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CONTENT

CONSTITUTIONAL PROCESS: CURRENT RESULTS, RISKS AND PROSPECTS

The current stage of the constitutional process was initiated by the President of Ukraine Petro Poroshenko in March 2015 with the establishment of the Constitutional Commission.[1] Already on 1 July 2015, the Parliament registered the Draft Law of Ukraine "On Amendments to the Constitution of Ukraine – on decentralisation" (Reg. No. 2217a), developed by the Constitutional Commission and submitted by the President of Ukraine. On 31 August 2015, the day this bill was approved, grenades exploded in front of the Parliament on the Constitution Square. The presence in this bill on decentralisation of the controversial Paragraph 18 "Transitional Provisions" did not allow entering the process of final adoption of amendments to the Constitution (on decentralisation) in compliance with requirements of Article 155.

On 25 November 2015, the subsequent Bill "On Amendments to the Constitution – on justice" (Reg. No. 3524) was registered in Parliament. In February 2016, the bill was approved, and on 2 June 2016, finally adopted by the Verkhovna Rada of Ukraine. For the first time since the "political reforms" of December 2004, significant amendments to the Constitution of Ukraine were legally introduced.

The adoption of a decision by Parliament to amend the Constitution of Ukraine in the part of justice, did not complete the reform of the judiciary. The fact that a number of amendments to the Constitution raised deep concerns among representatives of the expert community, and even more the judicial community, cannot be ignored. However, a number of updated provisions of the Constitution, implemented in effective mechanisms of special laws, are capable of positively influencing the judiciary. In this regard, firstly, the adoption by Parliament of the Law of Ukraine "On Judicial System and Status of Judges" in an unconstitutional way, with a gross violation of the Verkhovna Rada requirements cannot but cause concern. Second, the main content of the implemented law, introduced to the Parliament without obtaining opinions of the Scientific Experts Office or the Venice Commission, or discussing it in the expert community, can cause a real chaos in the process of implementing constitutional changes.

The question remains uncertain about the prospects of the Draft Law of Ukraine "On Amendments to the Constitution of Ukraine – on human rights and freedoms" prepared by the Working Group of the Constitutional Commission. The analytical report has summarized theoretical grounds of regulations contained in the draft law. Since the work on the draft amendments to the Constitution was completed by the Working Group, the Constitutional Commission must make a final conclusion as to its readiness for submission to the President, who will decide on the introduction of a relevant bill to the Verkhovna Rada of Ukraine.

Both aspects of constitutional amendments were analysed in the study by the Razumkov Centre, which is reflected in the content of the Analytical Report.

The Analytical Report consists of two parts:

First Chapter examines current state of constitutional reform principles of the judiciary, current results of the constitutional process, and the immediate prospects.

Second Chapter analyses the issues that emerge during the process of amending the Constitution of Ukraine concerning rights, freedoms and duties of a person and citizen.

In the preparation of the first Chapter of the report, in addition to the Razumkov Centre experts, the following experts also participated: Professor, Doctor of Law M. KOZYUBRA (Chair of the Department of General Legal and Public Sciences, Department of Law of Kyiv-Mohyla Academy) and PhD of Legal Sciences P. STETSYUK (Judge of the Constitutional Court of Ukraine).

In preparation of the second Chapter of the report, in addition to the Razumkov Centre experts, the following experts also participated: Professor, Doctor of Law V. BUTKEVYCH (Deputy Chair of the Constitutional Commission).

[1] Decree of the President of Ukraine "On the Constitutional Commission" No. 119 of 3 March 2015.

1. REFORMING CONSTITUTIONAL PRINCIPLES OF JUDICIAL POWER

The issue of judicial reform has been on the agenda in Ukraine since its independence. During this time, many attempts have been made to change the justice system inherited from the Soviet era, starting with the so-called "Lesser judicial reform" in early 2000, and ending with the Law of Ukraine "On Ensuring the Right to a Fair Trial" as of 15 February 2015. However, all these attempts have actually ended in failure. The reasons for this are multiple – from actual difficulties encountered in the formation of Ukrainian statehood, the state of social consciousness, political and legal culture of officials, conservative doctrinal thinking – to a lack of political will for making actual reforms.

The political forces that were in power, according to the established national traditions, often tried to adjust the judiciary under their own corporate interests, which has manifested most clearly in the approved Law of Ukraine "On Judicial System and Status of Judges" as of 7 July 2010 (the days of Yanukovych's regime). More recent legislative attempts to upgrade the judicial system, including the Law of Ukraine "On Restoring Confidence in the Judicial System of Ukraine" as of 8 April 2014 and the aforesaid Law "On Ensuring the Right to a Fair Trial", has not changed the situation. In fact, like all previous attempts, they were mere imitations of reform, since the judiciary has not become more accessible, transparent, professional and trustworthy (less corrupt). These efforts have not only failed to increase trust in the fairness of trial proceedings, but also further undermined its credibility, which has been confirmed by numerous polls. According to them, the courts enjoy only a 5-10% level of public confidence, which is the lowest among government institutions.[1]

Together with the decline of trust in the courts, the public demand for full-scale judicial reform increased in Ukraine. Along with anti-corruption reform, it has become one of the most popular demands in society. The domestic and foreign experts, investors, international organisations and others are united in this certainty.

At the same time, it became increasingly clear that the full-scale judicial reform is impossible without amending the Constitution of Ukraine, since some of its provisions not only fail to contribute to the strengthening of independence, impartiality and integrity of courts and judges, but also make impossible true, not just ornamental, reforms of the justice system.

Attempts to amend the Basic Law of Ukraine "On Justice" were made more than once. Some of them started with some draft amendments to the Constitution introduced to the Parliament by subjects of legislative initiative – the MPs of Ukraine. Changes of systemic, holistic nature were elaborated by the expert community as part of relevant advisory bodies of constitutional reforms under the President of Ukraine – the Constitutional Council, the Constitutional Assembly, etc. However, all these developments remained on paper.

With the renewal of government after the Revolution of Dignity, the constitutional reform of justice has finally gained evident features. The Constitutional Commission established under the President of Ukraine Petro Poroshenko (which unlike previous similar bodies is composed mainly of specialists and experts) during the year prepared the Draft Law of Ukraine "On Amendments to the Constitution of Ukraine – on justice", endorsed by the Commission in November 2015 and immediately introduced as a legislative initiative by the President of Ukraine to the Verkhovna Rada of Ukraine (Reg. No. 3524 of 25 November 2015).

After the positive conclusion of the Constitutional Court on the conformity of the bill with Articles 157 and 158 of the Constitution of Ukraine, the Verkhovna Rada approved on 2 February 2016, the draft amendments to Law No. 3524, and on 2 June 2016, the relevant law was approved by the constitutional majority – 335 votes. Although there were significant remarks, both to its content and procedure of its approval, as explained below, it should be noted that the Law is a significant step forward in reforming the judiciary. It contains a number of provisions, which, subject to their consistent implementation in the Law of Ukraine "On Judicial

[1] See, in particular, the material "Public Opinion on the Judicial Reform and Constitutional Protection of Human and Civil Rights", published in this journal.

System and Status of Judges" and procedural codes, and their strict adherence can contribute to achieving expected results – the establishment of an independent, fair and trustworthy judiciary, in line with European standards.

Unfortunately, the procedure for adoption of the Law "On Amendments to the Constitution of Ukraine – on justice", and in particular, the Law "On Judicial System and Status of Judges" does not inspire optimism. During their adoption, the ruling majority in the Parliament violated the procedure enshrined in the Law of Ukraine "On the Rules of Procedure of the Verkhovna Rada of Ukraine" for considering bills and resorted to subsequent manipulation: (the Law "On Judicial System and Status of Judges" was adopted prior to the law "On Amendments to the Constitution of Ukraine – on justice", thus ignoring the axiomatic principle of constitutionalism enshrined in Article 8 of the Basic Law – "the laws and regulations of the state are adopted on the basis of the Constitution, and must conform thereto". In this connection, a quite logical question emerges: is it admissible to implement, by illegal methods, even the progressive and allegedly noble intentions of the authorities?

Therefore, provisions of the amended text of the Constitution that deserve a positive assessment must include, in particular, the following:

1) improved procedure for appointment of judges, including:

- reject the first judicial appointment for five years by the President of Ukraine and the subsequent election by the Verkhovna Rada of Ukraine for permanent terms, which complies with persistent recommendations of the Venice Commission. The existing European practice does not provide for a trial period for judges (especially for a five year term). Judges, under the principle of irremovability are immediately appointed for an indefinite term (until retirement);
- increase the age limit for the candidates for judges from 25 to 30 years of age, and the length of service in law from three to five years (Part 3 of Article 127) to facilitate the formation of a judiciary with experienced and professional staff;
- introduce competition for judicial candidates (Part 2, Article 128), which opens opportunities for the selection of the most competent and trustworthy judicial candidates, and contributes to renewal of the judiciary;
- eliminate the political agencies from the procedure of appointment (election) of judges – the President of Ukraine and the Verkhovna Rada of Ukraine, which would help depoliticize the judiciary;
- shift the centre of election and appointment from political authorities to the judiciary – the High Council of Justice;
- introduce the procedure under which the appointment of a judge by the President of Ukraine is made exclusively on the proposal of the High Council of Justice. The role of the latter in this process should be decisive, and of the President – only ceremonial. The President, as the head of state, only legitimizes person's appointment as a judge. This is generally logical, since the High Council of Justice, which according to established European practice is seen mostly as a body of self-government, and cannot be legitimized by a holder of state power, which is the judge. Legitimizing the appointment of judges by the head of the state (president or monarch) is a common practice in Europe;
- deprive the President of Ukraine of the power to transfer judges from one court to another, including for the purposes of their career development, which fully corresponds to European practice and should help depoliticize these measures.

2) Certain improvements, compared to the current Constitution of Ukraine and the wording of Article 125 thereof, which refers to the judiciary. In particular:

- a positive aspect is the separation of administrative courts within the judiciary, whose main responsibility is to protect the rights, freedoms and interests of individuals in public and legal relations;
- a definite step towards the reorganisation of the judiciary could be considered the elimination of the provision Part 3, Article 25 of the current Constitution, according to which "the highest judicial bodies of specialized courts are the respective higher courts", had this position been maintained consistently enough. However, this was not the case, as is discussed below.

3) The improved version of Article 126 of the Constitution of Ukraine, among the provisions of which the following should be highlighted:

- preserving, contrary to the widespread populist appeals of certain political forces, functionally limited judicial immunity, as one of the guarantees of judicial independence (not their privileges);
- removing the right of Parliament from giving consent to detention, keeping in custody or arrest of a judge, and the transfer of these powers to the High Council of Justice, which corresponds to European practice and should facilitate the de-politicisation of this process;
- separating the grounds for dismissal of a judge and the judge's termination of powers;
- providing for a number of anti-corruption safeguards, up to the dismissal of judges who cannot confirm the legitimacy of the source of their property (P. 6, Part 5, Article 126).

4) Bringing in line with European standards the procedure of formation of the High Council of Justice, including:

- predominance in its composition of judiciary representatives, which will increase the professionalism of this entity, to which the Venice Commission has repeatedly drawn attention;
- improving powers of the High Council of Justice, especially those relating to the appointment of judges, their transfer from one court to another, dismissal of judges, etc., which brings such powers closer to European standards of the Supreme Council of Magistracy and should contribute to de-politisation of these processes;
- establishing a limited term of office for elected (appointed) members of the High Council of Justice, extending on them the principle of incompatibility, etc.

5) Cancellation of Chapter VII of the current Constitution of Ukraine on "Prosecutor" and moving the provisions on the Prosecutor's Office to the Chapter "Justice" (that generally complies with the common European practices), and limiting functions of the prosecutors, particularly, focusing on their main functions:

- maintenance of public prosecution in court;
- organisation and management of pre-trial procedure for investigation by covert surveillance and other investigative and search actions of law enforcement.

The adopted constitutional law contains some other novelties that deserve support, including the elimination from the Chapter "Justice" of the mentions of the Constitutional Court of Ukraine, which has specific powers and whose status does not "fit" in the traditional sense of justice; recognition of the jurisdiction of the International Criminal Court (P. 6 Article 124), although "deferred" for three years; replacing the concept of "law enforcement bodies" with "law enforcement agencies" (P. 2 Article 131[1]); rejection of such grounds for dismissal of judges as a "breach of oath" because of its ambiguity and the possibility of political manipulation; depriving prosecutors of evident supervisory powers; providing independence guarantees for attorneys at the constitutional level; funding of courts (Part 1, Article 130), remuneration of judges, which shall be determined only by the law on the judiciary, and not the by-laws (Part 2, Article 130), etc.

However, a number of new provisions of the Constitution contain risks that could adversely affect the prospects of judicial reform, or bring its declared intentions to naught. These provisions include the following:

1) According to Article 125 of the Law, the judicial system is not determined by the Constitution, as is the case in most European countries (and this is recommended by the Venice Commission) and assigned to regulation by the law. This creates a threat of conservation of the current judicial system, which is complicated and not always comprehensible, not only for ordinary citizens, but also for professional lawyers. Overall, the return to the three-tier system of judiciary, allegedly included in the law "On Judicial System and Status of Judges" (the most common in Europe, including in Ukraine's neighbouring countries) and recovery in this connection of the status of the Supreme Court as "the highest court in the judicial system" (Part 3, Article 125 Constitution of Ukraine) cannot but turn attention to a number of inconsistencies in regulation of these issues in the Law "On Judicial System and Status of Judges".

In accordance with Paragraph 3 of Article 17 of the Law, the judicial system includes:

1) Local courts;

2) Courts of Appeal;

3) Supreme Court.

At first glance, it would seem that the three-tier principle of the judicial system is being observed. However, the analysis of Chapter II "Judiciary" of the said Law devoted to local courts (Section 2) and courts of appeal (Section 3), especially the Supreme Court (Section 5) shows that complex and obscure judicial system has been essentially preserved in the law.

Thus, according to Article 37 of the Law, the framework of the Supreme Court consists of:

1) Grand Chamber of the Supreme Court;

2) Administrative Court of Cassation;

3) Economic Court of Cassation;

4) Criminal Court of Cassation;

5) Civil Cassation Court.

This "matryoshka" is a purely Ukrainian know-how. In Europe and worldwide there have been no cases when the Supreme Court, which by established European practice is itself a cassation court (that this is the status of the highest court in the system of court arrangement), would include specialized cassation courts as autonomous subsystems. Their autonomy is evidenced by provisions on their heads having executive powers in relations with public authorities, local governments, individuals and legal entities (Subparagraph 1, P. 6, Article 42); control of relevant structural units of the Supreme Court; the implementation of organisational support of the relevant Court of Cassation (Subparagraph 3, P. 6 of the same Article); and many other powers.

The powers of the Supreme Court under the law are actually limited by powers of the Grand Chamber of the Supreme Court, which are also outlined in the law only in general. At least, it is not clear from the content of the law, whether the Supreme Court (as amended by Law – the Grand Chamber of the Verkhovna Rada) shall retain its "revision" powers (review of cases under special circumstances), the so-called powers of further appeal and others. As in the previous law "On Judicial System and Status of Judges", the Supreme Court, the Grand Chamber and the Plenum of the Verkhovna Rada preserved many non-procedural powers (up to giving opinions on draft laws) are not able to compensate for the lack of authority of the highest, cassation court.

As the analysis of Section 2 and Section 3, of Chapter "Judiciary" demonstrates, the law essentially leaves the existing "vertical" of specialized courts intact.

The status and place of higher specialized courts in the judicial system – as introduced by the Law – regarding intellectual property rights and fighting corruption is rather perplexing. If these are special courts, their establishment under Part 6, Article 125 of the Law of Ukraine "On Amendments to the Constitution of Ukraine – on justice" is prohibited. If they are a form of specialized courts, there arise many questions related to their structure (higher courts logically provide for the existence of lower courts), the relations with the Supreme Court, etc. The uncertainty in all these areas, inherent in the Law of Ukraine "On Judicial System and Status of Judges", will inevitably lead to internal contradictions in the court system, complicate both ensuring the unity of judicial practice, as well as organisational unity of the judicial system in general.

2) The best option of the domestic judicial system should be a separation of the system into two relatively autonomous three-tier subsystems – general courts, which shall consider the civil (including commercial) and criminal cases, the highest cassation instance, which would include the Supreme Court with respective chambers in its structure, and administrative courts, courts of appeal, where the High (Supreme) Administrative Court should operate.

