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ЗМІЦНЕННЯ ІНСТИТУЦІЙНОЇ СПРОМОЖНОСТІ КОНСТИТУЦІЙНОГО СУДУ УКРАЇНИ В УМОВАХ СУЧАСНОГО СУСПІЛЬСТВА ЯК НАУКОВО-ПРАКТИЧНА ПРОБЛЕМА

Анотація. *Сучасне наукове дослідження проблем конституційної юрисдикції в Україні зумовлене не тільки усталеним теоретико-практичним їх значенням для правової доктрини та правозастосування. В умовах сучасних світових викликів і загроз, які неминуче відбиваються на внутрішньому правопорядку України, зважаючи на національні проблеми у сфері дотримання прав і свобод людини, взаємодії держави та суспільства, законотворчості, правозастосування і відправлення правосуддя тощо, потреба у зміцненні інституційної спроможності Конституційного Суду України виступає важливим науково-практичним завданням. Воно спрямоване на посилення стабільності функціонування інституту конституційної юрисдикції за складних суспільно-політичних ситуацій, відновлення суспільної довіри до Конституційного Суду і держави загалом, підвищення ефективності правової охорони Конституції України та забезпечення її верховенства, відродження поваги до Основного Закону і верховенства права, наближення роботи Конституційного Суду до кращих міжнародних стандартів конституційної юрисдикції. Метою статті виступає обґрунтування дослідження проблеми зміцнення інституційної спроможності Конституційного Суду України як комплексної науково-прикладної, що передбачає її розв'язання на міждисциплінарному науковому просторі. Використовуються загальнонаукові методи дослідження, соціологічний метод, структурно-функціональний, а також міждисциплінарний підходи. Інституційна спроможність Конституційного Суду України розглядається як інституційна властивість органу конституційної юрисдикції, що відображає його організаційно-функціональну здатність забезпечувати за визначених умов і ресурсів реалізацію своїх завдань, функцій і повноважень. Показниками інституційної спроможності Конституційного Суду виступають ефективність, стабільність та його адаптованість до змін. Зміцнення інституційної спроможності Конституційного Суду має відбуватися шляхом правового забезпечення посилення його незалежності від політичного впливу, удосконалення механізмів відбору кандидатур на посади суддів, модернізації процедур конституційного провадження, розвитку механізму взаємодії Суду із громадськістю тощо. Визначаються основні напрями дослідження інституційної спроможності Конституційного Суду*

Ключові слова: *громадянське суспільство, верховенство права, конституційна юрисдикція, комплексна проблема, міждисциплінарний підхід*

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STRENGTHENING OF THE INSTITUTIONAL CAPACITY OF THE CONSTITUTIONAL COURT OF UKRAINE IN THE CONDITIONS OF MODERN SOCIETY AS A SCIENTIFIC AND PRACTICAL PROBLEM

Abstract. *Modern scientific research of the problems of constitutional jurisdiction in Ukraine is conditioned not only by their established theoretical and practical significance for legal doctrine and law enforcement. In the context of modern global challenges and threats that inevitably affect the domestic legal order of Ukraine, taking into consideration the national problems in the field of human rights and freedoms, interaction between state and society, lawmaking, law enforcement and administration of justice, etc., the need to strengthen the institutional capacity of the Constitutional Court is an important scientific and practical task. It is aimed at strengthening the stability of the institution of constitutional jurisdiction in difficult sociopolitical situations, restoring public confidence in the Constitutional Court and the state in general, improving the legal protection of the Constitution of Ukraine and ensuring its supremacy, reviving respect for the Basic Law and the rule of law, accommodating the functioning of the Constitutional Court to the best international standards of constitutional jurisdiction. The purpose of the article is to substantiate the study of the problem of strengthening the institutional capacity of the Constitutional Court of Ukraine as a complex scientific and applied issue, which provides for its solution in the interdisciplinary scientific space. General scientific research methods, sociological method, structural-functional, as well as interdisciplinary approaches, are used. The institutional capacity of the Constitutional Court of Ukraine is considered as an institutional property of a body of constitutional jurisdiction, which reflects its organisational and functional ability to ensure the implementation of its tasks, functions, and powers under certain conditions and resources. Indicators of the institutional capacity of the Constitutional Court are efficiency, stability, and adaptability to changes. Strengthening the institutional capacity of the Constitutional Court should take place through legal support for strengthening its independence from political influence, improving mechanisms for selecting candidates for judges, modernising constitutional proceedings, developing a mechanism for the Court's interaction with the public, and so on. The main directions of the study of the institutional capacity of the Constitutional Court are determined*

