THE ORGANS OF CONSTITUTIONAL JUSTICE IN THE MECHANISM OF HUMAN RIGHTS AND DEMOCRACY PROTECTION: THE EUROPEAN AND UKRAINIAN EXPERIENCE

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Abstract: In this work the main modern approaches to place of organs of constitutional justice in the mechanism of human rights and democracy protection in Ukraine and European states are analyzed. Approaches of Ukrainian and foreign constitutional courts to the constitutional control are reviewed. Comparative analysis of different Constitutional Courts authorities is done. Several propositions for the improvement of the Constitutional Court of Ukraine legal nature, role and tasks are made.

Keywords: law, constitutional court, Ukraine, Europe, human rights, democracy, constitutional justice, constitutional jurisdiction.

Introduction
In modern democracies there is a clear legal mechanism for protection of human rights, where along with the courts of general jurisdiction an important place have the organs of constitutional justice. For the first time in Europe the constitutional court as a body of constitutional review was introduced in the Austrian judiciary after November 1920 when a democratic Constitution of the State (Federal law) was adopted. Establishment of the Constitutional Court was the implementation of the ideas of the famous Austrian law theorist Hans Kelzen. Therefore, this model of constitutional control is called Austrian or Kelzen.

This constitutional control model has spread in those European countries that have experienced periods of authoritarianism and totalitarianism and crossed to the path of democracy. It was introduced after the Second World War with the Basic Law of Germany of 23 May 1949, the Constitution of the Italian Republic of 22 December 1947, after the dissolution of the authoritarian regime in the Pyrenees - the Spanish Constitution, which entered into force on 29 December 1978, the Constitution of the Portuguese Republic of 2 April 1976, the law on amendments to the constitution or constitutions in the states that emerged in the post-Soviet period between 1989 and 1997. Interestingly, the constitutional courts had and have in common a serious popular support (as evidenced by opinion polls) and they belong to the most legitimate democratic institutions (Rozanvalon, 2009).

Method
In this work were used several methods: legal-comparative, method of system analysis, formal logical. Legal-comparative method was used for the research of different authorities of the organs of Constitutional Jurisdiction in European states. Method of system analysis was used for the identification of place of Constitutional Court in the system of higher state organs of power. Formal-logical method was used for the determination of different concepts, such as constitutional control, authorities of organs of constitutional jurisdiction.

Results
Thus, the role of constitutional justice in the modern legal, democratic state can not be overemphasized, as the constitutional courts occupy a key place in the mechanism of human rights and the sovereign rights of the people against unlawful actions and decisions of public authorities. The court is endowed with such power because it is the guard of the Constitution that is a social contract, on the one hand defining the basic rights and freedoms, and the other – limiting the powers of the state.

If we want the Constitutional Court of Ukraine to take a similar place in the higher echelons of power, we must radically review its legal nature, role and tasks, giving him powers that are today enshrined in the constitutions of European democracy states. Firstly, in the area of constitutional
control over observance of human rights and freedoms we should introduce the institute of a full constitutional complaint, which would provide an opportunity for the person (or group of people) to appeal to the Constitutional Court the constitutionality of laws and other legal acts that violated their rights and freedom. Secondly, to ensure the legitimacy and legality of the citizens' will we should give the Constitutional Court the authority to control the conduct of elections and referendums, as well as the final establishment of their results.