There are good reasons to separate administrative courts into a relatively autonomous subsystem of the judiciary:

- **administrative justice** is a special kind of justice. By its objectives and functions, it differs significantly from general courts: it comprises courts that protect people from infringement of their rights and freedoms by public authorities, and often – from their explicit tyranny;
- features of the tasks and functions of administrative justice, in turn, determine the specific administrative justice – the institution of proof in the administrative court (including the burden of proof); principles of administrative legal proceedings (a combination of the adversarial search principle, principle research, the essential principle of discretionary features, etc.); judicial reasoning of decisions (predominance of rational points and logical considerations, minimizing the impact of psychological factors and techniques of public speaking, etc.). According to Article 127 of the Law of Ukraine "On Amendments to the Constitution of Ukraine – on justice", these characteristics may entail some differences in the qualification requirements for administrative judges, the selection procedure of candidates for judges and others.

Although the issue of the place of administrative justice in the judicial system still has been settled differently in different countries (in a number of countries it belongs to a single system of courts in which the Supreme Court is the highest court), but the tendency for separation of administrative justice from general courts is becoming, in view of their outlined specificity, more visible, particularly in post-socialist countries. Obviously, keeping this in mind, the Venice Commission "strongly recommended" to distinguish administrative courts as a separate subsystem of the judicial system. Unfortunately, the authors of the Law "On Judicial System and Status of Judges" neglected this recommendation and postponed solving this issue for an indefinite term. However, since in Ukraine, unlike in other countries, the judicial system is determined by the Law of Ukraine "On Judicial System and Status of Judges" to make appropriate changes would be expedient now (along with numerous other changes, which legal experts would underline). **Incidentally, the Draft Law "On Judicial System and Status of Judges" was never analysed in terms of its conformity with European standards, not only by the Venice Commission, but also by the Central Scientific Experts Office of the Verkhovna Rada Secretariat**.

3) Unity of judicial practice between the general and administrative courts (of relevant jurisdiction) could be ensured at joint meetings of the Supreme Court and the High (Supreme) Court in the administrative procedure determined by law.

4) **Special features, as compared to general courts, are not inherent to the commercial courts.** Their isolation in the judicial system is a tribute to the Soviet tradition (and the result of lengthy debate between the Soviet civil and economic lawyers, in which the latter won a victory, which might have been appropriate in non-market relations). Today, when economic relations have become part of the market, the existence of an autonomous system of commercial courts is an anachronism. Even in Germany, where the judicial system is quite extensive (multisystem), no independent "vertical" economic (or commercial) court exists. **Economic disputes are considered according to the general procedure by general civil courts.**

5) **The transition to a three-tier (three-level) system** of relatively autonomous subsystems under general and administrative courts **does not entail rejection of the constitutional principle of specialisation, which can exist in different forms.** The most common of these is the specialisation of judges, not courts, within relevant subsystems. It is also possible to use forms of special courts, but at the level of first instance. **This practice exists in Europe, particularly in the form of retail, commercial and other courts**.

6) Supporting, as was already noted, the place of public prosecution and the principle of separation of powers, as defined in the constitutional amendments, and the narrowing of its powers, we believe that provisions devoted to prosecution, pose threats, due to their uncertainty (the selection of candidates for prosecutor; limits of extension to prosecutors of the principle of their incompatibility to represent interests of state in court; dismiss prosecutors, etc.). Since the organisation and procedure of prosecution activities, according to the approved amendments to the Constitution,

are determined by law (practice of referral to the law for regulation of these issues, unlike in the judiciary, is dominant), most of the uncertainty can be eliminated by changing the Law of Ukraine "On Prosecution".

However, there exist risks that are proven by domestic practice, especially with regard to the appointment of the Prosecutor General, which virtually cannot be eliminated by law. They demand the establishment of safeguards at the constitutional level. These risks are mainly associated with excessive politicisation of prosecution. Therefore, sooner or later, additional constitutional regulation will be required to address them anew.

In this regard, the Constitution should enshrine:

(*a*) **the provisions by which the public prosecutor, by analogy with the requirements of Article 131 of the Constitution of Ukraine for members of the High Council of Justice, "should belong to the legal profession and meet the criteria of political neutrality".** This would make impossible the manipulations of the law on the Prosecutor, to which political forces, belonging to the coalition of parliamentary factions, resorted during the appointment of the new Prosecutor General;

(*b*) **the opinion of the Venice Commission** on the Law of Ukraine "On Amendments to the Constitution of Ukraine – on justice" recommended the Verkhovna Rada of Ukraine to approve the **appointment of the Prosecutor General of Ukraine by the President by a qualified majority of votes.**

Adopting the Resolution on granting consent to the appointment of the Prosecutor General by constitutional majority of MPs (226 votes) will mean an excessive focus of the Prosecutor General on the President and coalition factions, that is – his incompliance with the "criterion of political neutrality". That is why a parliamentary approval for the appointment of the Prosecutor General is to be given, if not by a qualified majority (2/3 votes), then at least by 3/5 vote of the Verkhovna Rada.

Finally, to complete the prosecution reform, it is advisable to change not only the content of prosecutorial powers, but also to **bring the name of the body in compliance with the content by changing it to the "Public Prosecution Service"**, as is the case in some European countries. This name will be more in line with the main purpose of this body, and finally bury the idea of the prosecutor as "the eye of the sovereign", the bulwark of the totalitarian system, which is still prevalent among a large part of the population, including politicians. However, this also requires changing the Constitution.

7) **The provisions of Part 4, Article 131** are too categorical and remote from the current Ukrainian reality ("forward-looking" in the wording of the Venice Commission), according to which **"only a lawyer ensures representation of another person in court, as well as his protection from criminal prosecution".**

Although during the finalisation of the bill the recommendations of the Venice Commission were partially taken into account, and certain exceptions were made to this categorical rule (Part 5, Article 131[2]), they do not solve the problem. Similarly, it also does not eliminate the deferral in Chapter XV "Transitional Provisions" of the representation of another person in court solely by lawyer until 2017-2019, and of state authorities and local self-government – to 2020. The point here is not so much the consolidation of the monopolist position of the lawyers in the provision of legal aid (the tendency to increase the level of professionalism in its provision is common to all modern legal states), **but the non-readiness of Ukraine for such monopolisation**. It significantly complicates the provision of legal aid guaranteed by the Constitution (Article 59) to people (especially those with low incomes) due to the lack of state capacity for its adequate funding and lack of interest among lawyers to provide their service (they continue to interpret such assistance as forced labour, which ultimately is not paid by the state). This situation is unlikely to improve the quality of legal aid and ensure equality of litigants before the law and in courts. **Improving quality of legal aid will only create the competitive environment in this area (including among lawyers), which does not exist in Ukraine now.** Therefore, the real battle for quality of legal assistance and its professionalism can only be talked about when there is high level of competition in the legal service market. For Ukraine – this will not happen in two or even five years. In this regard, relevant innovations (however noble in their motives) can remain just another declaration, which does not promote respect for the Constitution.

8) **Limiting or eliminating altogether the influence of the Parliament during the formation of judicial corps, dismissal of judges, etc., excessive presidential powers over the judiciary remain intact.** Thus, reasonably stripping the President (Article 106 of the Constitution), according to the recommendations of the Venice Commission, of the powers "to establish courts as established by law", the amendments to the Constitution proposed a new wording: "The court is formed, reorganized and liquidated by law, the draft of which is introduced to the Verkhovna Rada of Ukraine

by the President, after consultation with the High Council of Justice" (Part 2, Article 125). At first glance this version fully complies with repeated conclusions of the Venice Commission – that the establishment, reorganisation or liquidation of courts should be made not by a Presidential decree, but under the law. However, it is unclear why the draft law on the establishment, reorganisation and liquidation of courts should be submitted to the Verkhovna Rada of Ukraine (legislative initiative) by the President, not the Government (as the main administrator of public funds) or the MPs themselves. The Venice Commission also expressed doubts that the President's role would be limited to this task only.

Although the wording, according to which the President submits the draft law to the Verkhovna Rada of Ukraine "after consultations with High Council of Justice", was proposed by the Venice Commission, it has not completely eliminated the problem of overly broad discretion of the President when using the right of legislative initiative in this case. Therefore, to prevent manipulation in solving issues on the establishment, reorganisation and liquidation of courts, it is advisable to clarify the wording of Paragraph 2 of Article 19 of the Law of Ukraine "On Judicial System and Status of Judges", noting that a draft law shall be introduced by the President Ukraine to the Verkhovna Rada, not just "following consultations with High Council of Justice", but consultations "during which it confirmed the need for establishment, reorganisation or liquidation of a particular court by his decision".

The annex to Chapter XV "Transitional Provisions" of the Constitution (P. 16[1]), according to which "for two years the judges are transferred from one court to another by the President of Ukraine upon the proposal of the High Council of Justice", **raises even more objections**. The compromising position of the Venice Commission on this point is unfounded, since two years are sufficient to employ "own people" in courts, thus preserving their own influence on the judiciary in future (a well-known practice of runaway President Victor Yanukovych).

9) As was previously stated, the Law of Ukraine **"On Judicial System and Status of Judges" adopted prior to amending the Constitution, in some provisions does not comply with these changes, and therefore requires a separate analysis.**

10) Changes regarding the Constitutional Court of Ukraine were made not only to the so-called core Chapter of the Basic Law (Chapter XII "Constitutional Court of Ukraine"), but also to nearly half of all other constitutional Chapters. These changes would also cover Chapter II "Rights, freedoms and duties of a person and citizen", Chapter IV "Parliament of Ukraine", Chapter V "President of Ukraine", Chapter VIII "Justice" and Chapter XV "Transitional Provisions". Thus, all the articles (Articles 147, 148, 149, 150, 151, 152 and 153 of the Constitution), without exceptions were changed in Chapter XII "Constitutional Court of Ukraine" and four new articles (148[1], 149[1], 151[1] and 151[2]) introduced to the "Chapter". However, a decisive factor in this process is not so much a mechanical (external) change of relevant constitutional provisions, as their actual content, the analysis of which can bring to understanding the true purpose of constitutional amendments and possible prospects for development of the institution of constitutional control in Ukraine itself.

Ukraine is expected to introduce the **institution of constitutional complaint**. In connection with this, it is proposed to supplement Article 55 of the Constitution of Ukraine with Part 4.

The idea to introduce the institution of constitutional complaint in Ukraine is generally progressive, meets general trends of European constitutionalism, and the main goals of the present-day constitutional review – the protection of rights and freedoms. It fits well into the existing national constitutional and legal system, as the task of the Constitutional Court of Ukraine is "to guarantee the supremacy of the Constitution of Ukraine as the Fundamental Law of the State throughout its territory (Article 2 of the Law of Ukraine "On the Constitutional Court of Ukraine"), namely the "rights and freedoms and their guarantees" should determine the content and focus of the Ukrainian state (Part 2 of Article 3 of the Constitution). The introduction of constitutional complaint is reinforced by the fact that now exists the so-called "hidden" form of constitutional complaint (opportunity to interpret law on the treatment of citizens on the basis of implementing the provisions of Article 94 of the Law of Ukraine "On the Constitutional Court of Ukraine"), which is extremely complex in its implementation and has not been regulatory elaborated in full.

Amendments to Article 147 of the Constitution of Ukraine **eliminated** the right to **"official interpretation of laws of Ukraine"** from powers of the Constitutional Court of Ukraine.

The repealed powers of the Constitutional Court "to provide an official interpretation of laws of Ukraine" was one of the "most vulnerable" phenomena in the national constitutional and legal system. In providing the official interpretation of laws (certain provisions of laws), **the Constitutional Court of Ukraine did not**

clearly follow the so-called dividing lines between interpretation and actual creation of new rules. The latter led to the actual unbalancing of the established system of legal regulation of the respective groups of public relations. On the other hand, the official interpretation of law or some of its provisions often represented a blatant form of abuse of power by the Constitutional Court of Ukraine, to which legal experts have repeatedly drawn their attention.

The official interpretation of laws by bodies of constitutional review is not common in modern European constitutional and legal practice. This "right" of constitutional courts existed largely only in the former Soviet space.

The following provision was eliminated from Article 124 of the Constitution of Ukraine*: "justice is administered by the Constitutional Court of Ukraine and courts of general jurisdiction".* This is correct because the Constitutional Court of Ukraine has never administered "justice", and will not do so in future.

Practical implementation of amendments to the Constitution of Ukraine may strengthen guarantees for the Constitutional Court (first, in its relations with other government bodies) and the independence and immunity of judges of the Constitutional Court.

As regards strengthening the safeguards for judges of the Constitutional Court, the attention should be drawn to the following provisions:

- Article 149: "*The independence and immunity of judges of the Constitutional Court of Ukraine is guaranteed by the Constitution and laws of Ukraine. The impact on a judge of the Constitutional Court of Ukraine in any way is prohibited. A Judge of the Constitutional Court of Ukraine cannot be arrested or held in custody or arrest, before conviction by the court, without consent of the Constitutional Court of Ukraine, except detention of judge during or immediately after the commission of grave or especially grave crime. A Judge of the Constitutional Court of Ukraine cannot be prosecuted for voting in connection with the adoption of decisions by the Court and conclusions provided by him, except for a crime or commission of a disciplinary offense. The State ensures the personal security of the judges of the Constitutional Court of Ukraine and their families*.

The corporate constituent part of the Constitutional Court of Ukraine is excessively reinforced. Evidence of this is the following provision: "*The decision on dismissal of judges of the Constitutional Court of Ukraine court shall be approved at least by a two-thirds of its constitutional composition" (Part 2, Article 149).*

The main drawback of amendments to Chapter XII of the Constitution of Ukraine is keeping intact the existing system of formation of the Constitutional Court of Ukraine, especially in part of appointing one

third of the Constitutional Court of Ukraine by the Congress of Judges of Ukraine. The established procedure for forming the Constitutional Court of Ukraine failed to meet public expectations. It neither ensures the so-called equal representation of interests of various branches of the single body of constitutional jurisdiction, nor prevents excessive politicisation in the appointment of judges to the Constitutional Court.

CONCLUSION

Thus, amendments to the Constitution of Ukraine – on justice did not end problems of constitutional principles of the functioning of the judiciary.

Obvious is the need for preparation of additional amendments to the Constitution, which should correct the shortcomings of the text of the Basic Law, including:

1) a clear consolidation of three-tier judicial system;

2) a clear definition of the structure of the Supreme Court and its authority as a judicial body;

3) to identify the prosecutor (by powers) as the "Public Prosecution Service";

4) to align the status of lawyer with existing realities;

5) to review the terms of transitional powers of the President of Ukraine;

6) to clarify the status of the Constitutional Court of Ukraine; the procedure for its formation.

The above shows that any undue hurry, let alone ignoring the Constitution of Ukraine, the procedure established by the Verkhovna Rada and the Law "On Amendments to the Constitution of Ukraine – on justice", which was adopted after adopting the Law of Ukraine "On Judicial System and Status of Judges", entail unpredictable consequences that may well lead tothe fact that the adopted constitutional amendments will remain only on paper. Obviously, the so-called Law of Ukraine "On Judicial System and Status of Judges" requires a thorough expert analysis and processing. The opinion of the Venice Commission on the final draft of the Law will also be appropriate.

2. ISSUES OF DEVELOPING AMENDMENTS TO THE CONSTITUTION OF UKRAINE (ON RIGHTS AND FREEDOMS)

We must realize that today the vision of the constitutional state, as it was in the 19th – first half of the 20th centuries is too narrow. Little has changed in this new approach and its new Chapter "Rights, freedoms and duties of a person and citizen". We continue to look at the constitution mainly as a fundamental act for public authorities. Even the "civil society" – possibly the main achievement of people in the non-government sector – was unable to win a place in the Constitution.

This is not the time to give up on understanding of the Constitution as a fundamental normalized Basic Law of organisation and functioning of public authorities. This is, so to speak, the core of the Constitution. At the same time, we should not ignore constitutional laws, judicial precedents of constitutional nature, constitutional traditions and constitutional agreement, underlying international legal obligations of the state, the basic rules and principles of regional and municipal authorities, the legal basis for functioning of the civil society in the country and, of course, achievements and capacity of the state to provide legal status of a person and citizen and other constitutional aspects of the political system of society and the state.