Keywords: *civil society, rule of law, constitutional jurisdiction, complex problem, interdisciplinary approach*

INTRODUCTION

The institution of constitutional jurisdiction is an integral feature of the democratic, social, legal state that Ukraine has proclaimed itself to be. The body of constitutional jurisdiction is called to protect the Constitution and constitutional values – man, his life and health, honor, dignity, inviolability, security, his decent living conditions, rule of law, freedom, equality, justice, the sovereign will of the people, democracy and other ideals of civil society. Therefore, since the founding of the institute of constitutional jurisdiction, then still in the Ukrainian SSR, the study of theoretical problems, and with the beginning of the actual activity of the Constitutional Court of Ukraine (1996) – and practical, play a priority significance in domestic legal science.

In addition, the need for modern scientific understanding of the problems of constitutional jurisdiction is caused not only by their established theoretical and practical significance. Scientific approaches to the problems of the Constitutional Court of Ukraine (hereinafter – the Constitutional Court, the Court) must be adjusted under the influence of dynamic changes in society because “social structures are partly sources of influence on the restriction or formation of power relations, determine power relations” [1]. Therefore, based on a solid theoretical basis and the methodological basis laid down in scientific works, further scientific research on ways to solve the problems of constitutional jurisdiction in Ukraine should consider modern global challenges and threats, as well as the conditions of modern Ukrainian society.

The negative tendencies of violation of human and civil rights and freedoms are deepening in Ukraine. In particular, according to the VRU Commissioner for Human Rights, the number of reports of violations

received by the Ombudsman during 2020 increased by 40% compared to last year [2]. The situation with human rights violations against human rights defenders, journalists, volunteers, and other representatives of civil society has also worsened [3]. Vulnerability to human rights contributes to developmental delays, and efforts to restore stability can create the conditions in which social and economic recovery and development can begin or resume [4]. Objectively, this highlights the problem of strengthening absolutely all elements of the human rights mechanism of the state, including the Constitutional Court as one of its key elements.

Therefore, effective constitutional and jurisdictional protection of rights and freedoms is the cornerstone of today. It should be noted that the quantitative annual figures for appeals to the Court with constitutional complaints traditionally exceed similar data for other forms of constitutional appeals. However, against the background of the need to increase the role of the body of constitutional jurisdiction in the system of protection of human rights and constitutional values of civil society, the Court at the end of 2020 gained a high level of public distrust (69% [5]).

It should be borne in mind that in pursuing the European course, the irreversibility of which is enshrined at the constitutional level, Ukraine must maintain the stability of the institution that ensures the rule of law, at the appropriate level in terms of EU membership. After all, in the framework of cooperation between Ukraine and the EU in the field of justice, freedom, and security, special importance is attached to strengthening the rule of law and strengthening institutions at all levels in the field of governance in general and the judiciary in particular. Cooperation is aimed at strengthening the judiciary, increasing its efficiency, guaranteeing its independence and impartiality, and combating corruption, and should be based on the principle of respect for human rights and fundamental freedoms.

In addition, the new legal conditions for the functioning of the Constitutional Court should be considered. The constitutional reform of 2016 in the field of justice was the starting point for the next stage in the history of the formation and development of the institution of constitutional jurisdiction in Ukraine and gave additional impetus to the study of the organisation and operation of the Court. But socially useful, at first glance, legislative innovations in the institution of constitutional jurisdiction potentially carry risks of inefficiency and need to be tested over time. In addition, any legislative transformations in the status, organization, and functions of the authority objectively affect the state of its institutional capacity. In particular, the 2017 year of the Court's work was significant, during which the Court (including due to the inability to elect the President of the Court) considered only 3 cases, compared to the usual statistics: on average about 10-13 cases per year.