Discussion

Regarding the formation of constitutional justice in Ukraine, only after Ukraine gained independence in 1991 work began on the creation of a special body of legal protection of the Constitution of Ukraine – the Constitutional Court of Ukraine. On July 3, 1992 the Parliament of Ukraine adopted the Law of Ukraine "On the Constitutional Court of Ukraine", which determined the order of formation and main functions of this body of constitutional justice of independent Ukraine. However, the activities of that body from 1992 to 1996 didn’t begin because the Parliament of Ukraine only limited to the appointment of the first Chief of the Constitutional Court of Ukraine L. Yuzkov. Attempts to elect Deputy Chairman and judges of the Constitutional Court of Ukraine by the Parliament of Ukraine were unsuccessful. Only after the adoption of the current Constitution of Ukraine on June 28, 1996, which stipulated that the judiciary in the state was held by the Constitutional Court of Ukraine and courts of general jurisdiction (art. 124) and section XII of which established legal basis for the organization and functioning of the Constitutional Court Ukraine was approved a new Law of Ukraine "On the Constitutional Court of Ukraine" dated October 16, 1996, which marked the beginning of a real single body of constitutional jurisdiction in Ukraine. Countdown of the Constitution of Ukraine legal protection, in its narrow sense, should be taken from 1996, when the current Constitutional Court of Ukraine was actually created.

The fact that in modern democracies over the past twenty years, the role of constitutional courts has increased significantly, especially in the countries with declining legitimacy of parliaments and other senior state authorities, is not accidental. This process was due to the fact that the constitutional courts have become the real guardian of the constitution, and hence as rights of individuals and society as a whole. The very concept of the role of constitutional justice in society and the state has changed. So, from a body that was designed to carry only formal-legal function, namely to ensure the supremacy of the Constitution and establish a hierarchy of legal provisions subordinated to the constitution as "fundamental rule" (which is a positivist understanding of constitutional review that was inherent to H. Kelzen), it turned to the body , the purpose of which was to ensure functioning of the new value-oriented paradigm of law whose main goal is to ensure the rights and freedom of the individual as the basic prerequisites of effective state.

Over the past three decades the European constitutional justice has promoted protection of human rights and freedoms, therefore significantly increased their place and role in the higher echelons of power. This activity is sometimes described as constitutional control over the implementation of rights and freedoms. In many countries, where an Austrian model of the constitutional control was invented, it is made with the so-called constitutional complaint.

Institute of constitutional complaint is rightly considered to be the invention of European democracy. Today it is used in the European countries such as Albania, Austria, Hungary, Spain, Latvia, Germany, Poland, Russian Federation, Slovenia, Slovakia, Serbia, Czech Republic, Croatia, Switzerland, and others. In addition, in Austria, Germany, Russian Federation, Serbia, Switzerland the right to file a complaint to the Constitutional Court is also granted to legal persons, including citizens' associations.

Undoubtedly, the process of implementing individual constitutional complaint procedures in different countries varies. Overall constitutional complaint is divided into two broad categories: individual constitutional complaint and the so-called people's complaints (Actiopopularis). In some countries two types of complaints are practiced simultaneously, and in some - preferably one of them.

Thus, the classical model of constitutional complaint there is in Germany where the Federal Constitutional Court has the very broad powers, including the control on the protection of rights and freedoms. Any person who considers that her fundamental rights have been violated may file a complaint to the Constitutional Court (Article 93 of the Constitution of Germany). The Court has the authority to recognize as unconstitutional acts of public authorities, which violated constitutional rights of the individual. In addition, the Federal Constitutional Court can supervise the process of reviewing some cases. Every year, the German Constitutional Court considers about 4.5 thousands of complaints, though only 1.5 percent of them meets (Sokolov, 2002).
The subject of the constitutional complaint in the first place are the normative acts (laws, acts of the President, the government, the other subordinate rule-making). There is allowed the existence of certain restrictions on the types of regulations that may be challenged by the person to the body of constitutional justice. For example, in the Russian Federation subject of complaint may be only laws. Under Part 4 of Article 125 of the Constitution, which legalized the institute of the constitutional complaint and Article 3 of the Law "On the Constitutional Court of the Russian Federation" dated July 12, 1994, the Constitutional Court considers complaints about violation of constitutional rights and freedoms of citizens and by the judges complaint review the constitutionality of the law that is applied or has to be applied in a particular case.

