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## **THE CONSTITUTIONAL COURT OF UKRAINE AS THE ONLY BODY FOR THE ADVOCACY OF THE CONSTITUTION OF UKRAINE**

The formation of a separate jurisdictional body in Ukraine began only after Ukraine left the USSR and gained independence. Thus, on June 3, 1992, the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On the Constitutional Court of Ukraine" № 2400-XII [3]. This law recognized the CCU as an independent body in the judiciary (Article 1 of the Law), the main purpose of which was to ensure the constitutional legality and supremacy of the Constitution of Ukraine (Article 2 of the Law). This first law provided for its composition in the number of the Chairman, two deputies and 12 members, and also emphasized that the order of activity of the CCU should be determined by a special Law on Constitutional Proceedings [3]. The Constitutional Court of Ukraine rendered its first decision (№ 1-zp/1997) on 13 May 1997 in the case № 03/29-97 "On the official interpretation of Articles 58, 78, 79, 81 of the Constitution of Ukraine and Articles 243-21, 243-22, 243-25 of the Civil Procedure Code of Ukraine (in the case of incompatibility of the deputy mandate)" [4].

With the expiration of more than twenty years after this first decision of the Constitutional Court of Ukraine, the question still remains: is the CCU a body of protection, advocacy or, perhaps, guaranteeing the Constitution of Ukraine? This issue is relevant, in part, due to the presence in modern jurisprudence of discussions on the content and use of legal categories "guarantee", "protection", "advocacy" of the Constitution.

Analysis of the scientific works of leading domestic and foreign constitutionalists allows us to state the existence of three separate terminological approaches to the ratio of these categories. According to the first approach, these categories are identified or used as components of each other. According to the second – these terms are differentiated on different grounds and used separately from each other. The third approach emphasizes the need to standardize terminology and use the term “legal protection of the Constitution.”

Thus, the supporter of the first approach was Y. Todyka, who pointed to the system of general guarantees of the Constitution, which distinguishes economic, political, ideological, social [5, p. 291]. At the same time, the scholar used the terms “protection” and “advocacy” of the constitution as synonyms, speaking of guarantees of observance, protection and advocacy of the constitution. Yes, Y. Todyka stated that: “Protection and advocacy of the Constitution of Ukraine is the task and duty of all state structures and officials, and special responsibility rests with the highest state bodies: the Verkhovna Rada, the President of Ukraine, the Cabinet of Ministers, the Constitutional Court. ... It is important that the content of the Basic Law establishes the necessary mechanisms for the protection and advocacy of the constitution, the constitutional order, the strict implementation of constitutional provisions. Such mechanisms are defined in the 1996 Constitution of Ukraine. This is, first of all, the establishment that the Constitution has the highest legal force; laws and other regulations must comply with it; the norms of the Constitution are the norms of direct action; the conclusion of international agreements that contradict the Constitution is possible only after the relevant amendments to the Constitution of Ukraine” [5, p. 289–291].

According to M. Vitruk, to protect and advocate the constitution are called all public authorities within the powers and procedures granted to them by the constitution and laws. The bodies of public authority that protect and advocate the constitution, as world practice shows, are: the head of state; parliament; government and other public authorities that are part of the executive branch, law enforcement and supervisory authorities, local governments, courts [6, p. 179].

According to I. Koreyba, the legal protection of the Constitution is the prevention and cessation of violations of the rule of law, carried out through

a set of means for the actual implementation of constitutional provisions in public relations. Forms of legal protection – the external expression of legal actions (indirect and direct) aimed at ensuring the constitutional order and the implementation of constitutional norms. At the same time, the scientist considers “legal advocacy” a kind of “legal protection of the constitution”, an activity carried out in order to stop the violation of constitutional norms, when it has already taken place [7, p. 4].

It should be recognized that Hans Kelsen is the founder of the European model of constitutional justice, according to which this type of justice should be conducted not by courts of general jurisdiction, but by a specialized body – the Constitutional Court, or a quasi-judicial body – the Constitutional Council or the Constitutional Chamber of Supreme Courts. This vision was the basis for the establishment of the Supreme Constitutional Court in Austria in September 1919, and the very institution of constitutional justice in 1920 was defined in the Austrian Constitution [8].