The Constitution as a "living" organism of the state and people should not be in a static mode, neither should social institutions. Already during the formation of the "core" of the Constitution, the following must be laid: prerequisites of the dynamics of power and guarantees of fundamental decision of the people and state policy decisions, basic principles and strengthening of civil society, factors ensuring human rights and freedoms and duties of each person, etc.

Issues of determining human rights and freedoms in the constitutional process in Ukraine

An important issue in our constitutional law-making is the borrowing of foreign constitutional counterparts or the constitutional standards sustainable for many. Quite often in the Ukrainian Constitutional law, these standards do not work, remain mere declarations, or take on different meaning. They are either interpreted differently than in theory and constitutional practice of other states, or are seen in the context of legal thought of the 19th and 20th centuries. A separate constitutional provision, often borrowed from a foreign constitution, remains an empty wish, without considering the economic, political and other relations prevailing in the country, history of their development, readiness of society to change, and other factors (for example, whether the "foreign" provision is systemically consistent with other provisions of the Constitution of Ukraine).

For example, the provisions of Article 13 of the Constitution "Property entails responsibility. Property shall not be used to the detriment of an individual or society" was borrowed (in the final phase of the draft development by the Parliament of Ukraine) with certain modification,[1] from the Basic Law of Germany. However, while in the Constitution of Germany this provision is systematically consistent with other provisions on property and is guaranteed as such by a number of provisions of the Constitution, in Ukrainian version, it sounds like a slogan, a declaration, "stuck" among other constitutional provisions on property. This provision was subsequently perceived as a mere declaration – that does not oblige anyone to anything.

The weak link of most provisions enshrined in the current Constitution has been their declarative nature, rejection of old and proclaiming of new ideological "axioms". This is especially true of proposals for socio-economic rights. A few reasons for this can be mentioned:

[1] Unfortunately, it was not corrected in the best way, as Paragraph 2 of Article 14 of the original does not refer to the prohibition, but the obligation: "Property entails responsibility. Property shall not be used to the detriment of the person and society", which is more characteristic of a legal democratic state.

(*a*) ***reluctance to abandon previously proclaimed rights and freedoms of a person and citizen*** in the Constitution of the USSR of 1937, later extended in the Constitution of the USSR of 1978, even though these rights to a large extent were not regulatory and legal provisions for everyone to apply in practice, but remained a well edited text of the Basic Law mainly so that "the West sees it and does not bother them about human rights":

(*b*) ***ignorance of the nature of social and economic rights.*** In the Soviet period, the standards of attitudes towards human rights were elaborated in the Central Committee of the Communist Party, which also determined, what social, economic and cultural rights meant, and provided an outline.

The duty of the person who wrote about such rights was to honestly cite these provisions. First of all, this applied to all employees of the Central Committee. Thus, after the adoption of the 1977 Constitution of the USSR, the Secretary of the CPSU K. Chernenko, who was responsible for this area, determined that "the social and economic rights of Soviet citizens enshrined in the Constitution of the USSR include the right to work, rest and health, social security and housing" and he included in the rights in the field of culture the "right to education, the right to useful achievements in the sector of culture, freedom of scientific, technical and artistic creativity".[2] In this, he was not original, because he borrowed the nature of individual rights from his predecessor, who wrote about these rights, enshrined in the 1936 Constitution of the USSR on behalf of the Central Committee, V. Karpinsky (even copied unchanged the quotes and other figures.[3] His only contribution to this work was that he eliminated his predecessor's remarks from the work: "Comrade Stalin said", "Stalin Constitution enshrined", "as Stalin did it in his time", "J.V. Stalin teaches", and others. Already this fact testifies to a formal attitude during the Soviet period to social and economic rights, and it, as these rights, did not change for nearly half a century of the Soviet Constitution.

After the collapse of the Soviet Union, the situation began to change slightly, but not significantly. The Constitution of Ukraine of 1996 managed to "go halfway": theoretically realize that socio-economic rights relate not to all areas of human life, but rather social and economic ones, and cannot be fixed as an average person would want them to, but should consider the state of economy and resources of the country. In fact, their definition entails much more than civil and political rights, including recommendation formulations and programme elements. Nevertheless, this section of rights in the Constitution has actually remained close to Soviet definitions.[4]

This applies to new draft amendments to the Constitution of Ukraine. When it comes to doctrinal developments in this field, they are evident as compared with Soviet period. Although, it is too early to be talking about essential changes. These are the Ukrainian scientists, who tend to consider social and cultural rights separately. This testifies to a clear understanding that not only the nature and essence of those rights, but also the material resources, financial opportunities and mechanisms to support them are not identical. However, when it comes to a certain list of such rights, the idea that a common vision and understanding prevail is not so convincing.

Thus, M. Havronyuk identifies five fundamental economic rights and freedoms (right to business activity, the right to work, right to rest, the right to participate in trade unions and the right to strike) and four "cultural (humanitarian) rights and freedoms" (the right to education, the right of persons who belong to national minorities in the humanitarian sector, freedom of work, right to the results of intellectual and creative activity, the right to participate in cultural life and the right to enjoy cultural heritage of Ukraine).[5]

O. Kushnirenko and T. Slinko do not see among socio-economic rights the right to entrepreneurial activities and the right to participate in trade unions. Instead, they believe that the above should include: the right to social security, the right to housing, the right to an adequate standard of living, the right to health, medical care and health insurance and the right to education. The right to education in their opinion, can also be attributed to cultural (spiritual) rights, like the right to freedom of thought and speech, free expression of opinions and beliefs, the right to information, i.e., the right to freely collect, preserve, use and disseminate information in verbal form, in writing or otherwise, the right to freedom of belief and religion, and others. They attribute to the basic cultural rights and freedoms the following: freedom of literary, artistic, scientific and technical creativity, the right to the results of intellectual creative activity, the right to the protection of copyrights and other intellectual property.[6]

This classification offered by researchers of the Kharkiv publication provides a distinctive freedom of approach to understanding social, economic and cultural rights. Even more, this freedom prevails in projects whose authors often do not attach importance to whether some or another right in a particular area of human activity, whether it is a universal, basic, or constitutional right, or is just a right the state may agree to, but the legal status of the person does not include it as a basic constitutional right.[7] And almost all Constitutional projects carry this Soviet understanding of the legal status of an individual. Obviously, it has changed

2 K.U.Chernenko. The CPSU and human rights. – Moscow, Novosti Press Agency, 1981, p.47, 105.

3 See: V.O.Karpinsky, The Constitution of the USSR. Translated from the 1950 Russian edition. – Radyanska shkola, 1955, pp.114-136.

4 On the one hand, the essential "inclusions" of the provisions of the European Convention on human rights and social and economic conventions, codes, charters and protocols, and the other – their saturation with limitations, characteristic of the Soviet period

5 Rabinovych P.M., Khavroniuk M.I. Human and civil rights. – Kyiv, Atika, 2004, pp.219-246.

6 Kushnirenko O.G., Slynko T.M. Human and civil rights and freedoms. – Kharkiv, Fakt, 2001, p.91, 101-102.

7 The "Achilles heel" of the Constitution, an issue with most drafts, is that their authors are vaguely aware about what social relationships are regulated by which legal act – following the example of formal law-making, they can offer a relationship that should be regulated by a by-law of the lowest level, to settle constitutional provisions as a basic human right and, conversely, exclude from the Constitution the rights and freedoms, without which their legal status will be limited.

since the events of October 1917, but not in its essence.[8] For example, when it comes to economic rights, the rights of employers (as, incidentally, their duties) it can be detected only by means of careful interpretation. In addition, they determine collective bargaining; they are entitled to the creation of their own organisations, both at national and international level to protect their interests; they have their representatives in the Council of the International Labour Organisation (ILO) and able to significantly influence decisions of the ILO and others.

The point here is not that the rights of employers are not sufficiently secured in the Constitution. With their combined economic potential, they can defend their rights (for example, we can refer to the practice of non-recognition by multinational companies of the subjects of international law. Such non-recognition has not particularly affected them, but created their powerful channels of influence on the state, the last "bend before them like a snake to the fakir's tune"). The question is whether it is advisable or not to continue holding them back from the constitutional legal framework, with its clearly defined rules of conduct. One should remember a pattern here: **the more the state ignores the non-government corporate sector, the more effectively most powerful and economically stable companies form their own legal system**. For the economically weak states, such a trend could lead to the loss of their independence. To avoid this, it is reasonable to define their rights and obligations in the Constitution.

Some terms and definitions are used not because they reinforce basic constitutional provisions, but as the practice of applying the Constitution of Ukraine has shown – for decency reasons: "the highest social value", "state is responsible to the people for its operations", "free and full development of personality", "proper, safe and healthy working conditions", adequate standard of living", "adequate food, clothing and housing", "health care, which is efficient and affordable to all citizens", and others.

(*c*) These and other **legal imperfections or illusions are often found in projects due to their authors' poor knowledge of law drafting**. A number of draft amendments to the Constitution were written under a simplified procedure: one has an idea, he writes and submits it, or does it under the influence of instant needs. Analysis of individual proposals has shown that they take into account an economic factor, though not always, and many of them only this factor. Sometimes the attention is paid to national, demographic, environmental, socio-cultural and other factors, but not systemically, as a rule, and in isolation from the others. **In fact, the procedure for preparation of such proposals was often subordinated to bureaucratic rules and procedures, without democratic and transparent design.**

Constitutional law drafting is a complex multi-vector process of building interconnected foundations of human life, the state and civil society. How difficult this is, we will see by analysing the compliance of current provisions of the Constitution with social realities prevailing in society, in terms of Chapter II "Rights, freedoms and duties of a person and citizen". Most of the proposals, draft changes and amendments to the Constitution were suggested by citizens, political parties, public associations, and individual politicians on the issue of highlighting Human Rights in the Constitution of Ukraine. Some did it because of the vital necessity, others – as a manifestation of concern for the state of human rights in the country, and others – simply for their own PR. Whatever were the reasons for such an interest, they resulted in thousands of suggestions and wishes. These had to be considered, analysed and possibly used in the draft amendments to the Constitution.

Often the authors of proposals approached the issue of human rights and freedoms in Ukraine based on emotional perception and proper understanding of their essence and nature or under the influence of a particular breach, even brutal one, of one or another right in their life, or guided by a simple desire – to have a Constitution similar to that of a state that we would like – in terms of welfare or law enforcement. In such cases, they mostly did not face the task to find out: which of their constitutional rights and freedoms needed to be changed or supplemented and why; how to improve the compliance mechanism, improve implementation and provide necessary guarantees to existing constitutional rights and freedoms; why is the proposed formulation of this draft better than the one written in the Constitution; in what way will a proposed new (or renewed) right relate to the rights and responsibilities of the state and its agencies, officers, employees and each subject of state power; what organisational, financial, material and other costs are required for its implementation from the state and others.

Typically, proposals for changes were motivated by basic principles of the current Constitution, such as: human rights – the highest social value, these have not been granted by the state, but oblige the state; they are inalienable, inviolable and those which cannot be limited to subsequent regulations, etc. However, when it comes to determining the mechanism of implementing these

[8] This is not surprising, because as stated in the 1978 Constitution of the USSR, the main objective of constitutional development in Ukraine was "to preserve the continuity of constitutional development of our country, ideas and principles of the 1919 Constitution of the Ukrainian SSR, the 1929 Constitution of the Ukrainian SSR and the 1937 Constitution of the Ukrainian SSR" (preamble), and they are known to present the human status as follows: Constitution of 1919: "The Ukrainian Soviet Socialist Republic is an organisation for the dictatorship of the working and exploited masses of the proletariat and poorer peasantry ...p. 32 ... given the interest of the working class across the Ukrainian Soviet Socialist Republic, the political rights are denied to certain individuals and groups who use these rights to the detriment of the socialist revolution; The 1929 Constitution: "On the basis of the rights of workers and exploited people proclaimed by the October Revolution..". (preamble) ..paragraph 17. "Guided by the interests of workers, the Ukrainian Socialist Soviet Republic deprives individuals and certain groups of the rights that they use to the detriment of the socialist revolution". 1937 Constitution: "Ukrainian Soviet Socialist Republic is the socialist state of workers and peasants". 1978 Constitution: "The Ukrainian Soviet Socialist Republic ... expresses the will and interests of the workers, peasants and intellectuals..". Only the 1996 Constitution of Ukraine speaks about the legal status of a person as such, and not as a representative of a certain class or stratum, but again, when it comes to social and economic rights, the working people mainly refers to a person on the one side of the "productive barrier" – small, medium, or the more wealthy owners are mentioned in the Constitution with their rights inherent only if one carefully searches for their status.

principles in life, in most projects, it was evident that this question has not been raised. Sometimes confusion arose in matters relatively simple from a legal point of view. For example, it is clear that international commitments should be a priority in human rights sphere, but when there is inconsistency between provisions of a treaty and the Constitution, then how do we start – with ratification of an international treaty or by amending the Constitution? Often, legal authors see a simple (if not simplified) mechanism to implement, protect and guarantee human rights in placing tougher responsibility on the state, its agencies, and public officials.[9] Most projects fail to consider this legal category as a positive duty of states on human rights, their limits, forms and methods of compliance.

The practice of constitutional rights and freedoms of a person in foreign countries has established certain principles that underpin the status of an individual, including: human rights provided by the common human nature, the nature of existence and human life; human rights that are determined by law, but they cannot be abused and their application cannot be refused; every human right should be seen as the one that ensures dignity equal to the dignity of another person; human rights are interrelated, interdependent and, therefore, indivisible, etc. Some draft amendments formulated "their" own principles, which are often not only inconsistent, but also contradict common understanding of human rights. Some authors of the draft laws did not consider that there is a limit of constitutional regulation and the ability of the Constitution to actively influence the development of an individual, society, the state and (as it was the case in the Soviet Union) to immediately "establish communism" in human rights law, proposing insignificant, fleeting, mutually contradictory human rights that had no social importance, or those that would help petrify certain socio-economic, political and legal system.

Theoretical and methodological approaches to improving the Constitution (in part of human rights)

No constitution, no matter how democratic the state is, cannot, once and for all, give a full list of rights and freedoms. For this purpose, one should recognize the provision of the current Constitution that human rights are not exhaustive, can and should develop, not limited to the rights that are already secured and will be supplemented with new rights to improve the status of people in a state and society. **However, the question arises, how often and how many new rights can enter the Constitution? Logic dictates that not more than the state could guarantee, and which reflect urgent needs of society.** We should not forget that we are **referring precisely to constitutional**, human rights. Dozens, if not hundreds, of new "constitutional" rights emerged from submitted proposals. Among these, were the rights that made public ponder whether or not it was the time to give them constitutional status – such as, the right to ecologically clean food and articles of daily use, the right to receive objective information and ban on defamation (including advertising); the right to debate and decision-making in enterprises and institutions; the right to debate and make decisions on production and technologies that may harm human health, etc.; a number of other human rights and freedoms set forth in the Charter of Fundamental Rights of the European Union,[10] given our intentions to join the EU.

The wording of legal regulations is the "Achilles heel" in drafting amendments or adopting a new Constitution. This is particularly evident when it comes to sections on rights and freedoms. Given the draft laws, the wording should be:

- not of declarative nature, i.e., the way the political norms are formulated (the boundary between political and constitutional norm is sometimes blurred, but one should try not to cross it);
- concise and easy to apply to changing conditions and circumstances, easy to distribute and capable of incorporating something new (of constitutional level and value) in the society and state in terms of human rights;
- formulated so as to be capable of performing their regulatory function and not be an inactive addition or "décor" in the Constitution;
- overall human rights system should be able to cover all available or potential legal gaps, and allow for an integration function in the legislation;
- capable of covering the existing realities and values in society, and channel the development of rights in line with development of social values, attitudes and aspirations, etc.

A positive element of many draft laws on constitutional rights and freedoms is the desire to optimize limitations, to clarify the content of obligations and holders of rights, their freedoms and responsibilities. However, they usually pay no attention to improving mechanisms for execution of duties by public authorities and governmental officials. For example, the system of courts of general jurisdiction and their role as part of the Constitutional Court shall be such as to bring the Constitution in line with the needs of society and include human rights at all stages of their implementation. The Court shall have the authority, including by way of interpretation, to prohibit the practice of human rights violations (though it might limit the judicial activity; interpretation of law cannot restrict or endanger the principles of a democratic society) before legal resolution, if the law does not cover such practice.[11]

[9] They obviously paid no attention to the effect known in the criminal practice that increasing the list of crimes for which the death penalty is applied, in proportion leads to increases in the number of such crimes.

