CONSTITUTIONALISATION OF LEGISLATION UPON THE ADMINISTRATION OF JUSTICE AS A MANIFESTATION OF THE RULE OF LAW (EVIDENCE FROM UKRAINE)

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Abstract: *This study investigates the formal and material criteria of constitutionality of the law in the law enforcement activities of courts in the judicial system as the basis for implementing the rule of law. Research methods: methods of the doctrine of judicial law (applied, method of complex analysis, structural and functional method), dialectical, empirical, comparative legal, and Aristotelian. The study proved that the Supreme Court mainly does not apply the constitutional provisions in cases where the final judgement impacts further redistribution of budget funds. The study modelled the risks of violating the constitutional principle of a binding judicial decision, when the performance of the judgement is associated with a considerable redistribution of budget expenditures and the actual lack of funds in the current accounts of legal entities of public law containing exclusively protected items.*

Keywords: presumption, procedure, competence of court, dispute resolution, law enforcement activities.

In the apt expression of T. Allan[1], the core of the analysis of the rule of law as an ideal of the constitutional system of government is a clearly defined concept of law. From this standpoint, human dignity and individual autonomy are fundamental values, and therefore integral prerequisites for any right. Part 2, Article 124 of the Fundamental Law of Ukraine states that its current version extends the jurisdiction of courts only to any legal dispute and criminal charge, providing for the possibility of courts to consider cases in the events stipulated by law. The new version of this constitutional provision, according to the authors of this study, narrowed judicial jurisdiction, depriving courts of universality in prompt response to the emergence of new legal relations in order to resolve disputes about law and avoid legal conflicts, which, in turn, weakened the national legal system of internal dynamism in ensuring respect for the rule of law[2]. Only in this case will the law be fair.

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[1] T. Allan, *Constitutional justice. Liberal theory of rule of law*, National University of Kyiv-Mohyla Academy, Kyiv, 2008.

[2] I. Berestova, O. Khotynska-Nor, O. Kopytova, O. Bratel, S. Dronov, "Subordinate relationship between civil and constitutional legal proceedings in the countries with an autonomous body of constitutional control", in *Journal of Legal, Ethical and Regulatory Issues*, 2020, vol. 23, p. 1-8; A.O. Selivanov, *The right in the modern political life of Ukraine*, Lohos, Kyiv, 2020.

Thus, in outlaw states and societies that are yet looking for their individual parameters of a civilised civil society, there are mostly laws that cannot be classified as constitutional[3]. Such laws do not have a targeted focus on the real provision of individual rights and freedoms[4]. The largest share is generally occupied by laws that reflect the will and interests of the state itself, state bodies, officials, and to a lesser extent – the will and interests of society and the individual[5]. Constitutional laws have a priority value nature, so by their very nature they cannot merge with the potential of illegitimate (which are still the majority) laws that function in various spheres of the legal life of society[6]**Error! Reference source not found.**. The authors of this study state that the rule of law organically interacts with constitutional legality as a special property of laws not only at the time of their creation, but also at the stage of law enforcement. Considering the formal definition of legality as the main component of the rule of law, constitutional legality is regarded by the authors as the core and basic component of the principle of legality. In this regard, the authors form the initial thesis that constitutional legality can indirectly be considered a key element of the rule of law through the procedure of virtual constitutionalisation of laws by courts in their law enforcement activities. The existence or absence of these indirect relationships can be traced precisely in this activity. If a dispute or criminal charge is considered by a fair court and based on the results of the judicial procedure, the court decision is performed (voluntarily or forcibly) without further initiatives of constitutional proceedings or appeals to international courts, the rule of law can be considered ensured in the consideration of the case by the court[7].

Respect for human rights is a fundamental component of the material concept of the rule of law. After all, human rights form an integral component of law, their existence outside the law is impossible, just as law cannot exist

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[3] V.I. Borysova, K.Y. Ivanova, I.V. Iurevych, O.M. Ovcharenko, "Judicial protection of civil rights in Ukraine: National experience through the prism of European standards", *in Journal of Advanced Research in Law and Economics*, 2019, vol. 10, no. 1, p. 66-84.

[4] Y. Orlov, "Thermodynamic processes in the social system as a factor of legal liberalization", in *Scientific Journal of the National Academy of Internal Affairs*, 2021, vol. 118, no. 1, p. 50-57.

[5] V. Tatsiy, S. Serohina, "Bicameralism: European Tendencies and Perspectives for Ukraine", in *Baltic Journal of European Studies*, 2018, vol. 8, no. 1, p. 101-122.

[6] A.V. Grin, *The relationship between natural law and legal laws in the context of the development of civil society (theoretical aspects): thesis of the Candidate of Juridical Sciences*, Kuban state agrarian University named after I.T. Trubilin, Krasnodar, 2014; O.M. Yaroshenko, A.M. Sliusar, O.H. Sereda, V.O. Zakrynytska, "Legal relation: The issues of delineation (on the basis of the civil law of Ukraine)", in *Asia Life Sciences*, 2019, no. 2, p. 719-734.

[7] S.S. Cherniavskyi, B.M. Holovkin, Y.M. Chornous, V.Y. Bodnar, I.V. Zhuk, "International cooperation in the field of fighting crime: Directions, levels and forms of realization", in *Journal of Legal, Ethical and Regulatory Issues*, 2019, vol. 22, no. 3. Available at https://www.abacademies.org/articles/International-cooperation-in-the-field-of-fighting-crime-directions-levels-and-forms-of-realization-1544-0044-22-3-348.pdf

without human rights because through the catalogue of human rights, primarily constitutional ones, the ideas of equality, freedom, and justice are embodied and guaranteed[8]. One of the requirements of the material aspect of supremacy is the establishment of clear rules for restricting human rights in rule-making and law enforcement practice. For example, in the practice of the Constitutional Court of Ukraine (hereinafter referred to as "the CCU"), the following fundamental ideas were developed on this matter. In particular, in decision No. 2-RP/2016 of June 1, 2016 (case on judicial control over the hospitalisation of incapacitated persons in a psychiatric institution), the Constitutional Court noted that "restrictions on the exercise of constitutional rights and freedoms cannot be arbitrary and unfair laws of Ukraine, have a legitimate purpose, be conditioned by the public need to achieve this purpose, proportional and justified; in case of restriction of a constitutional right or freedom, the legislator is obliged to introduce such legal regulation that would enable an optimal achievement of the legitimate purpose with minimal interference with the exercise of this right or freedom and not violate the essential content of such a right"[9].