Thus, in modern society, the need to strengthen the institutional capacity of the Constitutional Court of Ukraine is an important scientific and practical task aimed at restoring public confidence in the Court, reviving respect for the Constitution of Ukraine and the rule of law, strengthening the stability of constitutional jurisdiction in complex sociopolitical situations, bringing the work of the Constitutional Court closer to the best international standards of constitutional jurisdiction.

The purpose of the article is to substantiate the study of the need to strengthen the institutional capacity of the Constitutional Court of Ukraine as an important complex scientific and applied problem and the prospects for its solution using interdisciplinary methodological tools.

1. MATERIALS AND METHODS

During the writing of the article, general scientific research methods (analysis, synthesis, analogy, generalisation) were used, which were the theoretical basis for forming the concept of institutional capacity of the Constitutional Court of Ukraine and determining its key parameters. In particular, in the course of scientific research using the methods of analysis and generalisation, the basic characteristics of institutional capacity extrapolated to the sphere of constitutional jurisdiction were identified. Scientific research of the problem of institutional capacity of the Constitutional Court involves the application of the structural and functional approach, which allows to analysing the problem through the prism of the general features of the Constitutional Court as a body of state power and its features as a body of constitutional jurisdiction with assigned tasks, functions, powers, personnel composition, organisational structure, administrative procedures, constitutional proceedings, namely as a state institution.

The analysis of the problem of strengthening the institutional capacity of the Constitutional Court of Ukraine is based on the provisions of the Constitution of Ukraine, the Law of Ukraine "On the Constitutional Court of Ukraine", the Rules of Procedure of the Constitutional Court of Ukraine, the Communication Strategy of the Constitutional Court of Ukraine for 2019-2021, project on Strategy for the Development of Justice and Constitutional Judiciary for 2021-2023, bills on the constitutional jurisdiction reform. In the process of developing a theoretical model for a comprehensive study of this problem, the authors considered the results

of research conducted over almost a quarter of a century of the existence of the institute of constitutional jurisdiction in Ukraine.

At the same time, from the published scientific sources on the problems of organisation and activity of the Constitutional Court of Ukraine, the new resource of scientific knowledge is largely concentrated in dissertations. Their systematised data (search, selection, and systematisation of data is the result of analysis of bibliographic records of scientific works contained in the system of electronic and traditional catalogs and files of the Vernadsky National Library of Ukraine and the National Library of Ukraine named after Yaroslav the Wise) showed that the priority role in solving the problems of constitutional jurisdiction belongs to the theory of constitutional law. Each of the dissertations contains adequate proposals for improving the organisation and activities of the Court, increasing the efficiency of its work.

However, through the prism of the category of institutional capacity of the body of constitutional jurisdiction, basic research has not been conducted, which, among other reasons, attracted the attention of the authors to explore the scientific perspectives of this topic.

2. RESULTS AND DISCUSSION

2.1. *A systematic view of the category of institutional capacity in modern society*

A complex scientific problem is a system of various theoretical and practical tasks that belong to the subject field of research and are united by its common goal. Objectively speaking, almost all the problems that modern social development poses to science are complex, systemic in nature. Their solutions require the joint efforts of representatives of different fields of knowledge and/or scientific specialties of one field. The application of an integrated approach is traditionally used by modern legal science in the study of the phenomena of state and legal reality. Thus, complexity is an important component of modern scientific thinking. This category means taking into account the relationships and integrity of social life, the deep internal connection of its various spheres.

The problem of strengthening the institutional capacity of the Constitutional Court in modern society is no exception. The complex nature of this problem is due to the multifactorial dependence of the institutional capacity of the Constitutional Court, as well as the specifics of the concept of “institutional capacity” itself as one of the essentials in the study. As shown further, it is multidimensional and requires a systematic approach. Using the categories of terminology, the authors characterise the combination of terms “institutional capacity” as a multicomponent, formed by two tokens: “institutional” and “capacity”. In this case, the adjective “institutional” refers to “institution” (meaning agency, establishment) and is derived from it [6]. In English, a society, organisation, institution is translated as “institution” [7].