[10] Adopted on 7 December 2000 in Nice.

[11] For example, as was done in the USA in 1954, with the prohibition of racial segregation, to prevent social upheaval, the Court should act in this way in other important social situations.

In formulating the rights and freedoms in the Constitution, particularly using international standards, it is important to define what is taken as its foundation: positive approaches that prevailed in international law until the end of the Second World War; liberal international law (established after that period, which, in fact, formulated basic rights and freedoms that have slightly moved the state from its granite-sovereign pedestal, but failed to develop effective mechanisms for realization of these rights and freedoms; social or international law, which is now gaining ground due to attempts to develop and establish such mechanisms.

Yet, in Ukraine, we have: theoretically, the eclectic of all three directions; in legislation – flirting with liberal positivism; in terms of exercising rights and freedoms – complete domination of positivist vision of these rights in distorted interpretations of the Stalin-Brezhnev period.

Given the numerous draft laws proposed for amending the Constitution in part of human rights and freedoms, we must pay attention to the following aspects.

The absence in the current Constitution of the Chapter "Civil Society" shall remove the buffer safeguards of state influence on the person, including of aggressive nature. Especially, it is evident in established living wage, minimum salary, refusals to provide social assistance, etc.

Since only in a democratic society a person can optimally exercise his/her rights and freedoms, it is advisable to return to the Constitution to clarify the role of civil society, in particular, to determine:

- basic principles of formation, development and protection of civil society;
- a principle that civil society takes priority over the state;
- the right, if necessary, to form their own authority on human rights and the impossibility of government agencies to restrict people's activities if performed in accordance with the law;
- the right to make decisions, to hold public proceedings for publicly-urgent cases with adoption of recommended findings and others.

The haphazard statement of rights and freedoms should be considered a disadvantage of the current Constitution. The idea that all points are equally important in the Constitution and it does not matter where in it some or another human right will be stated is often refuted by applicable legal practice, which adequately responds not only to ill-conceived wording of provisions, but also to their ill-conceived placement in Chapter(s) of the Basic Law.

Regarding the system of presentation of rights and freedoms in the Constitution, it should be noted that in doctrine and in some constitutions, they are classified differently:

1. (*a*) political, (*b*) economic and social (*c*) cultural, (*d*) personal (civil);

2. (*a*) of first generation, (*b*) of second generation (*c*) of third generation (*d*) of fourth generation;

3. (*a*) rights of an individual, (*b*) rights of individuals, (*c*) collective rights;

4. (*a*) absolute, (*b*) with limitations provided for in the Constitution, (*c*) fixed at the discretion of state and society;

5. (*a*) general law, (*b*) rights of minorities, (*c*) rights of indigenous peoples and others.

Draft amendments to the Constitution can proceed from a single criterion, or be optimally used together. The same applies to their location in Chapters of the draft law. Without questioning that the Constitution cannot be a hierarchy of Chapters (though this thesis is disputable, but let us leave it to academic deliberations), we have yet to determine which chapter for us is the principal one, and which ones have to follow it and in what order. For example, the lion's share of all violations of human rights, lack of public mechanisms for their implementation, ineffective guarantees – all these aspects pertain to the Chapter "Local Government" in the current Constitution. However, neither the Constitution, nor the draft amendments to it, nor the drafts of a new constitution, raise such questions at all.

Based on fundamental constitutional principles that "affirming and ensuring human rights and freedoms is the main duty of the State" (Article 3), this must be felt in the structure of the Constitution and in its presentation of the main provisions. The provisions do not always correspond to the content and intent of the Chapter in which they are set. In Chapters where the guarantees for their application and liability for inobservance of human rights (III-XV) must prevail, they (regulations on human rights) are either absent, or are formulated as a declaration. In this context, **the presentation of human rights in Chapters of the Preamble to the final part shall be reformatted under the following scheme: the purpose of human rights – social, economic and political foundations – legal essence – implementation mechanism – guarantees and also the responsibility for their violation**. It is clear that the goal should be stated in the Preamble; Basic Principles – in the relevant Chapter together with the essence of the law; and the mechanism, guarantees and responsibility should be recorded in chapters on public bodies with special legal wording (resolution, liabilities, prohibitions) and others. Clearly, this should not be done mechanically, and in some cases – by introducing radical changes, "rewriting" certain provisions of the Constitution. For example, hardly anyone doubts today that Ukraine's foreign policy and its international legal position significantly affect the development of the state and society. From a legal point of view, having two constitutional provisions (that the ratified international treaties are part of national legislation and that our foreign policy aims to ensure national interests and security through the universally recognized principles and norms of international law) are very insufficient.

In the field of human rights, it is already noticeable that:

(a) we have ratified dozens of international covenants on human rights and freedoms, not paying attention to

the fact that the state is often in a situation where the performance of one convention violates the other;

(b) our reservations to conventions on human rights sometimes conflict with the main purpose of relevant conventions and the principle of the rule of law in international law;

(c) non-compliance of Ukrainian legislation with the European Convention on Human Rights leads to the fact that the European Court of Human Rights adopts pilot solutions, which require Ukraine to adopt relevant laws during a certain period of time. This significantly reduces the prestige of the national parliament.

It is clear that the Constitution is not a handbook on human rights, but some of its provisions in this area should be specified. These are not only tags such as "the rule of law", "principles of legality", "proportionality" or titles of specific laws (e.g., Article 48 "Everyone has the right to an adequate standard of living"). It should briefly outline what it is and what positive obligations of the state ensure its compliance. This is especially important, as it was already noted, for development of social rights – where illusions and promises reign.

Some methodological proposals shall be outlined on how to reflect on human rights and freedoms in draft amendments to the Constitution of Ukraine.

From a legal point of view, four basic approaches exist to writing on human rights and freedoms.

1) Preamble – the main fundamental ideas are formulated that should permeate the entire text of the Constitution and on which all its provisions should be based. In the context of human rights, it is enough to mention three fundamental imperatives: human dignity, democracy, the rule of law.

In the wording of Chapters of the Constitution and their contents, one should seek achieving their greater compliance with main tasks.

The triad "people – individual – state" in which the state is for the people and persons (not a person, but people solve fundamental problems of the state for the benefit of a person) has to influence not only the location of the material in the Constitution, but also the wording of its provisions in their relationship and interaction. The final document should provide the answer as to what it is: the "Fundamental Law of Ukraine on behalf of Ukrainian people", "Basic Law of the Ukrainian people", "Constitution of the State" or "the law of separation of powers and determination of their powers?"

2) General principles: definition of basic components on which all subsequent constitutional Chapters shall be built. With regard to human rights and freedoms, they shall disclose the essence of the main imperatives of the preamble and formulate fundamental legal principles of building a system of rights and freedoms in the country, determine what mechanism to protect these rights should be like, whose detailed outline is given after the "General Provisions" Chapter of the Constitution. Unfortunately, the method of presenting principles on the rights and freedoms in the current Constitution is not much different to how the preamble is written. Provisions such as "human life and health, honour and dignity, integrity and security are defined in Ukraine as the highest social values"; "Human rights and freedoms and their guarantees determine the area of the state activity"; "The state is responsible to the individual for its activity", etc. sound pompous. But as the practice has shown, state subjects in Ukraine have failed to understand what obligations these provisions impose on them. Obviously, major political and legal principles, not philosophical ones, should be the priority.

3) The rights, freedoms and duties of a person and citizen. This is a basic and purely legal (not political, not declarative, not fundamental, not mythological, etc.) part of the Constitution, which describes main constitutional rights, their content, scope and minimum standards for possible restrictions. Tasks and provisions of the Constitution of Ukraine should be compared to models that are to be followed – the 1950 European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, etc.

4) The mechanism for implementing and guaranteeing human rights must be disclosed in the following chapters of the Constitution (this mechanism is invisible in the current Constitution).

- the Constitution of Ukraine should be more demanding as to the use of terms, especially when they are not synonymous. For example, let us turn to the Preamble. It refers to "Ukrainian people", "Ukrainian nation", "people", "the citizens of Ukraine of all nationalities", etc. However, such an excessive use of the word "Ukrainian" gives an impression that someone wants to convince in something they are not sure of themselves.

President of Ukraine "defends the rights and freedoms of citizens" – "in the interests of fellow citizens", but he has to do the same in the interest of foreigners and stateless persons, who enjoy the same rights and freedoms under the Constitution of Ukraine. Therefore, maybe, it would be better if he defended the rights and freedoms not only of the "citizens" and not only "in the interest of fellow citizens"?

> In the history of Ukraine there was a case where Ukrainian President wrote the resolution to the letter of the deceased V. Chornovol: "Solve for the benefit of the citizens of Ukraine" and the European Court of Human Rights later admitted this violation of human rights. President of Ukraine within the jurisdiction of the state should protect the interests of all people, not just the citizens of Ukraine or their fellow citizens.

If the constitution is adopted, and any branch of power has doubts n its provisions, there is a direct "adviser" – the Constitutional Court, and not a scientific doctrine. Another thing is when the Constitution draft is being prepared. This is when national scientists and foreign experts should have a say. However, as for the latter, we also have to use our reason, not emotions. We should proceed from the fact that different conclusions and comments of respected authoritative international institutions (the Venice Commission, independent experts, etc.)

should be regarded in our work on the draft, at least, to avoid new errors or fall into the same trap twice. However, we must not forget that we are preparing a draft Constitution of Ukraine, not producing a draft Constitution of the European Community. **So, in order not to lose national identity, not to create a document, which collects all the best of constitutional law, but does not work in Ukraine, due to inconsistency of its constituents or constitutional provisions and national realities, we must carefully analyse the proposals and recommendations that we receive**.

For example, the proposed draft conclusion adopted by the Venice Commission on 12-13 June 2009, and proposed to Ukraine, cannot be received without discussions and reservations.

For example: "The provision that the citizen of Ukraine cannot be expelled or extradited to another state, can cause problems in connection with Ukraine's international obligations under the Rome Statute". The draft authors confused the ban on extradition or expulsion of its citizen to a foreign state with the transfer of its citizen to the jurisdiction of international judicial institutions. The former is a sovereign right of a state in relation to its citizens that is prohibited in relation to foreigners, in some cases, even by international law.[12]

The second case, which the experts emphasize, refers to performance of functions and powers (jurisdiction of the International Criminal Court in the Member State of the Rome Statute (or by special agreement on the territory of another State)). Such jurisdiction is provided in case of well-defined crimes (genocide, crimes against humanity, war crimes and crimes of aggression) to apply uniform standards for punishment of perpetrators in Member States, which are parties to the Charter and others. It should strictly adhere to the norms of national law.[13]

All such cases are not about the "expulsion" or "extradition", but the "transfer" of its citizens under the jurisdiction of the International Criminal Court. This does not affect the right of a state not to extradite and to expel its citizens to another state. This is an obligation that should be referred to.

Some considerations on improving the status of human rights in draft amendments to the Constitution

Preamble

1. Human rights and freedoms should be articulated more clearly since "taking care of the rights and freedoms" – is narrowing their meaning. The Preamble wording should apply to all bodies and situations related to human rights to be discussed in the following Chapters. It should reflect the guarantees for their approval and strengthening protection, elements of responsibility and duty related to these rights and freedoms.

2. Human dignity should not be reduced only to "worthy conditions of life". This should be a fundamental principle of the Preamble.

3. "Determination to defend democracy and the rule of law" should be mentioned.

General principles

1. Presentation of articles is subject to the tasks and logic of the "General Principles", but it is too political and declarative. As a result, almost all articles are "stuck" above reality: single citizenship (Article 4) vs. dual citizenship in practice; separation of powers into legislative, executive and judiciary (Article 6) vs. legislative functions of the executive branch; proclaiming the rule of law (Article 8), and at best, it is understood and used as the principle of the rule of legal documents; Local Government is only guaranteed on paper (Article 7) and not more. Authors of draft amendments to the Constitution of Ukraine should at least reduce a declarative nature of provisions related to human rights (again, especially true for social rights).

2. Articles should be placed more systematically. The current version of the Constitution first presents the issue of the state, of a person, then returns to the state, then a person; and includes third elements and components.

3. Taking into account obvious changes in the society, the following aspects should be given more clarity: equality (for obvious reasons and active differentiation in society), cultural, religious and linguistic diversity (Article 11 of the Constitution already started adjustment by legislation, but not as provided in the Article, which is not acceptable); not all social problems boil down to the definition: "Ukraine is ... a ... social state"; the issue of workers' solidarity in the General Principles is touched upon only indirectly; the appeal of the person and citizen to the Constitutional Court are not guaranteed (as is the right to a fair trial).

Chapter "Rights, freedoms and duties of a person and citizen"

1. It is necessary to match articles with Chapter "General Principles". For example, the provision "Norms found in the Constitution of Ukraine are norms of direct action" (Article 8) are difficult to implement in practice due to the wording of these norms in this Chapter. The social dimension of human rights is not reflected in "General Principles" and only declaratively proclaimed in Chapter II, etc.

2. Implementation of Articles 35, Chapter II (a total of 41 articles) actually made dependent on "the grounds and procedure established by law". Under such conditions, these articles are no longer constitutional (as practice shows), and the provision of direct action becomes a fiction.

3. It is better to follow the terminology of international legal documents to which we have made commitments. This will help avoid many issues in law enforcement practice. For example, as long as we have assumed

[12] See., e.g., Article 1 of Protocol No. 7 of the 1950 European Convention on Human Rights, and numerous decisions of the European Court of Human Rights on the basis of Art. Article 3, Clauses 1, 6, 8, 35 and so on. Article 13 of the 1966 International Covenant on Civil and Political Rights, Article 33 of the 1951 Refugee Convention and many other international instruments, under which Ukraine has assumed obligations.

[13] This is done in particular to prevent such incidents that occurred in the relations between Armenia and Hungary and Azerbaijan. Hungary extradited to Azerbaijan a person sentenced for crimes related also to Armenia. Azerbaijan asked to extradite a criminal to serve his sentence at home, and having achieved this, released him, and even awarded him.

an obligation to prohibit discrimination in any of its manifestations, this should be specified in the Constitution, but not replaced with misleading terms such as "privileges or restrictions" (Article 24); as long as we have assumed an obligation to guarantee "freedom of thought, conscience and religion", we shall not replace them with "freedom of belief and worship" (Article 35), or "freedom of expression" with "freedom of thought and speech" (Article 34). This is not the case of simple inconsistency of freedoms, but restriction on their scope and degree of rights, etc.

4. It is necessary to bring the content of provisions of the Constitution in line with international treaties that we have committed ourselves to, or with those of international organisations that we are planning to join, and will not be accepted unless we amend the current Constitution. If we compare the European Convention on Human Rights with "privileges or restrictions" of the Constitution of Ukraine, one can see that the latter does not prohibit discrimination on the grounds of religion (it mentions "religious beliefs"), national origin (mentions ethnic origin), belonging to national minorities and birth (this questions the birth in vitro and surrogacy, etc.). There are even more discrepancies between provisions of the Constitution of Ukraine and those of the Charter of Fundamental Rights of the European Union. The Constitution prohibits discrimination on the grounds of "religious, political, and other beliefs", but the Charter talks about beliefs and convictions – these are two different manifestations of discrimination, and, therefore, they appear as separate criteria according to certain features: religion, beliefs, political or other views. The Constitution does not contain the following prohibitions of discrimination that are underlined in the Charter: on genetic characteristics, belonging to national minorities, origins, disability, ages, and sexual orientations. It would not be correct to consider that the term "other features" has replaced them, since no court of Ukraine attributes sexual orientation to "other features".

5. Social rights are enshrined in the Constitution (almost all) as declarations, which make the Basic Law easily vulnerable. This requires a conceptually different approach. Since we are bound to join social charters, codes, and conventions of the European Council, the level and form of ensuring social rights should be secured in the Constitution today (our legislation, however, significantly lags behind even in areas where we used to be at an advantage: the right to work, to education, health care, social security, etc.). Once again, this disparity between guarantees of social rights is especially evident when comparing the Constitution of Ukraine to the Charter of the European Union. The Constitution is inferior to the Charter according to almost all indicators.

6. State discretion is quite easily formulated and the rights remain limited in the Constitution. For example, while the European Convention on human rights admits that public authority can sometimes interfere with the right to respect for one's "home" for clearly defined purposes based on law and if it is in the interest of a democratic community, such objectives are not defined in the Constitution at all. The need for such actions is not questioned in a democratic society, and all restrictions are based on a single criteria – the law. Not surprisingly that, in Ukraine, all violations of the right to inviolability of one's home recognised by the European Court of Human Rights were executed under the law.