Materials and methods

The fundamental purpose of the methodology is to investigate and apply approaches, methods, principles, etc., which allow gaining new knowledge (theoretical level) and practically changing reality (empirical level). A meaningful understanding of the methodology proceeds from the fact that it implements an instrumental, search function[10]. Identification of the grounds and procedure of actual constitutionalisation of laws by courts in the administration of justice requires the use of specific research methods. The constitutionality of laws is determined by the CCU. At the same time, the authors of this study argue that the actual daily constitutionalisation of the applied laws can occur in the practice of courts in the judicial system, especially by the Supreme Court of Ukraine (hereinafter referred to as "the SCU") as the highest court in the judicial system, which ensures the unity and constancy of

[8] A.O. Selivanov, *The right in the modern political life of Ukraine*, Lohos, Kyiv, 2020; A.P. Getman, "Human life and health as an object of environmental law in the globalised world", in *Journal of the National Academy of Legal Sciences of Ukraine*, 2020, vol. 27, no. 1, p. 189-200; A. Mernyk, O. Yaroshenko, M. Inshyn, D. Lukianov, O. Hyliaka, "Vaccination: Human right or duty", in *Georgian medical news*, 2021, no. 315, p. 135-140.

[9] Decision of the Constitutional Court of Ukraine in the case of the constitutional submission of the authorized Verkhovna Rada of Ukraine on Human Rights regarding the compliance of the Constitution of Ukraine (constitutionality) the provisions of the third sentence of part one of Article 13 of the Law of Ukraine "On Psychiatric Assistance" No. 2-RP/2016, 2016. Available at https://zakon.rada.gov.ua/laws/show/v002p710-16#Text.

[10] M.P. Orzykh (Ed.), *Problems of modern constitutionalism*, Yurinkom Inter, Kyiv, 2010.

judicial practice. When choosing methodological tools, this state of existence of two state bodies with similar, but different constitutional competence obliges to consider, first and foremost, the developments of the doctrine of judicial law as a universal theory of judicial power in the post-Soviet countries, including Ukraine. Considering the doctrine of judicial law from different angles, it is worth noting the difference in its methodology, namely 1) as a set of all judicial processes – procedural methods, abstraction, analysis, synthesis, induction, deduction; 2) as an integral branch of several branches of law – dialectical, system-structural; 3) as an identification of judicial law with judicial law-making with a certain functional element of judicial precedent for countries with an independent body of constitutional jurisdiction – methods of extrapolation, decomposition, modelling[11].

In addition, to identify the author's criteria for the actual constitutionalisation of laws by courts during law enforcement activities, the empirical method of scientific cognition was used. With its help, a number of court decisions were investigated, in which the constitutional provisions were subsidised or independently applied as provisions of direct action. This method also helped identify cases in administrative proceedings when the legislator applied the requirements of laws, actually establishing their constitutional content. The practice of the CCU, the identification of relevant legal positions in adaptation of the approaches of this court to the development of legal opinions by courts upon the administration of justice in terms of forming the unity of judicial practice were performed using a comparative research method. Since the stated problems are investigated in the mechanism of a single procedure, the final scientific method was Aristotelian, which allowed identifying the grounds, sequence, and algorithms of actions of courts upon the constitutionalisation of legislation in the mechanism of ensuring the rule of law, as well as procedural risks in this procedure.

In this study, the authors highlight court decisions (primarily court rulings) where parties or other participants in court proceedings have taken the initiative to apply to the SCU regarding the dispelling of doubts about the constitutionality/unconstitutionality of the provisions of certain laws or the need to interpret certain provisions of the Constitution of Ukraine, since the prescriptions of certain laws, according to the claims of the party/parties to judicial proceedings, do not correspond to it. Within the framework of this study, the authors develop the criteria for courts' approaches to the rules of constitutionalisation of laws as the legal basis for resolving a court case. The subject was only procedural decisions and decisions on the merits delivered by

[11] I. Berestova, O. Khotynska-Nor, O. Kopytova, O. Bratel, S. Dronov, "Subordinate relationship between civil and constitutional legal proceedings in the countries with an autonomous body of constitutional control", in *Journal of Legal, Ethical and Regulatory Issues*, 2020, vol. 23, p. 1-8.

courts of administrative jurisdiction of various instances. However, the civil and economic legal proceedings of Ukraine also contain corresponding procedural and final decisions on the issue under study, which will be the subject of a separate scientific study.

Results and discussion

The rule of law in judicial activity in material and formal concepts

The practical significance and value of applying the rule of law is manifested in material and formal concepts[12]. This study investigated these processes with the allocation of the role of constitutional legality as mediated by a key element of the rule of law. The specific feature of the material component is that the rule of law absorbs the requirements for the content of the law. As a rule, the law should proceed from such fundamental legal and moral principles as freedom, equality, and justice[13]. And the specific feature of the formal concept is that it focuses on the external form of legality[14]. B. Tamanaha[15] analysed various definitions of the rule of law and identified the formal components (rule of law, formal legality, democracy, and legality) and the material components (individual rights, the right of dignity and justice, the welfare state) of the rule of law.

One of the elements of the formal concept of the rule of law is the principle of legal certainty. In particular, there was a long discussion in Ukraine in the early 2000s and 2010s, that in then-recent years, the positivist theory prevailed in the CCU upon interpreting the constitutional provisions and laws of Ukraine (their individual provisions), which often resulted not in the consolidation of the rule of law and the identification of its component – the principle of legal certainty, but on the contrary – the establishment of the rule of law. The CCU usually emphasised considerable limitations in the interpretation of provisions, justifying this by the need to remain in the subject of interpretation through the lens of various aspects of interpretation (narrowing) and literal understanding of the provision by prioritising the application of grammatical interpretation. In addition, individuals/legal entities (subjects of constitutional appeal) could not be active subjects of the

[12] V. Kachur, "Legal values as determinants of sustainable development of society", in *Law. Human. Environment*, 2012, vol. 12, no. 3, p. 15-23.