In Spain, by contrast, under the procedure Amparo, you cannot challenge the constitutionality of the law, but only the constitutionality of subordinate regulations and instructions, as well as the actions of public authorities and officials of the state, regional autonomy and other local entities. Spain's 1978 Constitution restricts the constitutional rights of citizens, the violation of which may be grounds for an appeal to the Constitutional Court. This range covers mainly political rights and personal freedom (Art. 14 - 30 of the Spanish Constitution). The list of rights for the protection of which the procedure Amparo is used does not include social and economic rights, including the right to property. On average, the Constitutional Court of Spain considers annually about 500 complaints in accordance with the procedure Amparo (Baglay and Tumanov, 1998)

Overall, the European experience shows that in most cases the constitutional complaint concerns laws as well as regulations. An example is the implementation of constitutional control of human rights in Poland. In this state constitutional control is done by the Constitutional Tribunal, acting under the relevant provisions of the Constitution of the Republic of Poland of 2 April 1997 and the Law "On Constitutional Tribunal" of 1 August 1997. According to part.1, Art. 79 of the Constitution of the Republic of Poland: "Everyone whose constitutional freedoms or rights were violated is entitled in accordance with the principles set out in the law to file a complaint with the Constitutional Tribunal concerning the case on the constitutionality of a law or other regulation on which the court or public administration made a final decision on his freedoms or rights or on his obligations as defined in the Constitution.”. According to Art. 46 of the Law "On the Constitutional Tribunal" constitutional complaint may be made only after exhausting all instance possibilities of appeal that allows to prevent overloading of the Constitutional Tribunal. The law also defines other restrictions on the flow of complaints in order to enable effective normal operation of the Tribunal, including limitation of complaint (two months after the final decision of the authority), presence of the prescribed form of complaint, procedures of preliminary review of the complaint.

Thus the institute of the constitutional complaint is an important element in democratic society. As rightly noted by the former head of the Constitutional Court of the Republic of Moldova D. Pulbere, if the current system does not create a national mechanism to protect human rights and freedoms by introducing the constitutional complaint on the constitutional level, which will give the person access to constitutional jurisdiction, constitutional court is a legal mechanism available only for politicians (Pulbere, 2008). The practice of constitutional justice activities of European countries shows that neither officials of the higher authorities nor courts of general jurisdiction do not use the opportunities of constitutional justice to protect the rights and freedoms as active as do individuals. For example the statistics of the Constitutional Court of Spain: of the 500 cases referred to yearly only about two dozen complaints are considered from higher echelons of power, and all the rest - from the citizens.

The integration of Ukraine into the European space inevitably is linked to the experience of foreign countries of inclusion in the legal system such as an important element as the constitutional complaint. According to most scientists Ukrainian state should provide the person to take care of the protection of fundamental rights and freedoms on their own, when he realizes the corresponding need (Kostytsky M. Ushakova N, 2009; Shapoval V., 1998; Vladychenko S, 2006; Tkachuk P, 2006; Kolisnyk V, 2008). In this connection A. Selivanov rightly notes that citizens cannot expect the President or the Government to find an opportunity to support their individual or collective complaints of human rights violations by applicable law. Citizens have to rely on themselves (Selivanov, 2009). In our view, the grounds for introduction of constitutional claim exist in Ukraine. The right to go to the court to protect the constitutional rights and freedoms is guaranteed by the Constitution of Ukraine according to part. 2, Art. 8. Access to judicial protection enshrined in the Basic Law allows citizens to use the jurisdiction of the courts, which apply to all legal relations arising in the state (part. 2, Art. 124 of the Constitution of Ukraine), so access to justice in Ukraine should anticipate free access to constitutional justice.
Existing today in Ukraine the individual's right to appeal to the Constitutional Court, which according to M. Koziuba, to some extent offset the institute of the constitutional complaint (Koziuba, 2001), can not be considered as a complete tool of constitutional protection of rights and freedoms. The reason for this is that the subject of the constitutional appeal under Art. 42 of the Law of Ukraine "On the Constitutional Court of Ukraine," is that the Court officially interprets the Constitution and laws of Ukraine to ensure the exercise or protection of constitutional rights and freedoms of man and citizen, and thus only indirectly protects individual rights. Therefore, the Constitutional Court should have the first obligation to protect individual rights by recognizing unconstitutional acts which had violated rights and freedoms.