This broad uncontrollable freedom of action by state agents is also fixed in the Constitution in relation to other human rights.

This often leads to the conflict between the Constitution and international obligations of Ukraine. The European Convention on Human Rights restricts freedom of opinion, etc. only in four cases: (1) in the interests of public security; (2) to protect public order; (3) to protect health or morals, and (4) to protect the rights and freedoms of others. The Constitution of Ukraine in these cases adds: (5) national security; (6) territorial integrity; (7) the prevention of disorder or crime; (8) to protect the reputation of others; (9) to prevent the disclosure of information received in confidence, and (10) to maintain the authority and impartiality of the judiciary. **Democracies have not known such number of limitations even in the event of martial law.**

Restrictions are often presented as follows: "with the exception of restrictions established by law", without identifying those areas in which it can be done under law. Thus restrictions become unlimited.

7. Since the adoption of the Constitution of Ukraine, many states have introduced a number of new constitutional rights to their Basic Law (the right of elderly people and disabled people to social rehabilitation, computer science, management, consumer protection, personal data protection, etc.), which should be analysed for possible amendments to the new Constitution and giving them constitutional status.

It should be decided where/whether to locate prohibitions and obligations such as: the prohibition of derogation from the provisions of the Constitution (both in legislation and its enforcement); the prohibition to interpret the Constitution in a restrictive or another way, causing loss of human rights and fundamental freedoms in their respective field of application; prohibition of human trafficking and organ trade; prohibition of child labour, etc.

Chapters III-XV

1. These Chapters should establish basic government powers to ensure the proclaimed human rights, implementation mechanisms, and guarantees of ensuring and renewing rights and freedoms. Today, we have only declarative, formal provisions: the Parliament of Ukraine determines the rights and freedoms and their guarantees; the rights of indigenous peoples and national minorities; appoints and dismisses the Ombudsman and only hears his report. The President of Ukraine is the guarantor of rights and freedoms and is committed to defend them. The Cabinet of Ministers of Ukraine takes measures to ensure human rights and freedoms, and local administrations ensure observance of these rights. The court is obliged to ensure only the right to protection in court, but there is no

right to a fair trial. For a local government, human rights are not obligatory.[14] The Constitutional Court of Ukraine remains for citizens a virtually closed structure in terms of protection of their rights and freedoms. It is not about turning the Constitution into a regular law, but establishing guarantees for the respect of human rights and freedoms, powers and responsibilities of state agents in this field.

Obviously, a number of proposed ideas may be implemented in the new comprehensive constitutional process.

In the process of working out the text of Chapter II of the Constitution of Ukraine, in terms of its improving, the Working Group made the following conclusions.

1. Significant progress has been achieved in the current Constitution, in terms of withdrawal from the positivist tenets of the Constitution (Fundamental Law) of Ukraine of 1978. However, in some cases, a statist approach to human rights remains. In fact, Chapter II of the Constitution of Ukraine lists almost all human rights, which Ukraine is committed to respect under international treaties. One can hardly consider it appropriate, since it was enough to provide legislative support for most of those rights. The legislators addressed this by writing in the Article 9 of the General Principles of the Constitution of Ukraine, that effective international treaties that the Parliament agreed to be binding for Ukraine are part of national legislation. In addition, authors of the Constitution have eliminated the basic imperative: Human rights are granted by the state, as it was considered in jurisdiction of the 19th and first half of the 20th century.

Almost all of Chapter II of the Constitution of Ukraine is built under the scheme: the state is a determining agent and human rights – the result of determination of the state. If we systematically examine the entire Chapter II of the Constitution, then the provisions of Article 3 of General Principles ("Rights and freedoms and their guarantees determine the content and direction of the state") will mean that nothing can exist beyond the activity and control of the state. Although further statement of the Constitution says, that "the state is responsible to the individual for its activity", since it violates dependence of a person on the state, this responsibility is not assigned to any of the branches of power (actual implementers of the state's will). Thus, Parliament is responsible for the appointment and dismissal of the Human Rights Commissioner of the Verkhovna Rada of Ukraine; hears his annual report (Paragraph 17 of Article 85 of the Constitution), and is responsible for passing laws (P. 3, Article 85 of the Constitution of Ukraine), which often restrict or even violate constitutional rights of an individual. The President of Ukraine is obliged "to protect the rights and freedoms of citizens only" (Article 104 of the Constitution), thus violating Article 21 of the Constitution of Ukraine, according to which "all men are equal in rights". Although "the rights and freedoms of a person and citizen are protected by court" (Article 55 of the Constitution), they are actually reduced to the right to go to court; and the Constitution of Ukraine does not provide the right to a fair trial.

Chapter II of the Constitution of Ukraine shows that the legislator has beneficially improved and supplemented Section 6 of the Constitution (Fundamental Law) of Ukraine of 1978 "Fundamental Rights and Duties of citizens of Ukraine" by mentioning in almost every article of the Constitution of Ukraine such elements as governmental control, governmental permission, governmental restrictions and a possibility of adopting decisions on human rights by state law.

The following data can attest to the static nature of Chapter II of the Constitution of Ukraine.

In 48 articles of Chapter II, "Rights, Freedoms and Duties of a Person and Citizen":

(*a*) in 58 cases, the provisions relating to human rights, are stipulated by different legal terminology motivations:

- based on the law – 17 times;
- determined by law – 8 times;
- according to the law – 7 times;
- on legal grounds – 5 times;
- prohibited including by law – 4 times;
- "prescribed by law", "authorized by law", "restricted by law" – 3 times each;
- not forbidden by law – 2 times;
- every 1 time "equal before the law", "authorized by law", "prior authorisation", "prosecuted by law", "legally" and even entirely illegally – "given the need";

(*b*) in 47 cases human rights were related to, caused or made dependent on the will of the state (including 4 times – of government bodies, officials and officers);

(*c*) in 41 cases, contrary to the provisions of Article 21 of the Constitution of Ukraine, human rights were reduced only to the rights of "citizens", so again it only emphasizes legal connection of respective rights of an individual with the state.

[14] For comparison, the issues of democracy, human rights and freedoms for the Congress of Local and Regional Authorities of the Council of Europe is almost the key one.

[15] In general, to prepare a draft for public discussion of the Law of Ukraine "On Amendments to the Constitution of Ukraine – on Human Rights" 44 protocol meetings and five post-preparation meetings were held; additional suggestions and recommendations on the draft made by the public were discussed among the members of the Working Group by telephone and by electronic means of communication.

[16] See: Legal journal, The Law of Ukraine, No.10, 2015.

[17] Proposals were submitted by Odesa, Mykolaiv, Vinnytsia, Kirovohrad, Kharkiv, Sumy, Zhytomyr and other areas.

(*d*) in the developed democracies and under the international standards, the person is entrusted with two primary responsibilities: (1) comply with the Constitution and laws, and (2) pay taxes. Chapter II of the Constitution of Ukraine mentioned duties – 19 times;

(*e*) ostensibly, to emphasize that human rights cannot exist without a state, Chapter II of the Constitution of Ukraine – refers 13 times to possible restrictions (in different versions: narrow, exclusion, restriction of the scope, etc.), and only 11 cases – on guarantees provided by the state (although the number of rights proclaimed is 4 times higher).

Based on these indicators, the Working Group decided to assume a conceptually different approach to Chapter II of the Constitution of Ukraine, calling it "human rights" and laying the basis for all human rights (not the attitudes of state and government agencies and their understanding of these rights) but a person's dignity. It is from a standpoint of human dignity that the entire system of human rights was outlined in the draft Chapter II of the Constitution. However, the Working Group decided to make a significant step to equalize the rights of citizens with all persons who are not citizens of Ukraine. A slight difference remains, but only in cases where Ukraine, according to the Working Group is not ready to equalize the rights of citizens with those of non-citizens, or when imposing appropriate obligations on non-citizens violates Ukraine's international obligations (the right to be a member of political parties; the right to participate in public affairs; the right of equal access to public services; the right of citizens to free higher education (although, this expanded to other persons equated to citizens); to study in their native language or to learn their native language; to use the objects of state property; the prohibition of deprivation of the citizenship of Ukraine; the right to social protection (also expanded to other persons equated to citizens); the duty of citizens to protect the homeland and to perform military service).

2. The Working Group has admitted that Chapter II of the current Constitution of Ukraine generally complies with European standards of human rights and international commitments assumed by Ukraine. However, authors of the current Constitution quite often seek to justify every proclaimed right with "national features" but, for some reason, only when it comes to limitations and restrictions of rights, and exclusion or extension of duties or responsibilities of a state.

The Working Group did not see "national features" or efforts to preserve national traditions in strengthening mechanisms of state control over human rights, and often interpreted such provisions in the current Constitution as a retreat from international standards and international obligations of Ukraine. That is why almost for all the rights that are enshrined in the Constitution, the Working Group has cited the existing "restrictions", "limitations", etc. according to international standards. For instance, broad authority of the state to restrict rights of a person "in emergency cases", "other possible procedures", etc. were withdrawn from Chapter II of the draft. For the same purpose, the Working Group had changed a direction from prohibitions in exercising rights by a person to identifying lawful capability of state to hinder the effective exercise of rights.

3. The so-called **social rights** were another problem when developing amendments to Chapter II of the current Constitution by the Working Group. On the one hand, Article 22 of the Constitution prohibited the Working Group to "cancel" or "narrow" the secured rights, on the other – such rights as "the right to work" (Article 43), "right to rest" (Article 45), the "right to housing" (Article 47), "right to social security" (Article 46), "right to health" (Article 49) et al., are propaganda wishes, where the state is not able to provide the declared guarantees almost in all the articles to the extent that they are written. Not surprisingly that the declaration of these rights often contains conditionality: "according to law", "as determined by law", "as established by law", etc. that allows the state to "hide" behind such specifications, which, typically, minimize, or even negate such rights during their implementation. The state appears generous in proclaiming the rights and does everything to disavow them, not respecting human rights even to the minimum.

Based on the situation, the Working Group reviewed all the constitutional provisions on social rights and without removing those rights from the Constitution, formulated them in a way they could actually be implemented without removing positive responsibility for their provision from the state.

4. However, the decision-making method of the Working Group (majority vote of those present) as well as a decree of the President, which approved the Regulations of the Constitutional Commission in terms of its rights and tasks, has not given way to avoiding a number of existing shortcomings of Chapter II of the Constitution, and in some cases has added new ones. The draft of the Constitution, due to the impossibility of cancellation and restriction of the rights of the Basic Law, contains a large number of human rights that significantly complicates the government's ability to ensure them or bear a positive responsibility thereunder. This situation emerged partly because the authors of the current Constitution proceeded from the fact that human rights enshrined in international constitutions and international treaties as such, should be incorporated (almost without exception) in the national Constitution. This makes the Basic Law not a Constitution, but a list of existing human rights in the international community in the period between 20th – the beginning of the 21st century. **It is impossible to state that any particular constitutional right was introduced into the Constitution of Ukraine because it reflects national identity of Ukrainian people.**

However, in the draft changes and amendments to Chapter II of the current Constitution, the Working Group has made efforts to reduce the constitutional nature of the Basic Law. For example, modern constitutions and fundamental legal international conventions on Human Rights set out 7-9 criteria, which prohibit discrimination

and the rest are included in the column "and others" (e.g., 8 criteria in the Constitution of Germany; 5 – in the Spanish Constitution; 9 – Switzerland and Finland; 2 – the Constitution of Belgium; 5 – in the Constitution of the Netherlands), etc. – other prohibitions included in the category "and others"; the International Covenants on Human Rights (European Convention on Human Rights, Protocol No. 12 to the Convention – specifies 11 such criteria, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – 10, the other criteria referred to as "and others").

The current Constitution of Ukraine contains 9 such prohibition criteria, the rest being attributed to "and others". However, despite the fact that the Law of Ukraine "On Principles of Prevention and Combating Discrimination in Ukraine" and other laws and applicable codes of Ukraine significantly expand the list of such prohibition criteria (that just reveals the contents of "and others"), most members of the Working Group approved the list of 16 criteria for prohibition of discrimination, further extending its term to "and other features", because they thought that all of the criteria should be mentioned in the Constitution.

The argument that substantial, numerous lists of different features and criteria in the Constitution is not always an indicator of high professional constitutional law-making has had no effect. When PACE adopted Resolution No. 1474 of 26 September 2000, in which it recorded "P. 1 Add sexual orientation to the list of grounds for discrimination prohibited by the Convention for the Protection of Human Rights and Fundamental Freedoms", the authors of Protocol No.12 to the Convention recognized this recommendation as legally incorrect and provided the official explanation: "P. 20. Contained in Article 1 of the Protocol list of features to preventing discrimination is identical with a list contained in Article 14 ECHR. This decision was given preference over others, such as listing a number of additional features (such as physical and mental disability, sexual orientation or age), not because of lack of understanding that these symptoms became especially important in society, compared with those existing when editing Article 14 ECHR, but since such inclusion was legally not required, because the list of features is incomplete".

5. A number of shortcomings of the draft amendments to Chapter II of the Constitution of Ukraine can be explained by the fact that the Working Group was authorized to work only on this Chapter, excluding the Preamble, General Principles and others. Since all the provisions of the Constitution must be stated systematically from the preamble to transitional provisions, it was found that a number of proposals to the draft Chapter II can be implemented by making systemic changes to other Chapters of the Constitution that require approval by national referendum, which today, for obvious reasons, is unacceptable.

It is clear already now that the proposed draft amendments to Chapter II of the Constitution of Ukraine will not be agreed in all aspects with Chapter I "General Principles", set out in the Constitution not systemically (first, the question of the state, then human rights, then again about the state, and then about the person), declarative (especially when it comes to the separation of powers, citizenship, guarantees of local self-government, the rule of law, which Chapter II places over the Constitution (for example, in terms of the provisions of Article 17 of the Constitution, which state: "the establishment and operation of armed formations not envisaged by law is prohibited in the territory of Ukraine" – failure to comply with this prohibition of the Constitution and adoption of the law not only led to the occupation of the territory of Ukraine, but also to the fact that such formations began to be allowed for individuals, etc.)).

The lack of a unified concept of the Constitutional Commission led to the fact that even in cases where the Constitutional Commission's Working Group could amend the Basic Law – they did not do it collegially.

For example, the Human Rights Working Group enshrines in its draft the human right to a fair trial, and the **Working Group on Justice** (failing to respond to the objections of the Human Rights Working Group) in its draft deliberately restricted the right to a fair trial only by the right to go to court (as enshrined in the current Constitution), ignoring the numerous criticisms of that provision in the current Constitution of Ukraine by international experts and institutions.

The right of citizens to appeal to the Constitutional Court of Ukraine (Article 54 of the draft) enshrined in the draft amendments to Chapter II of the Constitution of Ukraine was actually substituted by the draft of the Working Group (and later in the draft Law of Ukraine "On Amendments to the Constitution of Ukraine – on justice" by the President Ukraine), which requires (Article 151[1]) a person "who believes that the law applied in the final judgment in his case contradicts the Constitution of Ukraine" to appeal to the Constitutional Court of Ukraine, only after "all other domestic remedies of protection are exhausted". This not only places certain bodies, which according to the Constitution should ensure human rights protection, above the court and its final decisions, but also eliminates the right to appeal to the Constitutional Court of Ukraine as such. This Court may declare the case inacceptable because the person failed to apply to the President prior applying to the Constitutional Court and requesting him to suspend the legal act, which contradicts the Constitution and referred the case to court for a final decision; or to the Ukrainian Parliament Commissioner on Human Rights, who under the law "is to protect the legal rights of individuals and society as a whole to ensure the rule of law and justice", etc. **That is, provided that a person after the final court decision may appeal to the Constitutional Court of Ukraine only "after having exhausted all other national remedies" (besides, this "all other" is legally uncertain), includes a right to yet another declaration.**

CONCLUSIONS

Constitutional rights and freedoms of a person should be viewed as the minimum set of basic person's capabilities, and the state, its agencies, public officials, and all subjects of a democratic (civil) society should be responsible for their provision. Since, in practice, the vast majority of violations of human rights could be prevented by appropriate actions taken by public bodies and officials, and the current Constitution is limited only by their political responsibility, it is necessary to enshrine in the Constitution the administrative and criminal responsibility for inaction or action that violates the Constitution and relevant laws.