Other scholars take the opposite approach and distinguish between the categories of “protection” and “advocacy” of the Constitution, using different grounds. A. Selivanov admits the existence of both terms – and “protection” and “advocacy” of the constitution. Moreover, we can conclude that these terms have a similar, but still different meaning. According to the researcher, protection concerns the avoidance of legal means, prevention of any influence on the constitutional order or the constitutional regime of functioning of the Basic Law by subjects of law, when other mechanisms of implementation of its norms are directly applied or involved and thus violation is not allowed constitutional space, is the direct subordination of any activity of government entities, individuals or legal entities to the Constitution [9]. For example, the scientist refers to the mechanism of amending the Constitution of Ukraine, which is provided by Section XIII of the Basic Law. In particular, in accordance with Article 153 of the Constitution of Ukraine prohibits such changes if they provide for the abolition or restriction of human and civil rights and freedoms or if they are aimed at eliminating the independence or violation of the territorial integrity of Ukraine. It is also impossible to make changes to the Constitution in conditions of martial law or state of emergency [9, p. 45].

Also A. Selivanov convincingly argues that, in contrast to protection, the concept of “advocacy” of constitutional relations, which applies to the entire content of the Constitution, is provided when there is a conflict of different legal interests. During such a conflict, each party is convinced of its legitimacy and insists on the protection of the violated constitutional right, which is reflected in certain rights, populations existing before the law, certain sponsorship acts or actions of the state subject unconstitutional, introduced or changed legal relations, regardless of rights court, another subject of state-legal relations or local self-government, which contradicts the Constitution, as well as other means of legal advocacy. The means of protection and advocacy of the Constitution are the President of Ukraine, the Verkhovna Rada of Ukraine, the Government of Ukraine and in all cases the only body of constitutional jurisdiction – the Constitutional Court of Ukraine (without independent initiative to determine the subject of advocacy). Advocacy can be carried out by all subjects on which jurisdictional powers are assigned [10, p. 80].

M. Vitruk, distinguishing between the concepts of “guarantee” and “protection and advocacy”, writes about the provision (guarantee), which, in his opinion, is aimed at creating conditions for the actual implementation of constitutional provisions. At the same time, protection (advocacy) have a different direction, namely: prevention and cessation of constitutional violations, the establishment and use of means of protection against them and means of responsibility for their commission. In this case, according to this scientist, in the first approximation, the concepts of protection and advocacy of the constitution can be used as equivalent, but can be distinguished on such grounds. The protection of the constitution is carried out by establishing in the constitution itself, in laws and other normative acts measures for prevention and means of detecting constitutional violations, measures to stop them, means of protection and measures of constitutional and other responsibility to restore violated constitutional provisions and punish those guilty of constitutional violations. The advocacy of the constitution is directly related to the active actions of both victims of constitutional violations in the use of remedies, and obliged competent bodies and officials to apply various means of legal responsibility to those who committed constitutional violations [11, p. 175–176].

Also, the terms “legal protection” and “legal advocacy” of the Constitution are not identical, according to T. Slinko and O. Kushnirenko. The main difference between them is that the legal advocacy of the Constitution should be discussed when the threat to the Constitution is so real that it is impossible to rectify the situation by ordinary protection measures (for example, by a decision of the Constitutional Court of Ukraine). The real threat to the existence of the Constitution itself and the constitutional order should be considered mass unrest among the population, the threat of a coup, a state of war and some others [11, p. 50]. In these cases, the Constitution should not just be protected, but advocate, with both legal and non-legal means [11, p. 50].

According to M. Teslenko, the concepts of “legal protection” and “legal advocacy” of the constitution must also be distinguished. Being united by a common object and common goals, they require adequacy in the methods of achieving them, which do not coincide with each other. If the legal protection of the constitution is a system of measures aimed at preventing violations of constitutional norms, the function of legal advocacy measures is to ensure the restoration of violated constitutional human rights and freedoms [12].

