite important for the functioning of the constitutional state. It should be noted that all constitutional European states that emerged in the late 18th and early 19th centuries were national states. Of course, their later development was linked to European integration and the formation of the common European identity, but the grounds of their constitutional statehoods were national. Ukraine has its own rather complicated history, which reflected in strong national traditions in the one hand and their denial on the other. Is Ukraine a national or multinational state? This basic for resolving many important issues is still

questionable. Since the Ukrainian Constitution and related provisions leave a wide scope for their interpretation, from time to time we return to the complicated issues of the official language, special statues for some state entities and so on. The time so needed to build a strong and effective constitutional system is being wasted.

The same situation is with the geopolitical situation, on-going struggle for the territorial integrity and independence of Ukraine. All these problems are interrelated and related to the previous one. Resolving them takes too much time and effort, which could give significant results if used appropriately.

CONCLUSIONS

Constitutional development of Ukraine, aimed at building the constitutional state with constitutionally limited government according to doctrine of constitutionalism, needs resolving a range of issues, researched in this text. Some of them lie on the surface, while others are deeper and more serious.

Thus, problems of the constitutional system, such as improving the form of the government, preventing the concentration of power by the Head of the state, and ensuring independence and effectiveness of the Constitutional court and Judiciary are only one part of the problem that needs to be resolved. Of course, arbitrariness of state power needs to be avoided, but this is part of a deeper issue of the perception of constitutionalism ideology by the Ukrainian society and political elites. Only understanding of all threats of unlimited government, which definitely leads to the decline of constitutionalism, violation of human rights and, quite often, loss of statehood, can create an appropriate basis for its implementation.

Awareness of the full range of problems, both common to post-socialist states and purely Ukrainian ones, is the first step in developing a strategy for the constitutional development of Ukraine, which is essential today. It should include ideological and institutional parts. The first one should give answers to important questions of the Ukrainian constitutional identity and become a reliable basis for the unchallenged state sovereignty. The other one should create an effective, constitutionally limited constitutional system aimed at guaranteeing of human rights and freedoms.

SUMMARY

The article is dedicated to the issues of constitutional development of Ukraine. It is stated that constitutional development does not mean every change of political, social or state character, but only the one aimed at building a Constitutional state (in the sense of state with constitutionally limited government according to doctrine of constitutionalism). The

constitutional development of Ukraine is quite complex with repeatedly arising problems, which gives the grounds to call it “wandering in the circle”. The most important issues researched in the article are related to the form of government applied and the system of separation of powers, as well as the functioning of constitutional jurisdiction and concentration of powers by the Head of state. The main reasons for this are divided into two groups: those common for post-socialist states and the ones inherent to Ukraine. The first group includes the problems of separation of powers, independence of the judiciary, and the effective activity of constitutional jurisdiction. The second one deals with lack of a single and unchallenged state-national identity reflected in constitutional identity, difficult geopolitical situation related to voluntary abandonment of nuclear weapons, and problems of protection of state sovereignty and territorial integrity of Ukraine from armed aggression.

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