Therefore, in our view, there should be in the Constitution of Ukraine and the Law of Ukraine "On the Constitutional Court of Ukraine" the legal norm providing an opportunity for any person who believes that his constitutional rights were violated by public authority to submit a complaint to the Constitutional Court of Ukraine on the issue of the constitutionality of a law or other regulation on which the court or the public authorities made a final decision about his rights and freedoms, or of its obligations stipulated in the Constitution. It is important that the subject of the constitutional complaint should not be only laws but subordinate regulations as well that significantly enhance the ability of the court in the matter of protection of rights and freedoms. In drawing up the constitutional complaint is necessary: first, to take into account that this complaint should be the last remedy of human rights, so before contacting the Constitutional Court, it is necessary to use all possible legal remedies provided by the legislation of Ukraine. Secondly, the constitutional complaint shall relate to solely defined list of rights enshrined in the Constitution of Ukraine (priority in this list must have personal and political rights). Third, in order not to overload the work of the Constitutional Court there should be restrictions on the procedure for filing a constitutional complaint: the timing of the appeal, established complaint form, etc.

The role of constitutional justice in modern democracies grew not because they were powerful authority, but because it has become the real force that is able to protect the rights and freedoms and the sovereign rights of the people, as reflected in the constitution against encroachments by public authorities in particular those of the representative bodies that try to monopolize it right. Thus, the former head of the US Supreme Court John. Marshall argued the need for the constitutional review of acts of parliament that the people's will expressed in the Constitution has the highest character, and this will establish some limits that no body can cross. To protect the will judicial control by the judiciary is necessary (Constitutional Control, 2007). Therefore, it is not accidental that separate bodies of constitutional jurisdiction, such as the German Federal Constitutional Court its decisions always proclaim in the "name of the people."

Thus, constitutional courts play a role of mediator between the people and the government, which, on the one hand, protects the right of people to his will, which is realized primarily through elections and the referendum, on the other - controls the constitutionality and legitimacy of acts of state power. Thus is defined the role of courts dealing with constitutional issues by Alexander Hamilton who pointed out the binding decisions of such courts for the other branches of government. They are, in his view, endowed with such power because they interpret the rules of higher levels as intermediaries between the people and the law (Federalist, 1994).

Due to the role played by constitutional courts today in establishing and promoting democracy, the boundaries of their subject expertise greatly expanded. So in the constitutions of European countries constitutional justice bodies are responsible for the implementation of constitutional legitimacy and legality of elections and referendums. Powers of constitutional justice in different countries vary. The most common, binding authority of constitutional jurisdiction under the constitution is a decision on the constitutionality of the normative act on appointment or declaration of elections and referendums. In most European countries the constitutional norms defined range of subjects of constitutional appeal that may apply to the court decision on the constitutionality of elections and referendums. In many countries, as, particularly in Albania or Slovakia, these standards are directly fixed in the Constitution (Derevyanko, 2009).

In Ukraine, the issue is governed by the Law of Ukraine "On the Constitutional Court of Ukraine." In particular, in Chapter 11 of this Law "Features of proceedings on the constitutionality of acts on appointment of elections, referendum or local referendum in Crimea" the timing of the constitutional petition (Article 78), subject matter (Article 79), the scope of persons whose constitutional The court may involve participation in the proceedings (Article 80) and the requirements for resolution of the judgment (Article 81). The Constitutional Court of Ukraine in its activity repeatedly addressed the issue of direct democracy, which resulted in several dozen decisions taken and the conclusions of the
Court, which are directly or indirectly related to elections and referendums and are the sources of constitutional law in Ukraine (Kornienko M, 2008).