As noted above, the third approach emphasizes the need to standardize terminology and use the term “legal advocacy of the Constitution.” The supporter of this approach is M. Savchin. According to this position, the use of the term “protection” of the constitution is not entirely correct. According to the scholar, the question of the protection of the constitution is statist in nature and involves social activity to ensure its validity in terms of various aspects (establishment, implementation and interpretation) depending on the state. Therefore, it is more legitimate, in his opinion, to speak of the term “legal advocacy of the constitution”, which provides for social activity of participants in constitutional relations to ensure the validity of the constitution, preservation and enhancement of common legal heritage, including the heritage of constitutionalism [13].

In our opinion, the use of the term “guarantee of the Constitution” in the context of ensuring that the President of Ukraine observes it is quite justified, given the relevant function of the President, established by Article 102 of the Basic Law of our state [1]. It is also quite acceptable to use the

term "legal protection of the Constitution" in legal terminology, but in the context of the functioning of the law enforcement system.

Solving the question of determining the place and role of the Constitutional Court of Ukraine in the modern constitutional field of Ukraine, we proceed from the fact that the Constitution of the State is a unique social and legal treaty, which, given its special nature, important social value and legal status, requires not only tools general legal protection, but also special institutional means and specific procedural rules. Defining these means and rules as law enforcement eliminates their uniqueness as well as denies the phenomenon of the Constitution, its supremacy as the Basic Law of the State, which cannot be taken for granted and requires scientific and legislative recognition as means and rules of constitutional advocacy.

If all public authorities and their officials use relatively universal law enforcement tools, then some of them, namely those with legally defined law enforcement status, use specific tools, the competence of which emphasizes the functional law enforcement specifics of these bodies.

According to Article 1 of the Law of Ukraine "On State Protection of Court and Law Enforcement Employees" of December 23, 1993 № 3781-XII law enforcement agencies are recognized bodies of the Prosecutor's Office, Internal Affairs, Security Service, Military Law Enforcement Service of the Armed Forces of Ukraine, customs, security state border, bodies of the state tax service, bodies and institutions of execution of punishments, pre-trial detention centers, bodies of the state control and revision service, fish protection, state forest protection, other bodies which carry out law enforcement or law enforcement functions [14]. Despite the fact that in accordance with this law a system of special measures of state protection is established for judges of the Constitutional Court of Ukraine, judges of other courts and law enforcement officers, the only body of constitutional jurisdiction is not included in the list of law enforcement agencies.

Important in the system of legal protection of the Constitution is the role of courts of Ukraine, which in accordance with Articles 124, 125 of the Constitution of Ukraine as amended by the Law of 02 June 2016 № 1401-VIII and in accordance with Article 17 of the Law of Ukraine "On Judiciary and Status of Judges" as amended by the Law of June 2016

№ 1402-VIII, constitute a single three-tier system (local courts, appellate courts, the Supreme Court), built on the principles of territoriality, specialization and instance [15]. Thus, the Supreme Court as the highest body in the judiciary in accordance with the second part of Article 36 of the Law has a special power to appeal to the Constitutional Court of Ukraine on the constitutionality of laws, other legal acts and official interpretation of the Constitution of Ukraine [15].

In our opinion, all courts in the judicial system (both general and specialized), despite their main human rights function, also exercise legal protection of the Constitution, ensuring its supremacy as the law with the highest legal force. This conclusion is based on the provisions of all procedural codes governing national courts in the administration of justice, which recognize that the Constitution is the source of the law applied by the court. At the same time, most procedural codes detail the powers of courts to apply to the Supreme Court in case of non-compliance of a law or other legal act with the Constitution of Ukraine. Thus, in case of inconsistency of a legal act with the Constitution of Ukraine, the court must apply a legal act that has the highest legal force or the provisions of the relevant international treaty of Ukraine. If the court concludes that a law or other legal act contradicts the Constitution of Ukraine, the court should not apply such a law or other legal act, but is obliged to apply the norms of the Constitution of Ukraine as norms of direct action. In such cases, the courts after the decision in the case should apply to the Supreme Court to resolve the issue of submitting to the Constitutional Court of Ukraine a petition on the constitutionality of a law or other legal act, fourth Article 7 of the CAJ [16], part six of Article 10 of the CPC [17], part six of Article 11 of the CPC [18]). Although there is no such provision in the Criminal Procedure Code of Ukraine, the legal protection of the Constitution, given the specifics of criminal proceedings, is the obligation of the court under Article 9 of this Code to strictly comply with the Constitution of Ukraine during criminal proceedings [19].