The noun “capacity” means a property in the sense of capable, namely having the ability to perform, to act, to do something; who can, has the ability to do anything; the ability to do something; the presence of conditions conducive to something, circumstances that help something; possibility [7]. The English translation of the word “capacity” is also multivariate: capacity, capability, volume; ability, readiness, competence, opportunity, designation, position, legal capacity [7]. At the international level, institutional capacity is treated in the context of the national development of states. The publication of the United Nations Development Program (UNDP, UNDP, the Agency for Assistance to Countries in Achieving Sustainable Development Goals), “Measuring Capacity” offers a general understanding and structure for measuring institutional capacity.

UNDP defines capacity as the ability of individuals, institutions, and societies to perform functions, solve problems and set and achieve goals on a sustainable basis. Capacity (or potential) development, according to the UNDP approach, means “how” to make development work better. In other words, it is about making institutions more capable (effective) of providing and promoting human development. UNDP notes that the strength of national institutions (formal, informal, public, private) is crucial to achieving national development goals, the progress, and achievement of which is due, inter alia, to changes in the efficiency, stability, and adaptability of institutions. Hence, the key to achieving the goals of national development is the constant improvement of the efficiency, stability, and adaptability of national institutions. **Efficiency** is seen by UNDP as the ability of an institution to turn invested resources into productive use, **stability** means to seek solutions to problems and remove barriers, **adaptability** means to adapt to changing realities [8]. UNDP calls efficiency, stability, and adaptability the institutional qualities to be demonstrated by key government systems, especially in crisis situations [9].

2.2. Essence of institutional capacity in the context of national development

Analysing theories of social development, Stanford University professor Stephen D. Krasner concludes that the theory of institutional capacity in strengthening the state plays an important role in the state apparatus, which is able to concentrate and effectively develop power for social purposes, and be able to establish order and rule law [10]. Without effective institutions, chaos can appear and sustained economic growth will not be possible [10]. The stance of the capacity of state and public institutions has a direct impact on the stance of state institutional capacity (“state capacity”). In this context, Hanna Klipkova develops the concept of the capacity of state institutions as a tool for studying the institutional quality of the state. The use of the category of the capacity of state institutions, as the researcher notes, allows studying the real capabilities of the state, to find out who actually manages them, using power mechanisms to achieve private goals. The capacity of the state-institutional system is a key factor for the possibility of reforming, developing, and eventually the existence of a society with the current form of the political system. This category determines the level of viability of the state [11]. In the context of the institutional capacity of the state, Hanna Bäck (University of Mannheim) and Axel Hadenius (Lund University) use the term “functioning state”, referring to its first feature – statehood (the ability of public authorities to maintain monopolistic control in the military, legal and financial terms) [12].

In turn, Kateryna Zaremba also identifies the concept of “institutional capacity” with the concept of “statehood”, and considers institutional failure as a key factor in the weakness of the state [13]. Oleksiy Valevsky attributes institutional capacity to a high level of institutionalisation (the process of forming stable models of social interaction), which ensures the proper performance of its functions by the authority. In contrast to institutional capacity, a low level of institutionalisation (institutional failure) indicates a weak impact of the institution on the social situation. Therefore, institutional capacity ensures the implementation of effective policies, and institutional failure always produces conflicting and ineffective policies [14].

According to Mykhailo Savchyn, the institutional capacity of the state is declared in Article 3 of the Constitution of Ukraine. Based on this, the meaning of the functioning of the Ukrainian state is to provide conditions for the free development of the individual. This fundamental postulate establishes requirements for the state to act in accordance with stable and predictable rules of the game, which determine the legal certainty and validity of government decisions [15]. That is, human rights themselves determine the requirements for the quality of organisation and operation of public institutions [16]. Thus, the ability to consistently enforce power decisions focused on human rights indicates the institutional capacity of the state [15]. The general concept of institutional capacity is given by the authors of the scientific-analytical report “Institutionalisation of public administration” (2019): institutional capacity is organisational and functional ability of the institution to implement its objectives and achieve the goals of activity [16].

Hence, the essence of institutional capacity is revealed through the categories of quality, efficiency, productivity (resultativity), firmness, sustainability, stability, etc., which reflect a certain state of public or private institutions. This concept is multidimensional, through which it is possible to systematically approach the study of institutional problems of the state in the context of the relevant goals of national development, to consider these problems in the context of the “concept of stabilisation”. Foreign analysts Steven A. Zyck and Robert Muggah have noted that stabilisation requires a combination of tools and approaches, and should be understood as the result of a combined multi-component strategy [4].