By defining the powers of the Constitutional Court of Ukraine to establish the constitutionality of the appointment of election and referendum the law in fact limits the powers of the Court in the constitutional review of these forms of expression of the citizens, thus creating obstacles in the implementation of the Constitutional Court legitimizing function of higher authorities.

Instead, the experience of European Constitutional Courts indicates that the bodies of constitutional justice are mandatory subjects of election and referendum relations. Thus, Article 25 of the Constitution of the Republic of Croatia provides that the Constitutional Court of the Republic of Croatia must "supervise the constitutionality and legality of elections and national referendums and resolve those disputes in elections that are not within the jurisdiction of the courts." The Constitutional Court of the Republic of Moldova "confirms the results of republican referendums, elections of the Parliament and the President." Similar rules are contained in the Constitution of Azerbaijan, Albania, Greece and Romania.

A specific power in the matter of direct democracy has the Constitutional Council of France. In accordance with Articles 58, 59, 60 of the Constitution of the French Republic Constitutional Council "observes" the election of the President of the Republic, deputies, senators, and a referendum procedures and announce their results. However, this body has the right to take and announce the decision to annul the election results. The last power does not apply to referendums in France which have higher legal force. In 1962, the Constitutional Council has decided that it has no right to control the "direct expression of national sovereignty" and thus formulated the doctrine that body of constitutional justice has no jurisdiction on decisions adopted at the national referendum.

Unlike the French Constitution to the jurisdiction of the constitutional courts of several countries belongs the power to resolve disputes on the results of referendums. Thus, according to the Constitution of the Slovak Republic "The Constitutional Court is considering objections to the results of the referendum." Complaints relating to the results of the referendum, decide the Constitutional Courts of Armenia, Georgia, Kazakhstan, Montenegro.

In Ukraine disputes regarding elections and referendums from September 1, 2005 belong to the jurisdiction of administrative courts (fifth paragraph of Article 17 of the Code of Administrative Procedure). Cases of the Central Election Commission results elections or referendum belong to the jurisdiction of the Supreme Administrative Court Ukraine as a court of first and last resort (the first part of the fourth paragraph of Article 18 of the Code of Ukraine). Such legal regulation and judicial practice prevailing in Ukraine in general not fully address the needs of judicial review of the election and referendum processes. In our view, the current procedure for disputes concerning the Central Election Commission results elections or referendum requires changes, in particular the provision of powers Constitutional Court of Ukraine to review the decisions of the Supreme Administrative Court as a court of last resort. So we think it is necessary to amend Article 150 of the Constitution of Ukraine and Chapter 11 of the Law of Ukraine "On the Constitutional Court of Ukraine" with the authority to control by the Constitutional Court on elections and referendums, as well as the final establishment of their results. Undoubtedly, to grant such powers the sole body of constitutional jurisdiction requires the adoption of a number of regulations that would allow to practically implement them and, most importantly, fundamentally review the role and place of the Constitutional Court in the system of higher state authorities.

However, in the context of constitutional control in Ukraine on the will of citizens in elections and referendums it would be appropriate to put to the Constitution of Ukraine the legal norm of about compulsory setting of constitutionality of certain laws, first of all the laws governing the organization and procedure of elections and referendums.

Since the main vocation of the Constitutional Court of Ukraine is to protect the sovereign will of the Ukrainian people, it should be the last instance to establish the final results of the elections and referendum. For this purpose it is necessary to provide both individual and collective complaints of citizens about violation of their rights during the popular will. In fact, the Constitutional Court would become the body that in a situation of impossibility of fair and free will of citizens (which can be seen in December 2004 during the "orange revolution") must take responsibility to take a final decision in the interests of the Ukrainian people.

Making appropriate changes in legislation based on the experience of foreign countries would help to eliminate some gaps monitoring the election and referendum legal relationship, concentrating control functions in a single body of constitutional jurisdiction - the Constitutional Court of Ukraine.
References