[13] R. Yulia, R. Sergiy, "Justice in the digital age: Technological solutions, hidden threats and enticing opportunities", in *Access to Justice in Eastern Europe*, 2021, vol. 4, no. 2, p. 104-117.

[14] I. Berestova, O. Khotynska-Nor, O. Kopytova, O. Bratel, S. Dronov, "Subordinate relationship between civil and constitutional legal proceedings in the countries with an autonomous body of constitutional control", in *Journal of Legal, Ethical and Regulatory Issues*, 2020, vol. 23, p. 1-8

[15] B. Tamanaha, *Rule of law: history, politics, theory*, National University of Kyiv-Mohyla Academy, Kyiv, 2007.

implementation of constitutional provisions, but it was to them that the government regulations formulated in the relevant process were addressed. In other words, in relations between the state and a person, the latter had a subordinate, "passive" status and could not protect their constitutional rights in court solely based on the Constitution of Ukraine, since it was not (and could not be) a subject of constitutional law[16]. The logical consequence of such approach to determining the legal nature and content of constitutional rights was the practical exclusion of a person from the judicial procedure precisely because they did not have an independent legal meaning, since they were only "adapted" to the relevant concretising law"[17].

The European Commission "For Democracy through Law" (Venice Commission) at its 86th plenary meeting on 25-26 March 2011 in its Rule of Law Report indicated that the main criteria for understanding the rule of law included, in particular, the accessibility of law (the law should be clear, express, and predictable); legal rights issues should be decided by the rules of law, not based on discretion; equality before the law; power should be exercised in a lawful, fair, and reasonable manner; the elements of the rule of law are as follows: legality, including a transparent, accountable and democratic process of introducing the rule of law legal certainty; prohibition of arbitrariness; equality before the law[18]. Legal certainty has regularly been the subject of consideration by the ECHR, and the CCU – legal certainty is one of the fundamental aspects of the rule of law[19]. Thus, the ECHR in the case of Brumarescu V. Romania recognised the "principle of legal certainty" as one of the fundamental aspects of the rule of law[20]. In other decisions, the ECHR has noted that for judicial interpretation to meet the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms, it is necessary that the judgments of the courts be reasonably foreseeable (cases

[16] S.V. Shevchuk, *Judicial law-making: world experience and prospects in Ukraine*, Referat, Kyiv, 2007.
[17] I.E. Berestova, *Theoretical principles of protection of public interest in civil proceedings and constitutional proceedings*, FON Maslakov, Kyiv, 2018; S. Shevchuk, *European Convention on Human Rights and Fundamental Freedoms: Practice of application and principles of interpretation in the context of modern Ukrainian legal thinking*, 1999. Available at http://eurocourt.in.ua/Article.asp?AIdx=416.
[18] Decision of the Constitutional Court of Ukraine in the case of the constitutional submission of 62 people's deputies of Ukraine regarding the compliance of the Constitution of Ukraine (constitutionality) of the Decree of the President of Ukraine "On early termination of powers of the Verkhovna Rada of Ukraine and the appointment of extraordinary elections" No.6-R/2019, 2019. Available at https://zakon.rada.gov.ua/laws/show/v006p710-19#Text; R. Petrov, O. Serdyuk, "Ukraine: The quest for democratization between Europe and Russia", in *International Actors, Democratization and the Rule of Law: Anchoring Democracy?* 2008, p. 189-223.
[19] V. Kopcha, "Modern rule of law and basic approaches to understanding", in *Law Journal of the National Academy of Internal Affairs*, 2021, vol. 11, no. 2, p. 7-12.
[20] O.S. Kopytova, *Theory and practice of judicial enforcement in Ukraine*, FOP Maslakov, Kyiv, 2020.

"S.W. v. Great Britain", decision of November 22, 1995; "Kokkinakis v. Greece" decision of May 25, 1993)[21].

Thus, the official constitutional doctrine in determining the rule of law concluded that "the rule of law means that public authorities are limited in their actions by pre-regulated and declared rules that allow them to provide for measures that will be applied in particular legal relations, and, accordingly, the subject of law enforcement can foresee and plan their actions and count on the expected result. One of the elements of the constitutional principle of the rule of law is the principle of legal certainty, according to which the restriction of fundamental human and civil rights and the implementation of these restrictions in practice is permissible only if the foreseeability of the application of legal provisions established by such restrictions is ensured; the restriction of any right must be based on criteria that will enable a person to separate lawful conduct from illegal" (Paragraph 6, Sub-clause 4.3, Clause 4 of the reasoning part of the decision of the CCU No. 1-r/2018 of 27 February 2018)[22]. Legal certainty is key in the question of understanding the rule of law; the state is obliged to abide by and predictably and consistently apply those laws that it has enforced; legal certainty presupposes that the rules of law must be clear and precise, as well as aimed at ensuring constant predictability of situations and legal relations; legal certainty also means that it is necessary to generally adhere to the obligations or promises that the state has made to people (the concept of legitimate expectations) (The Rule of Law Report, approved by the European Commission for Democracy through Law (Venice Commission) on the 86th plenary session of 25-26 March 2011).

The principle of legal certainty requires clarity, expressness, and unambiguity of legal provisions, in particular their predictability (expectedness) and stability (Paragraph 6, Sub-clause 2.1, Clause 2 of the reasoning part of the decision of the CCU No. 2-r/2017 of December 20, 2017)[23]. In the context of Article 8 of the Constitution of Ukraine, legal certainty ensures the adaptation of the subject of law enforcement to the statutory conditions of legal reality and its confidence in its legal situation, as well as protection from arbitrary interference by the state. Legal certainty should be understood through the following components: clarity, understandability, unambiguity of legal

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[21] Effects of judgments or cases 1959-1998, 1999. Available at http://www.eurocourt.in.ua/Article.asp?AIdx=112; Ya. Romaniuk, "The role of the Supreme Court of Ukraine in providing the principle of legal definition", in *Word of the National School of Judges of Ukraine*, 2013, vol. 3, p. 6-13.