It should be acknowledged that citizens who, although not members of the law enforcement system, also have the opportunity to apply certain legal remedies to the Constitution. An example of the legal tools of the citizens of Ukraine on the legal protection of the Constitution of Ukraine

is the right to unite in political parties and public organizations (Article 36), to participate in public affairs, to participate in national and local referendums, to freely elect and be elected to public authorities and local governments, access to public service (Article 38), meetings, rallies, marches and demonstrations (Article 39), the right to appeal (Article 40), etc. [1].

Unlike all these entities, the Constitutional Court of Ukraine has a special place in the system of state bodies. It is separated from the system of courts of general jurisdiction, and as a single, and therefore unique, jurisdictional body, it uses specific protective remedies unique to it. It should be reminded that the creation and long-term functioning of a single body of constitutional jurisdiction testifies to the reproduction of the European model of constitutional justice in Ukraine. In general, it is characterized by the separation of constitutional proceedings from the general and its implementation not by courts of general jurisdiction, but by a specialized jurisdictional (judicial or quasi-judicial) body.

In our opinion, the special status of the CCU is actually explained by the fact that it performs a unique function of legal advocacy of the Constitution of our state.

In our opinion, the analysis of the legislative changes that took place in the constitutional and legal field of Ukraine in 2016–2017 should be a confirmation of the special human rights purpose of the CCU in the modern Ukrainian state. These are, first of all, legislative changes by which the legislator clarified the human rights function of the Constitutional Court of Ukraine as the only body of constitutional jurisdiction in the system of public authorities. Thus, in accordance with the Law of Ukraine “On Amendments to the Constitution of Ukraine (Regarding Justice)” of June 2, 2016 № 1401-VIII, the Verkhovna Rada of Ukraine amended a number of amendments to the Constitution of Ukraine, which significantly changed the status of the Constitutional Court of Ukraine, endowing him with additional human rights powers [20].

Given the legislative definition of the status of the Constitutional Court of Ukraine, given in Article 1 of the Law of Ukraine “On the Constitutional Court of Ukraine” [2], the main functional purpose of a single national body of constitutional jurisdiction is to ensure the

highest legal force (supremacy) of the Constitution state system. After all, in accordance with Article 8 of the Constitution of Ukraine, laws adopted by the Verkhovna Rada of Ukraine and other normative legal acts adopted within the competence of higher state bodies must be adopted on the basis of the Constitution of Ukraine and must comply with it. This appointment is detailed through the relevant powers of the CCU, regulated by the amended version of Article 150 of the Constitution of Ukraine and Article 7 of the Law of Ukraine "On the Constitutional Court of Ukraine". Derived from the above purpose, but no less important, is the power of the CCU to officially interpret the Constitution of Ukraine and the laws of Ukraine [2].

### **CONCLUSIONS**

Thus, the legislator has established that the CCU, like other courts in Ukraine, within its competence has the constitutional authority to advocate the rights and freedoms of man and citizen established and guaranteed by the Constitution, i.e. its human rights function is emphasized.

The above gives grounds for a convincing conclusion not only to consider the function of constitutional jurisdiction assigned to the Constitutional Court of Ukraine as a function of legal advocacy of the Constitution of Ukraine, but also to deny the assignment of the CCU to the law enforcement system of Ukraine.

At the same time, we consider it expedient to ensure legal certainty and avoid different interpretations of the function of the Constitutional Court of Ukraine as a proposal to standardize legal terminology, to distinguish the use of legal terms "protection", "advocacy", "guarantee". It is expedient to introduce the term "advocacy of the Constitution" into legislative circulation by making appropriate clarifications to the current legislation in the context of defining the exclusive function of the Constitutional Court of Ukraine as the only body of legal protection of the Constitution to emphasize its special place and unique role in public authorities.

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