The Constitution should remove barriers to public control over implementation and holding the authorities responsible for negative consequences of implementing human rights and freedoms, including the right to appeal to judicial institutions against public institutions and their officials involved in illegal activities. Government officials responsible for violation of constitutional rights and freedoms should be held administratively liable (up to a ban for a certain period from working in state agencies and institutions) or criminally liable.

In order to extend the leverage for ensuring human rights and freedoms in the Constitution, its basic structural units (e.g. the most representative associations of trade unions) should be granted the following rights: legislative initiative; constitutional appeal to the Constitutional Court of Ukraine as to the compliance of the Constitution with legislative norms; representation of interests of the insured persons by management of compulsory public insurance funds; the right of access for civil society organisations to official documents and other information about the activities of state and local governments, their representatives, and other public institutions, etc.

The Constitution must secure international legal standards (including standards of the Council of Europe) as a mechanism of influencing Ukrainian society in achieving proper fulfilment of the rights and freedoms of persons.

To consolidate human rights and freedoms (particularly, the political rights in terms of acceptable limits, economic, social, cultural, environmental), the Constitution should specify a positive commitment of the state to ensure each of these rights. In addition, Chapters III-XV of the current Constitution of Ukraine should more clearly define functional responsibilities of relevant authorities, local governments and other state subjects for ensuring and protecting human and civil rights.

The Constitution should provide: the right to apply to courts for protection of human rights, including – to the Constitutional Court of Ukraine; the right to a fair trial and other rights essential for protection of rights; equal opportunities for citizens and non-citizens; effective assistance mechanisms for socially vulnerable and other particularly vulnerable groups of the population.

The analysis of draft amendments to Chapter II of the Constitution of Ukraine prepared by the Working Group shows that a significant step has been made to bring the constitutional provisions in line with international standards. At the same time, the appropriateness of the position of the Working Group on public discussions of the draft in regions and in the media was confirmed. The expert discussions of complex provisions of the draft continued (this allowed to make changes to the proposed law on education). The legality of including a reference to morality in the Constitution as the criterion for restricting human rights is being discussed now. A subgroup of the Human Rights Working Group on right to possession of firearms has been established. A draft law on proper observance of relevant provisions of the articles of the Constitution has been developed. The discussion continues at roundtables and international conferences with the participation of individual members of the Working Group and other complex (and some controversial) provisions of the draft (the issue of respect for human dignity and its basis for all other human rights; discrimination against foreign nationals, human rights restrictions in connection with terrorist acts; the anonymity of the Internet users; rights and freedoms in the sphere of religion; collective rights of indigenous peoples and national minorities; use of property and conditions for deprivation of property; guarantees to investors; the need to make progressive changes in the law on business activities; the equality of men and women in all areas of life (the current Constitution in Article 24 gives a list of such areas, which objectively cannot be complete); issues of the definition of marriage (in the current Constitution, marriage is referred to as a free consent of a woman and a man, without specifying their age. The draft refers to the guarantee of marriage law, and subsequent definition of marriage is attributed to the law). The debate continues in the legal community on the expansion of existing constitutional rights, adding to them the right of access to public information, the right to good governance, the right to democratic rebellion, the right to political strike for everyone, including the army, police, courts, etc., freedom of choosing their own destiny, etc.).

It is obvious that such discussions of certain provisions on human rights should continue, both in the media and in regions to be visited by the Working Group. Expert discussions should be held involving international experts; and before the final drafting of amendments – the experts of the Venice Commission should be contacted in order to obtain their opinion.

This procedure does not change the situation that the work on the draft amendments to Part II of the Constitution of Ukraine has been completed. It is necessary only to improve certain provisions of the final draft, before passing it over to the Constitutional Commission to make a final conclusion about its readiness for submission to the President of Ukraine, who will introduce the relevant bill to the Verkhovna Rada of Ukraine.

REFORM OF THE CONSTITUTIONAL PRINCIPLES OF THE JUDICIARY, HUMAN RIGHTS AND FREEDOMS: CURRENT AND EXPECTED RESULTS

22 June 2016, the Razumkov Centre, supported by the Hanns Seidel Foundation in Ukraine, held a Roundtable "The Reform of Constitutional Principles of the Judiciary, Human Rights and Freedoms: Current and Expected Results". The event was held as part of the Project "Constitutional Process in Ukraine: Improvement of the Foundation of Justice, Rights, Freedoms and Liabilities of a Person and a Citizen", implemented by the Centre with the support of the US Agency for International Development (USAID) under the "Fair justice" project.

Information and analytical materials containing an analysis of amendments to the Constitution as regards justice, rights and freedoms, the results of a nationwide and two expert surveys and interviews were presented at the roundtable discussion.

The following questions were introduced for discussion:

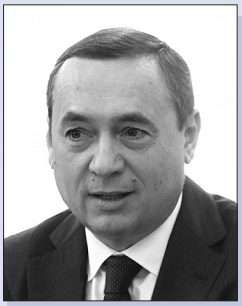
1. The parliamentary procedure for amending the Constitution of Ukraine regarding justice is complete: What comes next?
2. Is the Law of Ukraine "On Judicial System and Status of Judges" a legislative act that can, together with other required laws and codes, ensure effective operation of the judiciary?
3. The constitutional process of renewing Section II of the Constitution of Ukraine: The balance of universal and national standards.

Ukrainian deputies, judges of the Constitutional Court, representatives of the executive power, scholars, governmental and independent experts of Ukraine, public figures, as well as representatives of foreign embassies and international organisations took part in the discussion.

The following are speeches of the participants in the order they were presented at the Roundtable. The texts are prepared according to the discussion records and presented in a somewhat summarised form.

Roundtable, 22 June 2016

▶ WELCOME REMARKS ◀



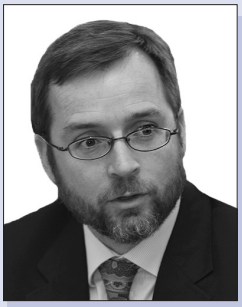
Mykola MARTYNENKO,
Head of the Board of the Razumkov Centre

Dear Sirs and Madams! Welcome to the Razumkov Centre's Roundtable meeting. Today, we will discuss a very interesting and topical issue. In recent years, we have often talked about constitutional changes and constitutional reform.

For many years, especially after the Revolution of Dignity, experts, scholars, and public activists have been arguing that there is an acute and urgent need for judicial reform in Ukraine. Now, finally, we can observe some results: certain changes were voted for. Are they the right changes? How will they be implemented? We are very much aware of the social resistance, which the introduction of these changes will bring. This, in my opinion, should be the subject of our roundtable discussion.

The second part proposed for discussion is no less important; it is a constitutional reform in part of rights and freedoms of persons and citizens. There has been much discussion about this; theoretical, professional and political discussions, since ensuring human rights is the main task of the Constitution; this is what the state with all its institutions exists for. At the same time, there is a conflict observed between the rights declared in the Constitution and the opportunities provided by our country.

I hope that we have interesting discussions today, and produce recommendations that can be implemented in respective draft documents that will be officially submitted to the Verkhovna Rada for further consideration. ■



Dan RYAN,
Deputy Director, Office of Democracy & Governance, US Agency for International Development – Ukraine

It's an honour to be with so many distinguished experts, jurists to discuss constitutional reform. A fair, independent and transparent judicial system is the cornerstone of democratic society that not only protects human rights but also promotes social development and economic growth. Adoption of the judicial amendments to the Constitution and the new Law "On Judicial System and Status of Judges" mark a significant step forward in judicial reform, fundamentally transforming the judiciary into more equal branch of government. These amendments, we hope, will strengthen judicial independence and accountability, and promote greater judicial integrity.

The United States Agency for International Development was pleased to support the drafting of these amendments through the "Fair Justice" Project with support of the Constitutional Commission and its Working Groups including the Judicial Reform Council. Despite significant achievements, much work remains to be done: the Law that includes developing and adopting implementing legislation, including amendments to the Law "On the High Council of Justice", implementing legislation on the anticorruption courts and other measures. Subordinate legislation must be developed. Civil society must also be engaged as monitors of the process and active participants.

Helping Ukraine to advance independent judicial accountability and integrity remains USAID strategic goal for promoting good democratic governance. We will continue to stand ready to support Ukraine throughout this effort. ■

Daniel SEIBERLING,
Regional Manager of the Hanns Seidel Foundation in Ukraine, the Republic of Moldova and Romania

It's an honour to be here today for the opening of this very interesting Roundtable together with our partners and discuss this very important step on the continuation of constitutional and democratic reforms in Ukraine.

In our opinion, the new Law "On Amendments to the Constitution" covers three big issues that we are dealing with when we are talking about constitutional reform in Ukraine – the laws which have been adopted in the last few months: the law on decentralisation, the law on civil service and now the constitutional amendment on the judiciary. I think we have reached the level from which it is very possible to continue the way forward in democratisation and the division of power, especially when it comes to civil society control over the government decisions in Ukraine. But it is very important to see how the implementation actually goes because, at first glance, the new amendment to the Constitution looks very well done and well thought through. It goes along with European democratic principles of balance of power. But how will it look like in reality? How will it be implemented? And what kind of hesitance and obstacles will be met during implementation of these laws? It is the biggest part of work for the next few months.

I am sure that discussions like this and organisations, like the Razumkov Centre, who are filling this gap, fulfill this watchdog function to see what comes out of the written text of the law and how all these papers will live in Ukraine. ■

▶DISCUSSION◀

UKRAINE IS BUILDING AN INDEPENDENT AND PROFESSIONAL COURT

Kostyantyn KRASOVSKY,
Chief of the Main Department on Legal Policy, Administration of the President of Ukraine

On 2 June 2016, the Verkhovna Rada of Ukraine finalised the amendments to the Constitution regarding justice and adopted the implementation law "On Judicial System and Status of Judges". These amendments shall come into force on 30 September 2016. What main steps towards implementation of the judicial reform have already been taken, and what are to come?

The first step on this path was the Law "On Ensuring the Right to a Fair Trial", which came into force in March 2015 and started the operation of judicial bodies such as the High Council of Justice and High Qualification Commission of Judges, which were not functioning for 15 months and nine months respectively. The law created new mechanisms, transparent, competitive principles for selecting the members of these bodies, which made it possible to bring their work more in line with the requirements set out by the Ukrainian people. In addition, the law established judiciary clearance mechanisms, including through qualification-based assessment of all judges, established the institution of court files containing the professional history of judges, improved the selection process for judges, raised the requirements for judicial candidates, established exclusive competitive procedures for the appointment and transfer of judges, established effective mechanisms for disciplinary proceeding against judges and restored the role of the Supreme Court of Ukraine as the highest judicial body in the judicial system. This is what can be done at the level of relevant legislation without amending the Constitution of Ukraine.

The next step was to develop and adopt constitutional amendments. The amendments were developed with the participation of leading Ukrainian and international experts and were twice approved by the Venice Commission. The discussions as to these amendments were rather lively, and the overwhelming majority of the participants of this process speak of a comprehensive approach to reform and the positive step forward for the whole judicial field.

The ideology of amendments to the Constitution of Ukraine as to justice in general is to ensure that the judiciary operates according to the rule of law, social expectations and the European system of values and standards.

Firstly, this means independence and political neutrality that deprives any political bodies of the opportunity to influence courts, and the transfer of most powers as to the judicial carrier to the High Council of Justice where the majority is made up of judges, elected by judges; the creation and elimination of courts solely according to the law, transparent judicial competition.

Secondly, this means the irremovability of judges that provides for the immediate appointment of judges for an unlimited term without any probationary procedures.

Thirdly, this means legal certainty that provides for a clear and comprehensive definition of the grounds for a judge's dismissal and termination of powers; removal of the rules on the breach of a judge's oath as a reason for dismissal.

Fourthly, this means functional immunity and the individual responsibility of judges.

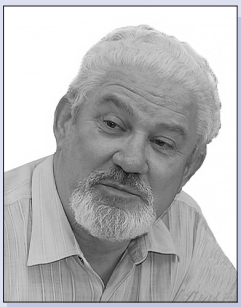
Finally, we can say: **currently the provisions of the Constitution as to justice correspond to the standards of the Council of Europe**, and their further implementation and strengthening will depend on the adoption of the required implementation legislation and the actions of each participant of court proceedings.

The first of these implementation laws, that is the Law "On Judicial System and Status of Judges" was adopted simultaneously with the amendments to the Constitution in the part of justice. According to this law, a new Supreme Court is to be established within six months after its entry into force. The Supreme Court will include the Grand Chamber, which will unify judicial practice and settle judicial disputes, as well as four cassational divisions – courts of cassation, which will review cases under cassation. The judges of the Supreme Court will be appointed exclusively through an open and public competition with qualification-based assessment as its component. Candidates outside of the system – lawyers and legal scholars – have the opportunity to take part in competitive tenders, provided that these candidates have at least 10 years experience in the Supreme Court, and at least 7 years work experience for candidates for appeal court judges.

The law establishes the broad participation of the public in the qualification-based assessment procedures of judges and monitoring of their lifestyles. For example, the Public Council of Virtue under the High Qualification Commission of Judges of Ukraine will be established, which will assist the High Qualification Commission of Judges of Ukraine to establish the conformity of the judge or judicial candidate with the criteria of professional ethics and integrity. In addition, judges also have to submit two declarations, one on integrity and one on family ties.

Now the Judicial Reform Council is working on other required implementation draft laws – "On the High Council of Justice", "On the Constitutional Court of Ukraine", amendments to the procedural legislation and advocacy legislation. It is planned that these draft laws will be adopted by the end of September this year. Then it will be necessary to vote on amendments to the five procedural codes and the Law "On Advocacy and Legal Practice." Under these conditions, we can expect first significant results next year. ■

LAWS CAN GRADUALLY RESTRICT HUMAN RIGHTS



Viktor SHYSHKIN,
former Judge
of the Constitutional Court
of Ukraine

Regarding the constitutional reform of the judiciary and human rights: I am against any constitutional changes in the light of Article 157 of the Constitution,[1] even if they are of great necessity.

But now on something else. The Strategy of the President up to 2020.[2] I want to ask a question: Do people who have introduced this constitutional reform actually see the conceptual ultimate goal of this reform? They do not seem to. Or is it just me, because there is simply no goal?

Once I gave an interview to the Voice of Ukraine, which was dedicated to the 20th anniversary of the Constitution, where the concept of the new Constitution of 19 June 1991 was brought in. This concept is already 25 years old; it was adopted back in Soviet times. The first part on general methodological principles of the new concept said: "the Constitution should define the priority of universal human values". It is said that we are old and lag behind the young, but I would like to see young people declare this in the communist regime. **"…To recognise the principles of social justice, to establish the democratic and humanistic choice of the people of Ukraine, to clearly show Ukraine's commitment to the generally recognised norms of international law"**. This concept was not only made public, but also adopted by the Decree of the Verkhovna Rada of the USSR.[3] This is the achievement of all the Ukrainian people. The Decree is based on the Declaration of State Sovereignty (where general methodological principles are defined), constitutional changes of November 1990 – radical and revolutionary changes, which actually pried Ukraine away from the Soviet Union.

I could, to some extent, discuss such an issue: **how are human rights prescribed, are all of them prescribed in the Constitution or in slogans**, and then interpreted in the law? By the way, there are many references to the law regarding the judicial system. This is possible when referring to state institutions, but when it comes to human rights, I have very serious doubts.

Why are there any doubts? I am afraid **to give the lawmakers and our government the weapon that would be the opportunity to manipulate human rights in the laws**. I would like to give an example. Today, the Constitution contains one of the principles of our court procedures – the right to appeal and instigate cassation proceedings against a court decision, except in cases established by law. Anything can be distorted by means of these laws. And, unfortunately, they are distorted. The Constitutional Court of Ukraine should have, right from the start in 1997-1998, explained what was meant under "except in cases established by law" and, in particular, should have listened to the developers of the Constitution as amended in 1996. We[4] meant: except in cases when new courts are established and their decisions could not be challenged. For example, the decision of the Constitutional Court of Ukraine is final and not subject to appeal. We had previously proposed to create the Anti-Monopoly Court – one court for the whole of Ukraine. It would have been the court, and its decisions could not be challenged.