[22] Decision of the Constitutional Court of Ukraine in the case of the constitutional submission of 62 people's deputies of Ukraine regarding the compliance of the Constitution of Ukraine (constitutionality) of the Decree of the President of Ukraine "On early termination of powers of the Verkhovna Rada of Ukraine and the appointment of extraordinary elections" No. 6-R/2019, 2019. Available at https://zakon.rada.gov.ua/laws/show/v006p710-19#Text.

[23] *Ibidem.*

provisions; the right of a person to count on reasonable and predictable stability of current legislation in their actions and the ability to foresee the consequences of applying legal provisions (legitimate expectations). Thus, legal certainty implies that the legislator should strive for clarity and understandability in the presentation of legal provisions. Each person, in accordance with particular circumstances, should be guided by which rule of law is applied in a particular case, and have a clear understanding of the occurrence of particular legal consequences in the corresponding legal relations, given the reasonable and predictable stability of the legal provisions[24]. In the aspect of Article 8 of the Constitution of Ukraine, legal certainty means the consistency of such regulation and the inadmissibility of changing it in violation of the fundamental principles of law. In the context of the rule of law, legal certainty is aimed at ensuring the clarity of the content of legal provisions. Legitimate expectations – an integral part of legal certainty – arise as a result of the legislative activity of the parliament and lie in the fact that if a person expects to achieve a certain result, acting in accordance with the legal provisions, then the protection of these expectations must be guaranteed"[25].

The decision of the CCU No. 6-r/2019 of June 20, 2019 regarding the understanding of the rule of law, legal certainty, and legitimate expectations of persons is also notable[26]: "according to the legal position of the Constitutional Court of Ukraine, the rule of law requires the state to implement it in law-making and law enforcement activities (Paragraph 2 of Sub-clause 4.3, Clause 4 of the reasoning part of the decision No. 1-r/2018 of February 27, 2018). Considering the content of Article 8 of the Constitution of Ukraine and the practice of the Constitutional Court, the rule of law should be understood, in particular, as a mechanism for ensuring control over the use of power by the state and protecting a person from arbitrary actions of state authorities. The rule of law as a statutory ideal to which every system of law should strive, and as a universal and integral principle of law, should be considered, in particular, in the context of the following fundamental components: the principle of legality, the principle of separation of powers, the principle of popular sovereignty, the principle of democracy, the principle of legal certainty, the principle of fair trial[27]. Consequently, the rule of law in judicial activity is

[24] V.J. Tacij, V.I. Tjutjugin, J.V. Grodeckij, "Conceptual model establish responsibility for offense in the legislation of Ukraine (draft)", in *Criminology Journal of Baikal National University of Economics and Law*, 2014, vol. 2014, no. 3, p. 166-183.

[25] Decision of the Constitutional Court of Ukraine in the case of the constitutional submission of 62 people's deputies of Ukraine regarding the compliance of the Constitution of Ukraine (constitutionality) of the Decree of the President of Ukraine "On early termination of powers of the Verkhovna Rada of Ukraine and the appointment of extraordinary elections" No. 6-R/2019, 2019. Available at https://zakon.rada.gov.ua/laws/show/v006p710-19#Text.

[26] *Ibidem.*

[27] *Ibidem.*

manifested through the predictability of court decisions taken in accordance with due process and based on a high-quality law that factors in moral principles such as freedom, equality, justice, and the recognition of a person as the highest social value and is essentially consistent with the Fundamental Law of the country.

Practical aspect of the constitutionality of laws in the law enforcement activities of courts

The right (obligation) of judges of general jurisdiction to refrain from applying an unconstitutional law in a case (in their opinion) of a regulation considerably strengthened the current system of ensuring constitutionality in Ukraine, giving the weakest of its participants (a person and a citizen, private legal entities) new opportunities, the indication of which, provided that the necessary legal work is performed, will be properly evaluated, if not today, then in the shortest possible time[28]. Ensuring constitutionality in Ukraine in specific cases is a manifestation of the implementation of the principle of constitutional legality. The presumption of constitutionality of the law directly affects the improvement of the activity of courts in the judicial system. In countries with a centralised form of access to constitutional control (or justice – in some countries), a special body – the Constitutional Court – disqualifies laws that, by virtue of their content, contradict the Fundamental Law of the state. In Ukraine, as already noted, such a body is the CCU. The opinion that until declared unconstitutional, all laws are considered constitutional is traditional in the constitutional doctrine, that is, all laws are presumed to formally meet the criterion of "presumption of constitutionality of a legal act"[29]. Therefore, acts are applied, although their provisions may not always be adequate to the values of society in a particular period of its development.

The totality of legal certainty, legitimate expectations of citizens, fairness and predictability of laws certainly affect the predictability of judicial practice

[28] S.V. Riznyk, *Constitutionality of normative acts: essence, methodology for evaluation and system of provision in Ukraine*, Ivan Franko National University of Lviv, Lviv, 2020; O.V. Petryshyn, O.S. Hyliaka, "Human rights in the digital age: Challenges, threats and prospects", in *Journal of the National Academy of Legal Sciences of Ukraine*, 2021, vol. 28, no. 1, p. 15-23; M. Rudenko, I. Malinovska, S. Kravtsov, "Justice for judges in Ukraine: Looking for peace and strong judiciary institutions in a sustainable society", in *European Journal of Sustainable Development*, 2021, vol. 10, no. 1, p. 339-348.