2.3. The concept of the institutional capacity of the Constitutional Court of Ukraine

In relation to a public authority, institutional capacity can be considered as:

- a) its institutional property;
- b) institutional capacity (reserve);
- c) the total indicator of efficiency, stability, adaptability;
- d) the institutional component of the mechanism of the state;
- e) the parameter of its institutional capacity;
- f) the condition of national development;
- g) the factor of formation of institutional trust.

Extrapolating the characteristics of institutional capacity to the sphere of constitutional jurisdiction, it can be noted that **the institutional capacity of the Constitutional Court is an institutional property of a body of constitutional jurisdiction, which reflects its organisational and functional ability to ensure the implementation of its tasks, functions, and powers.**

Based on the scheme of measuring the level of institutional capacity proposed by the UN Development Program, the key components of the theoretical model of the institutional capacity of the Constitutional Court

are efficiency, stability, adaptability. The methodological way of theoretical development of the problem and formation of the doctrinal model of strengthening the institutional capacity of the Constitutional Court is the structural-functional approach. Organisational and functional aspects of this approach are complementary (cumulative): organisational reflects the conditionally static form of the institutional characteristics of the Court; functional reflects the dynamic side (activity).

The structural-functional approach is based on the analysis of the Court through the prism of its general features as a body of state power and special characteristics as a body of constitutional jurisdiction with assigned tasks, functions, powers, formation, staffing, organisational structure, administrative procedures, constitutional proceedings, that is, as a state institution. This approach allows identifying the following key areas of research on strengthening the institutional capacity of the Constitutional Court at the present stage:

1) The state of legal support of the organisation and activity of the Constitutional Court and ways of its improvement;

2) the mechanism for selecting candidates for the positions of judges of the Constitutional Court;

3) the effectiveness of the structure of the Constitutional Court and the implementation of its functions;

4) efficiency of execution of acts of the Constitutional Court;

5) the mechanism of interaction between the Court and civil society.

The state of the institutional capacity of the Constitutional Court plays an important role in the development of the statehood and legal system of Ukraine. M. Savchyn puts the ability of the Constitutional Court to make decisions based on constitutional values and principles as the first parameter of the institutional capacity of the state [15]. Therefore, since the Constitutional Court is the last legal “bastion” in the mechanism of national remedies, in the context of the implementation of the constitutional duty of the state (Article 3 of the Constitution of Ukraine), the higher the level of institutional capacity of the Court, the better the stance of the protection of rights and freedoms of human and citizen and other subjects of civil society, the higher the degree of respect for the Constitution and constitutional values, as well as the degree of institutional trust in the Court, stronger its authority and stronger the state itself.

2.4. The role of the institutional capacity of the Constitutional Court of Ukraine for national development

The appropriate level of institutional capacity of constitutional courts is especially important in unstable and contradictory sociopolitical conditions, conflicts, crises, and other turning points for the state. The Court of constitutional jurisdiction in its activities, notes V. Kovalchuk, constantly balances between law and policy, which significantly distinguishes it from the courts of general jurisdiction. Being, essentially, a non-political institution, by virtue of its powers, the constitutional court is forced to make decisions that have essential political significance. This is especially relating to the constitutional justice in developed democracies, where courts base their decisions not only on positive constitutional norms but also on unwritten constitutional norms and principles, and also carry out “creative”, namely expanded interpretation of the constitution, which may arouse “suspicion” regarding their impartiality and political neutrality [17].

As explained by Nathan J. Brown, Julian G. Waller, in cases of constitutional vacuum, including when the political system operates outside the constitutional field, constitutional courts seem to cease to play their primary role (explain the content and spirit of the constitution). However, as per the fact that courts play a role in resolving fundamental issues, they and their judges can go beyond a strictly formalised decision framework. In such cases, constitutional courts often serve as the ultimate symbols of the permanence and legitimacy of the state, which is above the vicissitudes of politics [18]. Therefore, in the context of democratic transit, notes S. Gardbaum (University of California), constitutional courts need a careful balance between constitutional scrutiny and political provocations. Constitutional courts may entrust this balance to the law, taking a wise and cautious political decision [19].