Initially, when the first instance on land cases review was established, when people were deprived of land based on decisions of administrative courts. There were appeals and cassations. When, according to the amended Code of Administrative Procedure, the first instance was transferred to the court of appeal, the Higher Administrative Court became an appellate court, and cassation disappeared. So Article 22 of the Constitution was violated, and people were deprived of the right to cassation. Then, there was Article 172 of the Code of Administrative Procedure of Ukraine, when penalties imposed by the administrative authorities had to be considered in administrative courts – from 2005 there was the right to appeal and cassation. The same: when complaining against the actions of the higher echelons of power (the President, the Verkhovna Rada of Ukraine, the Cabinet of Ministers) was a subject of consideration in first instance courts, district courts executed the right to appeal and cassation. When it was transferred to the Higher Administrative Court of Ukraine, the right to appeal and cassation was abolished.

So, human rights can gradually be manipulated by laws. I am not talking about all human rights, but only the right to appeal. Two-thirds of my thoughts as a judge of the Constitutional Court regarding the decisions of the Constitutional Court of Ukraine are dedicated to violations of Article 22 of the Constitution. It clearly states: "When adopting new laws or amending current laws, no narrowing of the content or scope of the existing rights and freedoms is allowed". If you do not like Article 22, amend it. But as long as it is effective, it should be an icon, including for judges of the Constitutional Court of Ukraine. ■

Roundtable, 22 June 2016

[1] Article 157 "The Constitution of Ukraine cannot be amended in the event that these amendments foresee the abolition or restriction of the rights and freedoms of humans and citizens or if they are aimed at the elimination of the independence or violation of the territorial integrity of Ukraine. The Constitution of Ukraine cannot be changed under martial law or a state of emergency."

[2] The strategy of sustainable development "Ukraine – 2020." Approved by Decree of the President of Ukraine No. 5 dated January 12, 2015.

[3] The concept of the new Constitution of Ukraine. Approved by Decree No. 1213 of the Verkhovna Rada of the Ukrainian Soviet Socialist Republic, dated June 19, 1991.

[4] V. Shyshkin was one of the developers of the 1996 Constitution.

A CONCEPTUAL APPROACH AND CONSISTENCY OF REFORM OF THE WHOLE SYSTEM IS REQUIRED

Volodymyr SUSHCHENKO,
Lecturer at the Department of Legal Sciences of the National University of Kyiv-Mohyla Academy, Managing Director of the Research Centre for the Rule of Law

Firstly, we all recognise that it is not separate elements of the legal system that are "ailing." In my opinion, it is the entire legal system of the state that is "ailing." If the system is ailing, the treatment should also be systematic and comprehensive, and not by pulling out some of its elements and trying to treat it through so-called "reforms". A **comprehensive approach should be taken as the basis for reforms**, since everything is interconnected: the prosecutors, the court system, advocacy, and law enforcement agencies. Regrettably, we started competing to be the first to implement reform of the segment, starting with the police and prosecutors. It is clearly impossible to do this quickly. It requires time, opportunities, resources and preparation with obligatory explanations, first of all to the people, about what should be done and how. Unfortunately, we explain the aim of the reform post factum.

The second thing I want to point out is the constitutional laws. The law "On the Judicial System and Status of Judge" is obviously a constitutional one. It has been amended 50 times in six years! What does that mean? **It demonstrates the inadequacy of basic law and unpredictability of original provisions.** Furthermore, it points to politicisation of the legal system and its operation. Everything begins from scratch with the arrival of new authorities, be they legislative or presidential. Everyone wants to sell his or her vision of a legal system. I believe that constitutional laws should be adopted by at least 2/3 of the Verkhovna Rada, so that each successive convocation would neither have the desire nor the opportunity to easily amend such laws.

The third point. **While reforming the judiciary, for some reason we narrow everything down to the creation of new laws**, without hardly any discussion of how such laws should be implemented; what are the mechanisms or instruments which will carry them out and how? We adopt practices from all countries, take the best of all constitutions, while forgetting about our own history. Why can't we establish magistrate courts? This is the history of our Ukraine. A huge number of the so-called domestic disputes could be resolved. The burden of professional courts could be reduced to some extent. They could also be a place to resolve advocacy issues in this transitional phase.

The last thing I want to point out is that everyone relies on competitive principles in respect of the resetting of the judiciary. The police and prosecutors are now also being reset on a competitive basis. I can say one thing, based on my brief experience of work in the competition committee for selecting members of the National Agency for Prevention of Corruption: **everything is decided through agreements, so-called "fixed matches" in this competition committee"**. And the question is, who should create such competition committees, how they will work, who will be included, and what are the internal mechanisms of such competition committees that will provide the opportunity to bring in deserving people to the respective authorities through competition, through fully democratic procedures, and through qualification-based assessment. This is an extremely serious and important issue. I have a question: "Did members of the High Qualification Commission of Judges and the High Council of Justice that constitute the judiciary undergo recertification?" No one tested them, including their level of honesty. These **procedures must be carried out**. We should make sure to create a body that enjoys confidence of the people, and then such a body would bear responsibility for whom it chooses to appoint to office. ■

THE LEVEL OF LEGAL CULTURE NEEDS ENHANCING

Father Oleksa PETRIV,
Mitred Protopriest of the Ukrainian Greek Catholic Church

A discussion on amendments to the Constitution, required according to the dictates of time, is very much needed. The biggest problem of our nation is the low level of legal culture. Legal nihilism is an awful scourge that is destroying our future. We clearly need to work on this and put in the effort to change the situation. The religious community of Ukraine, especially the Ukrainian Council of Churches and Religious Organisations that represents over 90% of believers, which is over two thirds of the citizens of Ukraine, obviously cannot stand apart from amendments to the Constitution of Ukraine since they are part of civil society. Keeping in mind that the Constitution is a social contract, we cannot stand apart.

As to the system of justice, the Ukrainian Council of Churches and Religious Organisations issued a request concerning the establishment of justice in Ukraine on 17 May, this year.[5] The main point of this request is that justice is the foundation of coexistence in a democratic society, and this is beyond all doubt. The independence of the judiciary guarantees democratic development, and there is hope for fair trials in Ukraine. Judicial reform has been voted for since then, and other well-known events discussed here have taken place. The religious community now has a request, especially for reputable professionals;

[5] The request of the Ukrainian Council of Churches and Religious Organisations concerning the establishment of justice in Ukraine. – The Ukrainian Council of Churches and Religious Organisations website, May 17, 2016, *http://vrciro.org.ua/ua/statements/465-uccro-statement-justice-court-judge-ukraine*.

those who are vigilant of both justice and the fair division of powers among the branches of government: please, make sure that the division of powers in Ukraine is really appropriate in these two years.[6] This is the content of the request of the Ukrainian Council of Churches. We, representatives of churches and religious organisations, do not have the potential that you do, as scientists. Everyone present here, please be vigilant, and let us know when the first signs occur. **We, the believers, are ready to make a stand for these basic principles together with the judiciary and the entire civil society.**

The second thing to be said, since it also concerns the religious community, is about administrative reform. Why can churches and religious organisations be useful and involved in this, and engaged in its implementation? Because community, the religious community, is the essential form of our existence. Such centuries-long experience of the existence of communities should be used during this reform in the context of decentralisation.

Our biggest concern, of course, is Section II of the Constitution regarding the rights, freedoms and duties of persons and citizens. This is where we have the most to say. Certainly, we support the idea of the necessity to reflect our national identity in the Constitution. Our country's characteristics are not limited to the flag, anthem, the coat of arms, and unitarity. Human rights is the section that should definitely reflect our national identity. In our opinion, it is impossible without the introduction into this section of the notion of "public morality". Not morality in general, not personal morality, but public morality, which means the morality of our society, our nation, and our people. There are scientific and expert conclusions that confirm the appropriateness of such a provision in the Constitution of Ukraine. Furthermore, we already have legislation concerning public morality, and it can be developed further.

The issue of amendments to Section II of the Constitution has provoked a large-scale public debate. If Mr. Gianni Buquicchio[7] says that our section on human rights is fine, why amend it, not to mention that we are in a de facto state of war. Good is not enough if you can do even better. The section without a doubt requires work, and we can attest to this. We confirm it, first of all, in view of the necessity to raise the level of legal culture of our people. For example, over 120 thousand signatures were collected through the work of our church, the Roman Catholic Church and some Evangelical churches and submitted to the President in defence of morality, traditional family, and the protection of life.[8] When collecting signatures, the people who familiarised themselves with the content of proposals discussed them, and drew conclusions that they still know very little about what is written on human rights in Section II of the Constitution. In this way they raised the level of their legal awareness.

So, we need to come together, create working groups, bring these issues into wide discussion, and in such a way raise the level of legal culture, and eliminate legal nihilism. However, **we would not recommend that Section II of the Constitution is amended now**. In this regard, I would like to give an example of coexistence of the religious community. One of the main factors leading to peace and mutual understanding between the religious community in Ukraine is that our basic Law "On Freedom of Conscience and Religious Organisations", which is highly rated by international experts, has recently celebrated its 25th anniversary. During these years only small amendments were made to it. It was hardly amended at all, although there was the desire and attempts to "improve it". We ask you to be very careful when "improving" such delicate areas. ■

THE LEGAL SYSTEM SHOULD BE REFORMED IN AN INTEGRATED MANNER

Oleh BEREZIUK,
Chairman of the Ukrainian Law Society

Firstly, I am absolutely convinced that the Constitution should not be amended in the conditions of martial law. Yet, it has been done; **the Constitution has been violated**. Furthermore, our government, representatives of the Parliament, Cabinet of Ministers, and President say that they are adhering to the principles of a law-governed state. I am having doubts as to this due to violations of these principles, which are documented in the Constitution. I was listening carefully to the representative of the Presidential Administration and came to a rather simple conclusion: in order to do nothing, it is enough to start speaking about any issue. There is no escaping the impression that this is not reform, but imitation of reform. We have established quite a few unconstitutional bodies in the system of state governance. For example, the National Anti-Corruption Bureau, Anti-Corruption Prosecutor's Office, and a masterpiece of the legal mind – the formation of the Anti-Corruption Court. This has led to an overlapping of the law enforcement agencies, and an overlapping of functions of the prosecutor in the prosecutor's office itself.

The existence of a reform strategy has already been mentioned. To tell the truth, I do not see any strategy in what is going on in Ukraine now. To speak of the strategy, **we need to see the concept and the end result of implementation of this concept**; but I do not see it. However, I see various sporadic movements, as a result of which we can observe the emergence of new state authorities.

Our Western partners are giving positive feedback as to the reforms in Ukraine and the correctness of these reforms. I am having considerable doubts as to their correctness.

[6] This refers to assigning the power to create, reorganise and liquidate courts (Section XV "Transitional Provisions" of the Constitution of Ukraine, Clause 16.1, Sub-clause 6) to the President for two years (until December 31, 2017).

[7] Gianni Buquicchio – President of the European Commission for Democracy through Law (Venice Commission).

[8] The initiative group of believers of the Greek Catholic Church and the Roman Catholic Church prepared a request for the President concerning amendments to the Constitution of Ukraine in terms of human rights. – Ukrinform, *http://www.ukrinform.ua/rubric-roundtable/1967086-simejni-cinnosti-abo-comu-virani-proti-viklucenna-z-konstitucii-ponatta-slub.html*.

I am absolutely convinced that unless we have the political will to reform (and not the imitation of these reforms), nothing will change in our country; and when we speak of a crisis in our judicial system, then this is, primarily, a crisis in our public administration.

A lot of constructive proposals were given today. Unfortunately, government officials ignore most of the rational suggestions. In my opinion, the reason for this is simple: **there is no desire to build a legal state. Instead, there is a desire to rule the country with a manual system of control**. When there are no clear and comprehensible legal rules, then, there is always a temptation to apply voluntary methods of governance and disclaim all liability. Today, there are a lot of examples of this, including the appointment of the Prosecutor General, when the law was changed for the benefit of a man.

In the USA, when a new President replaces the former one, he does not change the judges appointed by his predecessor. This is a prerequisite of democracy. This is a prerequisite of the independence of judges. While the dependence of our judges is being strengthened. We do need to reform the structure of the judicial system, but we also need the courts to be independent from politics. Despite the presence of rational amendments to the Constitution, which can be discussed and embodied, I am very critical about the possible consequences of this reform. For example, amendments to the prosecutor system and advocacy reform. Advocacy and the prosecutor are institutions belonging to the judicial system. There should be a systematic approach; it is necessary to reform all these three institutions in an integrated manner, and not separately. Then there will be positive outcome. ■

THESE CONSTITUTIONAL CHANGES STILL PROVIDE THE CHANCE TO IMPROVE THE JUDICIAL SYSTEM

Yuliya KYRYCHENKO,
Constitutional Law Expert, the Centre for Political and Legal Reforms

Is there a strategy for judicial reform, constitutional reform in general, and are the conceptual principles of the reform observable? We have a clear understanding that **the strategy of the judicial system** is, unfortunately, **the preservation of the existing judicial system,** which is dependent. However, the role of civil society and expert community is growing; and, therefore, the authorities are forced to make these changes to the judicial system. The expert reports reveal all the drawbacks of such constitutional changes, the drawbacks of the procedure and the drawbacks of the content. At the same time, we say that these constitutional changes still provide the opportunity to improve the judicial system, reduce its dependence; however, this will happen only with active participation of the civil society in the process of proposing candidates for lawyers and scholars: candidates with at least ten years of work experience in the Supreme Court, and those with at least seven years experience in the field of law or at least seven years experience in advocacy to appellate courts. Today we have come to the conclusion that **if we know worthy people from these spheres**, and there are such people, **then we should ask them to take a place in the Supreme Court and appellate courts**. Without renewing courts and the judiciary, the judicial system will choke. According to a sociological survey by the Centre for Political and Legal Reforms carried out in December 2015: the level of confidence in courts, that is, "fully trust", in almost all regions of Ukraine is little more than 1%![9] If no changes are made, then we can expect social upheaval.

As for the conceptual vision. Right from the start it was unclear why the reform of the Constitutional Court was related to the reform of the judicial system. It became clear when we saw that **the authorities** completely forgot and **ignored the core of constitutional reform, that is, to improve the form of governance**. It stands to reason that it is necessary to reform the Constitutional Court of Ukraine with a comprehensive vision of reform of power triangle, and how to make the Constitutional Court of Ukraine independent and capable of settling political and legal disputes within the conflicts of higher authorities. Unfortunately, this has not been done. No work has been done in this regard, but we will not keep silent and we hope to see constitutional changes in the future, perhaps, after the replacement of political forces in Parliament and the President.

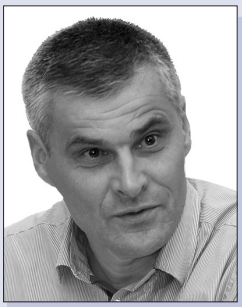
The changes concerning constitutional justice were not properly developed. As has been said, the main thing that could reduce the dependence of the Constitutional Court is a change to the procedure for its formation. This is not found in the constitutional amendments. The only sentence that a competitive procedure for candidates for the position of judges of the Constitutional Court of Ukraine will be established in the law, makes analyses impossible, because it was mentioned that there is no new edition or comprehensive amendments to the law on the Constitutional Court of Ukraine.

Again, the expert community emphasised that there should be implementation laws, and that these drafts should be registered at the time of final approval of the constitutional amendments. The emphasis was constantly made on the fact that these laws should not be adopted with any procedural violation, but they should be implemented, and society and deputies, who will vote, should view comprehensive details of the constitutional changes. Instead, the Law "On Judicial System and Status of Judges" was introduced no later than a day before voting; it was another "rape" of the procedure. There are still no other required laws, including in the High Council of Justice, in the Constitutional Court, although the changes have already been voted for.

I believe that **we can expect positive outcomes** if we all take part in the procedures provided by the Law "On Judicial System and Status of Judges". ■

[9] For more details see: What Ukrainians think of the Constitutional, judicial and prosecutor reform – Website of the Centre for Political and Legal Reforms, *http://pravo.org.ua/ua/news/20871276-scho-ukrayintsi-dumayut-pro-konstitutsiyu,-reformu-sudu-i-prokuraturi*.

THE PROBLEM IN UKRAINE IS THE QUALITY OF GOVERNANCE



Mykola MELNYK,
Judge
of the Constitutional Court
of Ukraine

I, as well as previous speakers, want to stress that **the problem in Ukraine lies not in the Constitution in general, or in its contents in particular**. The problem, in Ukraine, is in the quality of governance, the low level of legal and political culture, and the fact that the so-called elite considers political power a tool.