[29] K. Trykhlib, "Law-making activity in the case law of the constitutional court of Ukraine", in *International and Comparative Law Review*, 2019, vol. 19, no. 2, p. 27-75; T. Slinko, O. Uvarova, "Freedom of Expression in Ukraine: (Non)sustainable Constitutional Tradition", in *Baltic Journal of European Studies*, 2019, vol. 9, no. 3, p. 25-42.

and the predictability of a particular court decision[30]. The authors of this study state that despite the unification of the new versions of the Economic Procedural Code of Ukraine (the EPCU), the Civil Procedural Code of Ukraine (the CPCU), and the Code of Administrative Procedure of Ukraine (the CAPU) (2017), each procedure still has its individual features, which affects the particular manifestation of the rule of law in a particular judicial procedure. First, the legislative consolidation of various jurisdictional processes determines various manifestations of the unified constitutional foundations of judicial proceedings, various own principles and distinctive presumptions[31]. In particular, the CPCU and the EPCU contain a presumption of guilt and the principle of initiative appeal to the court (the disposition principle), in a broader version this principle is available in the CAPU, where the court has expanded judicial discretion; the Criminal Procedural Code of Ukraine (the CrPCU), however, legally consolidates the constitutional presumption of innocence, and the accused is considered innocent until their guilt is proved legally and established by a court finding of guilt. In civil and economic proceedings, the burden of proof is placed on each of the parties to the procedure, while in administrative cases, in cases of illegality of decisions, actions or inaction of a subject of power, the obligation to prove the legality of its decision, action or inaction is assigned to the defendant (Part 2, Article 77 of the CASU). These principles are one of the starting points that affect the course of each procedure in general, hence the different fact of the existence or absence of constitutional legality upon the consideration of a court case. The authors of this study illustrated this with particular examples of judicial practice of courts of various instances, after which the authors attempted to identify general approaches to the manifestation of constitutional legality in the practice of courts.

Prematurity of the need to establish the constitutionality of the content of the law. In administrative case No. 405/1607/18, the plaintiff filed a petition to the court, where the latter requests to file to the CCU a submission on the grounds of non-compliance with Clause 1, Subclause 12, Article 312 of the Law of Ukraine "On Mandatory State Social Insurance in case of Unemployment" regarding the restriction of payments for a one-year period, provided the status of unemployed for more than a year, regardless of the unemployment circumstances, Article 46 of the Constitution of Ukraine regarding social protection and the right to security from unemployment due to independent circumstances in the form of benefits, where such a right is

[30] O. Lutsenko, "Bringing civil servants to liability for disciplinary misconduct in judicial practice of Ukraine, Poland, Bulgaria and Czech Republic", in *Journal of Advanced Research in Law and Economics*, vol. 8, no. 1, p. 103-112.

[31] O. Pankevych, M. Havryltsiv, "The constitutional court of ukraine: some discussion questions about its place in the modern state mechanism", in *Social and Legal Studios*, 2021, no. 4, p. 12-19.

unconditional and not limited in time by the Constitution of Ukraine, where such assistance must be provided before the date of actual employment to maintain the citizen and his family's material and social needs and property status that existed at the time of social assistance[32]. In this case, the court rejected such a request, arguing that "from a systematic analysis of the requirements of the above provisions, it can be seen that making a submission to the Constitutional Court of Ukraine falls within the powers of the Supreme Court. The court that is considering the case has the power to appeal to the Supreme Court to resolve the issue of making a submission to the Constitutional Court of Ukraine regarding the constitutionality of a law or other legal act that falls under the jurisdiction of the Constitutional Court of Ukraine. Therewith, the court applies to the Supreme Court to resolve the issue of making a submission to the Constitutional Court of Ukraine after deciding on the case and provided that the court comes to the conclusion that a law or other legal act contradicts the Constitution of Ukraine[33]. As of the time when the plaintiff filed this petition, the decision on the case on the claim of a person to the Municipal and District Employment Centre to cancel the order and the obligation to perform certain actions has not been made. ...The court concluded that the plaintiff's request to file a submission to the Constitutional Court of Ukraine regarding the constitutionality of the law is premature and is not subject to satisfaction"[34].

In the procedure of consideration of a case, the current law is subject to application, and therefore is constitutional. In another case, the court formally recognised the law as constitutional due to the impossibility of applying Article 58 of the Constitution of Ukraine to disputed relations. Therewith, the court literally did not resort to analysing the constitutionality of the law, but kept within the limits of the exclusively procedural nature of the case consideration. Thus, PJSC "Kyivhaz" appealed to the District Administrative Court of Kyiv with a claim where it requested "to recognise the Resolution of the Cabinet of Ministers of Ukraine No. 316 "On Amendments to Clause 2 of the Resolution of the Cabinet of Ministers of Ukraine No. 203 of 23.06.2016" of 27.04.2016 as illegal and invalid from the date of its adoption[35]. By a ruling of the District Administrative Court of Kyiv dated 26.12.2018 (considering the decision of the District Administrative Court of Kyiv dated 24.01.2019 on correction of typo),

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[32] District Decision of the Kirovograd Administrative Court in the case No. 405/1607/18, 2018. Available at http://reyestr.court.gov.ua/Review/76109061.

[33] D. Oleksandr, R. Oleh, M. Valeriy, "Mediation and court in ukraine: Perspectives on interaction and mutual understanding", in *Access to Justice in Eastern Europe*, 2021, vol. 4, no. 3, p. 181-190.

[34] Decision of the Kirovograd District Administrative Court in the case No. 405/1607/18, 2018. Available at http://reyestr.court.gov.ua/Review/76109061.

[35] Decree of the sixth Appellate Administrative Court in the case No. 826/8079/16, 2019. Available at http://reyestr.court.gov.ua/Review/80702614.

proceedings in the administrative case were closed. Disagreeing with this decision, the plaintiff filed an appeal where he requested to cancel the appealed decision as one that was made in violation of the provisions of procedural law, and to send the case to the court of first instance for further consideration". The Court of Appeal rejected the request, noting that the request of Public Joint Stock Company "Kyivhaz" to apply to the Supreme Court with a corresponding ruling to resolve the issue of filing to the Constitutional Court of Ukraine a claim on unconstitutionality (non-compliance with Article 58 of the Constitution of Ukraine) of the Resolution of the Cabinet of Ministers of Ukraine No. 316 "On Amendments to Clause 2 of the Resolution of the Cabinet of Ministers of Ukraine No. 203 of 23.06.2016" of 27.04.2016 regarding the granting of a reverse action in time is unjustified and shall not be subject to satisfaction"[36].