In this context, the **state of the institutional capacity of the Constitutional Court largely depends on the state of its institutional independence**. In general, the independence of the judiciary from the direct political domination of another branch of government is a critical and traditional source of the judiciary [20]. The institutional independence of the judiciary is a complex and multifaceted phenomenon, as it should be seen as preventing any undue outside influence on the judiciary, its full autonomy from other branches of government, which means non-interference in the judiciary, and presupposes judicial independence in all its aspects, manifestations, guarantees of independence and inviolability of judges in full. Such independence is universal in the constitutional and legal dimension, given its importance as an essential requirement of the principle of separation of powers, the rule of law, and the right to judicial protection [21-23].

As convincing analysis of recent trends in the practice of the Constitutional Court to protect judicial independence, there is not only a violation of the individual guarantees of judicial independence but also an

intervention in the institutional independence of the judiciary in Ukraine as an independent arbitrator from among the other branches of government through the introduction of aggregate legislative changes in the national judicial system, which encroached on its constitutionally defined structure and key guarantees of the independence of judges (the principle of immutability of judges, their proper material maintenance, ensuring the independence of judicial self-government) [24-26]. This indicates the presence of signs of crisis in the relationship between the legislative and judicial branches of government, which undermines public confidence in the latter, contradicts the constitutional principles of separation of powers, the rule of law, eliminates the right to judicial protection, and weakens the constitutional order in general.

It is important to note that in the context of modern judicial reform in Ukraine, the strengthening of the institutional capacity of the Constitutional Court should be carried out considering the current demands of society for the integrity of government. The Constitution of Ukraine [27] and the Law of Ukraine “On the Constitutional Court of Ukraine” [28] stipulate that judges of the Constitutional Court must have high moral qualities and be lawyers with a recognised level of competence. It is clear that every candidate for the position of a judge of the Constitutional Court deserves such characteristics due to his/her efforts and achievements in the scientific and/or practical field. At the same time, for the objectivity of the selection, it would be expedient to focus on a scientifically sound list of moral qualities and, perhaps, business abilities required to hold the position of a judge of the Constitutional Court, the methodology of their evaluation, using the Standards of Professional Ethics to be established by the Court. These legislative requirements should be supported by the principle of the integrity of judges of the Court.

CONCLUSIONS

External threats and internal challenges are a powerful stimulus to strengthen the potential of the Ukrainian state and its key institutions. One of the most important factors in establishing a developed civil society in Ukraine according to the best European standards is the stable and effective operation of the Constitutional Court of Ukraine. The establishment of the Constitutional Court in Ukraine was the most significant step towards the development of our state as a legal state and of Ukrainian society as a civil society. The Constitutional Court of Ukraine ensures the rule of law, the rule of the Constitution and is the only body of the state that by exercising its functions and powers provides legal protection of constitutional values and ideals of civil society: man, his life and health, honor, dignity, inviolability, security, its decent living conditions, freedom, equality, justice, the sovereign will of the people.

The multidimensionality of the phenomenon of constitutional jurisdiction and, accordingly, the multifaceted nature of its research in the field of domestic science is demonstrated by the scientific works of theorists of common law doctrine, constitutionalists, and other scientific specialties. In the field of legal science in times of independence of Ukraine, a huge amount of scientific work on development issues of constitutional jurisdiction was held. At the same time, in the context of world trends in global development and national conditions for the formation of the rule of law and civil society, increasing the institutional capacity of the Constitutional Court of Ukraine is a significant scientific and practical problem. It is comprehensive and requires an interdisciplinary approach.

The institutional capacity of the Constitutional Court is a parameter of the institutional capacity of the state itself and, at the same time, is a factor in the formation of institutional trust. It is largely through the “channel” of constitutional jurisdiction that the Constitution of Ukraine exerts a reciprocal influence on society, strengthening its position in relations with the state. Hence, against the background of general trends in modern jurisprudence and its branches, improving the institution of constitutional jurisdiction in Ukraine means not so much and not primarily point changes in the mechanism of its functioning, but a systematic update of this mechanism by strengthening the institutional capacity of the Constitutional Court.

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