The constitutionality of the law is reviewed by the Constitutional Court, but the court of general jurisdiction independently recognised the law as constitutionally defective and did not apply it upon the consideration of the case. The latest resolution, which the authors highlight within the framework of this study, concerns the application of judicial discretion in the matters of protecting the right when applying the requirements of the law, which is currently analysed for constitutionality – the Law of Ukraine "On the Purification of Power". First of all, almost all judicial proceedings in Ukraine (except for two decisions of the courts of Kharkivska and Cherkaska Oblasts) in cases concerning the Law of Ukraine "On the Purification of Power" were stopped in connection with the appeal of the SCU to the CCU with three constitutional submissions on declaring certain provisions of the mentioned law unconstitutional. As of mid-2021, the joint constitutional proceedings on four constitutional submissions (there was also an appeal from people's deputies) are under consideration in the CCU. The CCU decided to return to the open part and hold the court hearing in the form of oral proceedings. Thus, the provisions of the Law of Ukraine "On the Purification of Power" are such that they objectively cause the need to verify it for compliance with the Fundamental Law of Ukraine, that is, the content of this law lacks any trace of presence of a specific property indicating its constitutionality – constitutional legality.

Thus, within the framework of the stopped proceedings[37], "the plaintiff appealed to the court with an administrative claim to the State Fiscal Service of Ukraine, Chernihivska Customs of the State Fiscal Service of Ukraine, in which he requested to recognise his dismissal as illegal and other claims related to the consequences of applying the Law of Ukraine "On the Purification of Power"

[36] *Ibidem.*

[37] Decree of the Chernihiv Administrative Court in the case No. 825/3475/15-A, 2019. Available at http://reyestr.court.gov.ua/Review/85960449#.

with a request to resume proceedings. The reasons for the decision to initiate proceedings contained, among other things, that "in accordance with Part 2, Article 6 of the CAPU, the court applies the rule of law, taking the case law of the ECHR into consideration. Article 17 of the Law of Ukraine "On the Enforcement of Decisions and Application of the Practice of the European Court of Human Rights" stipulates that courts apply the Convention and the case law of the ECHR as a source of law when considering cases. According to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 No. ETS No. 005, everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal. The decision of the European Court of Human Rights in the case "Geoffrey de la Pradel v. France" of 16.12.1992 states that there should not be too formal attitude towards the requirements stipulated by law, since access to justice should be not only factual, but also real. During the study of the case materials, the panel of judges found that the issue of the constitutionality of certain provisions of the Law of Ukraine "On the Purification of Power" has not yet been resolved[38].

In this case, the court noted that "consideration of this case and deciding on the merits within the framework of this claim is possible in the absence of a decision of the Constitutional Court of Ukraine regarding compliance (constitutionality) of certain provisions of the Law of Ukraine "On the Purification of Power" with the Constitution of Ukraine, since as of the date of adoption of the contested order by the defendant and its appeal in court, the Law of Ukraine "On the Purification of Power" was in force, the operation of its certain provisions was not stopped. In accordance with Part 2, Article 152 of the Constitution of Ukraine, laws, other legal acts or their individual provisions recognised as unconstitutional become invalid from the date of deciding on their unconstitutionality by the CCU. According to Paragraph 5, Part 1, Article 361 of the CAPU, the establishment of the unconstitutionality of a law, other legal act or their separate provision by the CCU, which was applied by the court upon deciding a case, serves as the basis for proceedings in exceptional circumstances"[39]. The court also emphasised the shortest consideration and resolution of the administrative case (Paragraph 11, Part 1, Article 4 of the CAPU). Proceeding from this, the panel of judges concluded that there are grounds for resuming proceedings in the case, since at present, in accordance with the requirements of Articles 3, 7, 236, 361 of the CAPU, *for resolving the case on its merits*, there is no need to wait for the CCU to decide on the constitutionality of certain provisions of the Law of Ukraine "On the Purification of Power". Considering the subject matter and grounds of the claim, as well as the provisions of Article 262 of the CAPU, the panel of judges

[38] *Ibidem.*
[39] *Ibidem.*

concluded that it is possible to consider this case in accordance with the procedure of simplified claim proceedings with notification (summoning) of the parties and holding a court session"[40].

The above decision is of scientific interest because the court decided not only to resume the proceedings in the case[41], despite the open constitutional proceedings that have been ongoing in Ukraine for more than five years, but also further considered the case on its merits[42]. The claim of the person was partially satisfied, and the defendant was obliged to restore the plaintiff to the relevant civil service position through the court's application of Part 6, Article 43 of the Constitution of Ukraine in a systematic connection with Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[43]. Important in this process is that the appellate instance supported this decision[44], and the SCU – rejected the cassation appeal of the Chernihivska State Fiscal Service in accordance with Paragraph 4, Part 5, Article 332 of the CAPU – "the cassation appeal is not accepted for consideration and is returned by the judge-rapporteur if the cassation appeal does not specify the grounds stipulated in this code for appealing the court decision through cassation procedure"[45]. That is, on formal grounds, the cassation review did not take place and the decision entered into legal force.

The provisions of the law obviously contradict the Constitution, but they are still applied by the court as a valid law. When reviewing administrative cases, in particular certain types of social disputes where the contradiction of the prescriptions of laws to the Fundamental Law of Ukraine is clearly traced, the Supreme Court is on the position of positivist interpretation of the prescriptions of laws and other sub-legislation, and does not construe them as violation of the rights and freedoms of individuals. This refers to cases of recalculation of pensions for former civil servants, changes in the basis for assigning pensions to other categories of pensioners, recalculation of pensions for military personnel and persons equated to them, etc., recalculation of pensions for Chernobyl clean-up veterans. In particular, in cases concerning the recalculation of pensions for civil servants of the Supreme Court, a legal opinion has been formed, which is noted for its constancy and has been repeatedly supported by the SCU in its subsequent decisions. At the same time, the above controversial issue is currently under consideration by the CCU:

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[40] *Ibidem.*

[41] *Ibidem.*

[42] Decision of the Chernihiv district administrative court in the case No. 825/3475/15-A, 2020. Available at http://reyestr.court.gov.ua/Review/86927249.

[43] *Ibidem.*

[44] Resolution of the sixth Administrative Court of Appeal No. 825/3475/15-A, 2020. Available at https://reyestr.court.gov.ua/Review/86951905.

[45] Decree of the Cassation Administrative Court as part of the Supreme Court in the case No. 825/3475 / 15th, 2020. Available at http://reyestr.court.gov.ua/Review/89957356.

constitutional complaints and constitutional submission of the Ombudsman regarding the compliance with the Constitution of Ukraine (constitutionality) of the provisions of Article 90, Subparagraph 1, Paragraph 2, Section XI "Final and transitional provisions" of the Law of Ukraine No. 889-VIII "On Civil Service" of December 10, 2015, Part 7, Article 21 of the Law of Ukraine No. 2493-III "On Service in Local Self-Government Bodies" of June 7, 2001[46]. The Cassation Administrative Court of the Supreme Court of Ukraine (hereinafter referred to as "the CAS SCU") noted that "from December 1, 2015 – the beginning of the application of the Resolution of the Cabinet of Ministers of Ukraine No. 1013 "On Streamlining the Structure of Wages, Specifics of Indexation and Amendments to Certain Regulations" of December 9, 2015, which excludes Paragraph 4 of Resolution of the Cabinet of Ministers of Ukraine No. 865 "On Certain Issues of Improving the Determination of Earnings for Calculating Pensions" of May 31, 2000, and its Paragraph 5 is set out in a different wording, and in connection with the entry into force of the Law of Ukraine No. 889-VIII "On Civil Service", which differently regulates legal relations related to the pension provision for civil servants, pensions assigned under Article 37 of the Law of Ukraine No. 3723-XII "On Civil Service" of December 16, 1993 are not subject to recalculation due to an increase in the amount of earnings of working civil servants (Paragraph 23 of the Resolution)[47].

Within the framework of this study, the authors emphasise that the motives of the CAS SCU in the last court decision look in such a way that these conclusions do not reflect concern for a person as the highest social value of the state, and therefore the rule of law is not ensured for such decisions and there is no constitutional legality as a property of the law. A similar position of the CAS SCU also concerned the issuance of a certificate on the amount of pension to a civil servant, which has not been updated since 2008, that is, for more than 12 years. Important in this resolution is that the SCU begins the motives of the resolution by quoting the requirements of the Constitution of Ukraine, but in the end makes an absolutely positivist conclusion, in a certain way incompatible with respect for the dignity of a person and their pension provision, which, as a rule, is their only source of income during the loss of labour capacity (retirement age).

"Pursuant to Article 46 of the Constitution of Ukraine", the CAS SCU notes, "citizens have the right to social protection, which includes the right to support them in case of full, partial, or temporary loss of labour capacity, loss

[46] Constitutional submission on Human Rights regarding the compliance of the Constitution of Ukraine (constitutionality) of the provisions of Article 90, subparagraph 1 of paragraph 2 of the XI "Final and Transitional Regulations" of the Law of Ukraine "On Civil Service", 2019. Available at http://www.ccu.gov.ua/sites/default/files/5_7129_2019.pdf.

[47] Resolution of the Cassation Administrative Court of Supreme Court in the case No. 712/15392/17, 2019. Available at http://reyestr.court.gov.ua/Review/79410417.

of the breadwinner, unemployment due to circumstances beyond their control, as well as due to old age and in other cases stipulated by law". This right is guaranteed by mandatory state social insurance at the expense of insurance premiums of citizens, enterprises, institutions, and organisations, as well as budgetary and other sources of social security; the creation of a network of state, municipal, and private institutions for caring for the incapacitated. Pensions, other types of social benefits and aid, which constitute the main source of livelihood, must ensure a standard of living not lower than the subsistence minimum established by law. Until May 01, 2016, the conditions for pension provision for civil servants were determined by the Law of Ukraine No. 3723-XII "On Civil Service" of December 16, 1993 (hereinafter referred to as "the Law No. 3723-XII"). In particular, in accordance with Article 37 of this Law, the plaintiff in the case was awarded a pension. Part 1 of Article 37-1 of the Law No. 3723-XII (as amended before January 01, 2015) provided that in case of an increase in the salary of working civil servants, as well as in connection with the person's acquisition of the right to pension of a civil servant under this Law, previously assigned pensions are recalculated accordingly. The pension is recalculated based on the amounts of wages for which insurance premiums are accrued for mandatory state pension insurance of a working civil servant of the corresponding position and rank at the time the right to recalculate the pension emerges[48].

Therewith, on January 01, 2015, the Law of Ukraine No. 76-VIII "On Amendments and Invalidation of Certain Legislative Acts of Ukraine" of December 28, 2014 (hereinafter referred to as "the Law No. 76-VIII") came into force, which, in particular, sets out Article 37-1 of the Law No. 3723-XII in a new wording, according to which the conditions and procedure for recalculation of pensions assigned to civil servants are determined by the Cabinet of Ministers of Ukraine. Thus, starting from January 01, 2015, the legal regulation of recalculation of pensions of former civil servants has changed. Such a basis (condition) for recalculation of previously assigned pensions as an increase in the salary of working civil servants is not included in the new version of Article 37-1 of the Law No. 3723-XII, and the determination of the conditions for recalculation of previously assigned pensions is delegated to the Cabinet of Ministers of Ukraine. According to paragraphs 4, 5 of the Resolution of the Cabinet of Ministers of Ukraine No. 865 (as amended before December 01, 2015) (hereinafter referred to as "the Cabinet of Ministers of Ukraine"), pensions are recalculated from the month of increasing the salary of a working civil servant based on the submitted application and certificates issued by state bodies at the last place of work. The form of salary certificate submitted for assigning (recalculating) pensions to civil servants is approved by the board of the Pension Fund of Ukraine in coordination with the Ministry of

[48] *Ibidem.*

Social Policy. That is, the provisions of Paragraph 5 of Resolution No. 865 (as amended before December 01, 2015) provided for the form of a salary certificate, both for assigning a pension and for recalculating the pension of a civil servant. However, Resolution of the Cabinet of Ministers of Ukraine No. 1013, which applies since December 01, 2015, amended the Resolution No. 865, which are in effect since December 01, 2015, namely: Paragraph 4 is deleted, and Paragraph 5 is set out in a new wording: "the form of a salary certificate submitted for assigning a pension to civil servants is approved by the Board of the Pension Fund of Ukraine in coordination with the Ministry of Social Policy"[49].

Thus, since December 01, 2015, state bodies at the last place of work have been authorised to issue a certificate only for assigning a pension, and not for its recalculation. Thus, at the time of the plaintiff's appeal to the defendant, the issuance of certificates for pension recalculation was not legally stipulated. A similar legal position was expressed by the CAS SCU in the decisions in case No. 804/5078/16 of June 12, 2018 and in case No. 804/5077/16 of July 17, 2018. Thus, at the time of the plaintiff's application to the defendant for a salary certificate (the components of which correspond to the salary of a working civil servant who holds a position similar to that held by the plaintiff) for the recalculation of the pension based on the Law No. 3723-XI, a regulation governing the grounds, form, content, mechanism, and subject of its issuance had not been adopted. The absence of this act is explained by the fact that the law does not provide (regulate) the possibility, conditions, and procedure for recalculating pensions for non-working pensioners of the civil service, to achieve the goal of which there is a need for a certificate with information about wages[50]. Since at the time of the emergence of disputed legal relations, regulations governing the conditions and procedure for recalculation of assigned pensions to civil servants had not been adopted and did not apply, the plaintiff's requirements to recognise illegal actions of the defendant in refusing to issue a salary certificate and oblige to issue it were groundless and were not subject to satisfaction.

Having analysed the specified legislative provisions in conjunction with the circumstances of this case and the evidence available therein, the panel of judges concluded that the right to receive a certificate for further recalculation of the pension of civil servants in connection with the increase in wages of working civil servants at the time of the plaintiff's appeal is not stipulated by the current legislation, and therefore the Koriukovska Oblast State Tax Inspectorate had no legal grounds for issuing such a certificate, in connection with which the defendant, refusing to issue it, acted on the basis, within the limits of the powers granted to him, and in accordance with the procedure

[49] *Ibidem.*
[50] *Ibidem.*

established by the Constitution and laws of Ukraine[51]. Since the courts of previous instances incorrectly applied the provisions of substantive law, the appealed court decisions are subject to cancellation with the adoption of a new decision on refusal to satisfy the claims in the case"[52]. The specified legal conclusion (approach) of the CAS SCU is developed in resolutions: 211/860/17-a (2-a/211/87/17); 805/3163/16-a; 820/3288/16, and others.

The illustration of the approaches of the SCU to the development of its individual opinion on the constitutionality of laws and the application of the constitutional provisions as provisions of direct action in order to ensure the principle of the rule of law indicates its somewhat one-sided approach, described not only by the financial component of the consequences of dispute resolution, but also in a certain way political. The SCU exercises an ambiguous approach to the attitude of the state towards participants in categories of cases of administrative proceedings and the obligation of state bodies themselves to achieve the goal of the rule of law within the administrative procedure – the rule of law in society and prevention of excessive state expansion into human rights (social, tax, etc.)[53]. The SCU often evades application of the provisions of the Constitution of Ukraine as directly applicable provisions when it comes to human rights. Even though the requirements of the laws applied by the courts do not correspond to the feature of "constitutional legality", the Supreme Court generally does not apply the constitutional provisions in cases where the final judgement impacts further redistribution of budget funds. A substantial redistribution of expenses (in particular, when it comes to pension disputes to the Pension Fund of Ukraine) will simultaneously cause a long-term failure to comply with a court decision, due to the virtual lack of funds awarded to a person by the court, when such recovery of funds would take place from current accounts containing exclusively protected items.

In cases where other obligations of public authorities are simultaneously involved (primarily administrative proceedings), the courts may partially satisfy claims or further cassation complaints – exclusively within the limits of the obligations of state bodies to perform certain actions[54]. To summarise, the rule of law in judicial activity is manifested through the predictability of court judgements delivered in accordance with due process and based on a high-quality lawful legislation that factors in moral principles such as freedom,

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[51] *Ibidem.*

[52] Resolution of the Cassation Administrative Court of Supreme Court in the case No. 825/816/16, 2019. Available at http://reyestr.court.gov.ua/Review/83943043.

[53] I.H. Barabash, O.V., Serdiuk, V.M. Steshenko, "Ukraine in European human rights regime: Breaking path dependence from Russia", in *The EU in the 21st Century: Challenges and Opportunities for the European Integration Process*, 2020, p. 247-270.

[54] S.V. Kivalov, "Electronic form of citizens' appeal as an indicator of digital transformation of public administration", in *Public Policy and Administration*, 2020, vol. 19, no. 4, p. 52-63.

equality, justice and practical, and not illusory recognition of a person as the highest social value.

Conclusions

This study established that the rule of law organically interacts with constitutional legality both at the time of creation of laws and at the stage of their application, when constitutional legality can indirectly be considered a key element of the rule of law. The existence or absence of such an indirect correlation can be traced precisely in the judicial activity. If a dispute or criminal charge is considered by a fair court and based on the results of the judicial procedure, the court decision is performed (voluntarily or forcibly) without further initiatives of constitutional proceedings or appeals to international courts, the rule of law can be considered ensured in the consideration of the case by the court. It was proved that the SCU, upon applying the provisions of the Constitution of Ukraine as provisions of direct action to ensure the rule of law, acts somewhat one-sidedly, being motivated not only by the financial component of the consequences of dispute resolution, but also, to some extent, by the political component. The SCU exercises an ambiguous approach to the attitude of the state towards participants in various categories of proceedings and the obligation of state bodies themselves to achieve the goal of the rule of law within the administrative procedure – the rule of law in society and prevention of excessive state expansion into human rights (social, tax, etc.).

The study proved that the SCU frequently evades application of the provisions of the Constitution of Ukraine as directly applicable provisions when it comes to human rights. Even though the requirements of the laws applied by the courts do not correspond to the feature of "constitutional legality", The Supreme Court generally does not apply the constitutional provisions in cases where the final judgement impacts further redistribution of budget funds. A substantial redistribution of expenses (in particular, when it comes to pension disputes to the Pension Fund of Ukraine) will simultaneously cause a long-term failure to comply with a court decision, due to the virtual lack of funds awarded to a person by the court, when such recovery of funds would take place from current accounts containing exclusively protected items. In cases where other obligations of public authorities are simultaneously involved (primarily administrative proceedings), the courts may partially satisfy claims or further cassation complaints – exclusively within the limits of the obligations of state bodies to perform certain actions.