The next point undoubtedly consists in those clauses and risks that the voted draft law regarding amendments to the Constitution contains.[10] The two year period has already been mentioned, during which we should be vigilant and careful in civil society. These two years were also mentioned in my dissenting opinion.[11] I wrote in my separate opinion on the conclusion of the Constitutional Court concerning the mentioned draft law that **the legitimate goal of assigning powers to the President for the transitional period of two years was unclear**. Therefore, if a new body is "launched", the High Council of Justice will be formed, and such powers transferred to it, then such a delay lacks logic.

According to its ideologists, the new Law of Ukraine "On Judicial System and Status of Judges" will make it possible to infuse "new blood" into the Supreme Court.[12]

Firstly, not everything new is better. *Secondly,* not everything that is called reform is really so. Thirdly, it was already mentioned about the competition for "new blood"; however, it is unclear what "blood" this will consist of. As for the competitions, their external management has already been spoken of, and this unfortunately is becoming a tradition, and as such there are risks.

Why did I express such a lengthy dissenting opinion? I noticed some legal dangers, namely, **the restriction and abolition of the rights of humans and citizens** because of the fact that the amendments to the Constitution involve uncertainty in the judicial system. If the current Constitution clearly defines the judicial system in Ukraine, then its amendments do not. Now we can observe these outlines in the new Law "On Judicial System and Status of Judges." **The amendments to the Constitution provide for a narrowing of judicial competence, and the limitation of powers of courts as judicial bodies.** In my opinion, the right to judicial protection as regards the review of judicial decisions, including the cassation review of court decisions, is being limited. The national model of the constitutional procedure is being changed, and the conditions are being created so that general jurisdiction courts can change the exclusive powers of the Constitutional Court. In particular, this is observable in the amendments to the Constitution as regards decentralisation, when the functions of the assessment of regulations for their constitutionality are delegated to general courts; and this is an encroachment on the exclusive powers of the Constitutional Court.

The judiciary is the least protected, but it is the most powerful, and V. Yanukovych showed us the real power of the judiciary (in the negative sense, of course). He showed us the way to use courts to replace the Parliament, the executive branch and, in fact, the people. That should have been a big lesson.

Three years ago, the Razumkov Centre[13] held a roundtable meeting concerning judicial reform introduced by V. Yanukovych in the same hall. The reports and analytical materials of the Razumkov Centre indicated that the so-called reform entails risks of the unlawful seizure of power and increasing dependence of the judiciary. However, many politicians and international institutions, in particular the Venice Commission, welcomed this reform, and the President of the Venice Commission at that time Gianni Buquicchio spoke out for the adoption of these changes. Although here, in Ukraine, it was obvious that everything was done to strengthen the influence of V. Yanukovych in courts and the usurpation of power by state authorities.

So, I would like to emphasise: I have recently heard about the Ukrainian inferiority problem. We need to treat outside advice both with attention and care, first of all, taking into account our Constitution, historical traditions, and the specifics of our legal and state systems. Any advice we receive is good. They tell us about international standards. But what is an international standard? As I see it, there the standard of the right to a fair trial. But how it is achieved is the right of each state.

Then again, the problem lies not in statutory regulation, but in the legal and political culture. Will the goals stated for this judicial reform be achieved: the right to a fair trial reinforced, the judicial system depoliticised, and the independence of judges increased? I seriously doubt it.

As it is known, two of three draft laws concerning amendments to the Constitution remain unimplemented at present: the first one (almost forgotten for now) contains amendments regarding the cancellation of parliamentary immunity and restriction of judicial immunity, the second one concerns the decentralisation of power. The third one

[10] The law of Ukraine "On Amendments to the Constitution – on justice" was voted for on June 2, 2016; however, it was not signed by the President at the time of the roundtable meeting.

[11] This is the dissenting opinion of the judge of the Constitutional Court of Ukraine M. Melnyk as to the conclusion of the Constitutional Court of Ukraine on the case of the Verkhovna Rada of Ukraine on providing a conclusion on compliance of the draft law on amendments to the Constitution of Ukraine (as regards justice) with the requirements of Articles 157 and 158 of the Constitution of Ukraine No.1 dated January 20, 2016 – Website of the Constitutional Court of Ukraine, *http://ccu.gov.ua:8080/doccatalog/document?id=299898*.

[12] The new law of Ukraine "On Judicial System and Status of Judges" was voted for on June 2, 2016; however, it was not signed by the President at the time of the roundtable meeting.

[13] M. Melnyk mentions the roundtable meeting "The Constitutional Stage of Judicial Reform in Ukraine: Prospects and Risks" as part of the Project "Judicial Reform in Ukraine: Current State, Problems and Prospects" (Project Manager – M. Melnyk, scientific consultant in legal matters at the Razumkov Centre at that time). A roundtable meeting organised by the Razumkov Centre with the support of the Embassy of the Kingdom of the Netherlands in Ukraine took place on October 17, 2013. M. Melnyk was the main speaker at the event.

concerning justice has been already adopted. These draft laws demonstrate the tendency towards the disruption of the existing balance of the policy of checks and balances of the system of government. This includes **reducing the powers of the Parliament, increasing the powers of the President and increasing the dependence of legislative and judicial branches**. In the context of the weak democracy, volatile social and political environment, absence of an effective legal system and full principle of the rule of law, such trends may create the conditions to ignore the basic constitutional provisions concerning exercising state power in Ukraine based on dividing it into legislative, executive and judicial. Our only salvation is that democracy will grow stronger, and it is democracy that plays the key role in preventing this from happening.

Certainly, the CCU gives the amendments to the Constitution a green light. In 2013, when V. Yanukovych proposed to introduce amendments to the Constitution, the CCU gave a unanimous positive opinion, and there were no separate opinions.[14] This year, the CCU gave judicial reform concerning justice a green light twice, but there were 10 separate opinions among 13 judges[15] for the first time, and five separate opinions the second time[16] Even this suggests that there are some big issues in the amendments introduced to the Constitution in terms of justice. ■

THE AMENDMENTS TO THE CONSTITUTION ARE A REALITY NOW

Mykola ONISHCHUK,
Rector
at the National School
of Judges of Ukraine

I fully share the opinion of my colleagues who say that the amendments to the Constitution are a reality now. I have no idea why we are continuing to talk about conditions for adoption of the Constitution, the war or martial law.

We should also acknowledge that when the formula of constitutional changes was defined, we received numerous conclusions from the Venice Committee, resolutions of the Council of Europe, the Consultative Council of European Judges, which formed a vision, that is, the standards according to which dozens of nations and countries live. We should acknowledge that today, now the amendments to the Constitution have been introduced, we have entered into a new reality.

What is currently really important? In my opinion, two issues: **implementing legislation**. This is not limited to the new Law "On Judicial System and Status of Judges". It also includes the new Law "On the Constitutional Court of Ukraine" and many other laws, including procedural codes, let alone enforcement proceedings, prosecutors, advocacy, etc. There is a saying: "It's the retinue that makes the king". So, implementing laws will be the retinue of the new constitutional provisions. They will provide regulatory and legal content of the constitutional amendments that, in fact, have already been established. Here, we indeed have much to do. It is vitally important to involve experts as extensively as possible, since draft laws contain many pitfalls, shortcomings, even technical errors. Here, it is highly important to engage the watchful expert community to the full extent to achieve the required quality of implementing legislation.

The second condition is the **formation of virtuous practices when applying the Constitution and legislation**.Here certain expectations relate to the High Council of Justice and qualification commission, which compositions were renewed. It is highly important for civil society to strive to make these practices virtuous ones, since unfortunately we do not have so many traditions of virtue due to various reasons related to the work of these bodies.

As for the National School of Judges and some clauses when we talk about the renewal of the judiciary. Currently, the new version of the Law "On Judicial System and Status of Judges" assumes that we will have a shortage of judicial personnel. First of all, due to the fact that many of them have already resigned from their positions, and that quite a lot of judges have no intention of taking the qualification-based assessment. It is obligatory now for judges to confirm their ability to administer justice in order to gain access to the new conditions of remuneration. The primary qualification-based assessment is no longer mandatory, but qualification-based assessment on application of the judge is being introduced – this is one case. The second case is when there is a career advancement of the judge and he or she is willing to take part in a competition for vacant position. **As an integral part of any case of access to professional and career advancement, qualification-based assessment** will be performed as a test, and the National School of Judges is to develop these tests.

Meanwhile, taking into account the future wide access of scientists and lawyers to the judicial profession, judges of courts of cassation and appeal, there are some concerns: whether they will be able to administer justice properly, when the issue concerns appellate courts, which are legal courts. Perhaps, it concerns courts of cassation to a lesser extent, as these are courts of law; they apply, analyse and interpret the law. While appellate courts may have some problems with some scientists from an academic environment entering the world of actual justice where they have to evaluate evidence, determine its relevance, etc. That is why it is stipulated by law that such judges shall undergo special express training at the National School of Judges. This is a new function that never existed before. Another category of people gaining access to the judicial career includes judicial assistants. They will obtain the

[14] This relates to the opinion of the CCU in the case of the appeal of the Verkhovna Rada of Ukraine for providing the opinion on compliance of the draft law on introducing amendments to the Constitution of Ukraine concerning strengthening the guarantees of independence of judges with the provisions of Articles 157 and 158 of the Constitution of Ukraine No. 3 dated September 19, 2013 — CCU website, *http://ccu.gov.ua:8080/doccatalog/document?id=220986*.

[15] For more details, see: Opinion of the CCU in the case of the appeal of the Verkhovna Rada of Ukraine for providing the opinion on compliance of the draft law on introducing amendments to the Constitution of Ukraine (concerning justice) with the provisions of Articles 157 and 158 of the Constitution of Ukraine No. 1 dated January 20, 2016 — CCU website, *http://ccu.gov.ua:8080/uk/doccatalog/list?currDir=299459*.

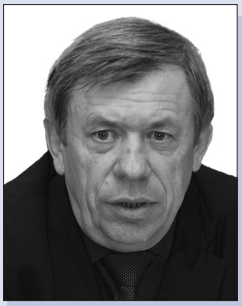
[16] For more details, see: Opinion of the CCU in the case of the appeal of the Verkhovna Rada of Ukraine for providing the opinion on compliance of the revised draft law on introducing amendments to the Constitution of Ukraine (concerning justice) with the provisions of Articles 157 and 158 of the Constitution of Ukraine No. 2 dated January 30, 2016 — CCU website, *http://ccu.gov.ua:8080/uk/doccatalog/list?currDir=301277*.

right to take part in a separate competition for the position of judge through a course at the National School of Judges in a reduced training period of 6 months instead of 12.

After the amendments to the Constitution come into force, the measure of constitutional amendments will depend heavily on quality, even the virtue of implementing legislation. We do not have so many experts in this area. It is important that the centre and its powerful expert community are engaged in this process, which will be benefit the development of respective regulatory scope. It is useful, as there is the opportunity to improve the law by introducing amendments to it. This is the case when preliminary constitutional control serves as the means to prevent flaws of the constitutional process. Preliminary expert control and preliminary expert debate would be useful for the formation of regulatory scope of adequate quality that should implement changes to the Constitution.

And the last point. The sustainability of legislation concerning justice. The Constitutional Committee was based on the fact that we have to introduce amendments to another section of the Constitution that regulates the laws adoption procedure in respect of justice. There was a consensus of opinion that such laws should be adopted according to a separate procedure with 3/5 of the votes in the Parliament. In other words, not 300 (since that would be the constitutional level), but 275 deputies would have to approve the so-called "constitutional laws", the adoption of which has a direct influence on the Constitution. In particular, the laws concerning the High Council of Justice, judicial system and status of judges. This idea failed at this phase of the constitutional process, but we should not forget about this evident tool for providing sustainability in legal relationships in the field of justice. ■

THE HIGH QUALIFICATION COMMISSION OF JUDGES OF UKRAINE IS READY TO IMPLEMENT CONSTITUTIONAL CHANGES



Mykhailo MAKARCHUK,
Judge of the Higher Specialised Court of Ukraine for Civil and Criminal Cases, Member of the High Qualification Commission of Judges of Ukraine

I agree that the system is "ailing", but I cannot concur with the position of an outside observer under the principle "will survive/will not survive", and if it does, then how healthy it will be. I cannot assess the laws that have already been adopted, because as a judge I am more used to being guided by them to solve public legal relations. The laws are more perfect, less perfect or totally imperfect. In any case, **even the imperfect law is aimed at solving public legal relations** and its application will depend on the mechanisms of its implementation and amendments to the Constitution in the Law "On Judicial System and Status of Judges."

I have not seen the final draft of amendments to the Constitution or the law on the judicial system. I can only

Roundtable, 22 June 2016

operate the draft that was adopted by the Verkhovna Rada the previous day. However, that draft law also had drawbacks. The Law "On Judicial System and Status of Judges" gave the grounding for establishing courts, but did not define the mechanism for doing so. The High Qualification Commission of Judges of Ukraine has already drawn up the plan of priority measures required for implementation of the Law "On Judicial System and Status of Judges".[17] It was four days later, because it is the work of the High Qualification Commission of Judges of Ukraine that determines the extent to which we will be able to give substance to this law, form the judicial system that will shape the judicial system of Ukraine and the legal practice not for a year, but for decades.

We are aware of the level of responsibility that lies on our shoulders. We did not undergo qualification-based assessment or a virtue test. Take note that the effectiveness of implementation of the Law "On Judicial System and Status of Judges" as regards the formation of the judicial system depends on us, and primarily on the Supreme Court. I would like to take this opportunity to appeal to everyone present here, who has a vision of how to perform qualification-based assessment, of the selection and competition rules to enter the Supreme Court, how to form appellate courts and district courts. We will be happy to make use of all your proposals.

Letters have been drafted for all non-governmental organisations in the field of law, for academic and educational establishments with a request to submit proposals on examinations and competitions to fill vacancies. It is necessary to adopt about 20 legal documents to implement the Law "On Judicial System and Status of Judges". We are aware of the scope of work to be done, and we are always glad to accept any help from anyone, if it is aimed at ensuring that we accomplish the objectives assigned to us in the best possible manner.

Regarding the level of trust towards courts. The issue is whether society has reliable information on the work of the judicial branch. There are various analyses, I have seen different conclusions, but society **is still not aware of the principles of the judicial system**. No one is informed that the judicial procedure is carried out based on the competitiveness of the parties, that the court does not have to prove anything to anyone, and that the court has to establish the violated law or oppose certain reasons. I have never heard of these issues being raised in the media.

[17] The new law of Ukraine "On the judicial system and status of judges", which was voted for on June 2, 2016.

But this is what trust towards courts depends on. If citizens do not have reliable information, they cannot carry out the right assessment of the work of courts. No one ever said that all court sessions begin with an announcement of the court composition and a question: do the parties trust the court to review their cases? And, in rare cases, the judges are challenged, but this is also a criterion that can be assessed. ■

THERE ARE RISKS FOR OPERATION OF THE JUDICIAL BRANCH IN THE FUTURE

Oleh MARTSELIAK,
Professor at the Constitutional Law Department of Taras Shevchenko Kyiv National University

I want to express gratitude to those people present here, who took part in the formation of our Constitution and who adopted it. This is an important step in the formation of our state. Both national and foreign experts recognised the Constitution, adopted on 28 June 1996 that meets international standards, embodied the best constitutional standards, and was elaborated by the international community.

Of course, the 20 years of our Constitution revealed some gaps in the regulation of social relations, some drawbacks enshrined in the Constitution. The creation of the Constitutional Commission was triggered by urgent need to improve the national Constitution of Ukraine. We have chosen a somewhat tricky way of constitutional reform. We have chosen three directions of constitutional reform – decentralisation, improving the status of the judiciary and rights and freedoms of humans and citizens.

I understand that these issues were important and still are; and it is a good thing that the Constitutional Commission has considered these issues, and that we have obtained the first results. At the same time, it should be noted that other issues remain: the status of the Verkhovna Rada of Ukraine, the status of the Cabinet of Ministers. Are they less important, and are there fewer problems in the operation of these institutions? This is the first drawback in the work of our Constitutional Commission.

As to **the amendments to the Constitution as regards justice, there are positive steps, of course**. Regarding the status of the prosecutor: this issue was raised by scholars, politicians, and foreign experts. The status of the prosecutor, defined in 1996, was a compromise between the political forces in the Parliament to maintain the status of Soviet times. But this should be changed now.

It is a positive point about a range of other issues related to the organisation and operation of the judicial branch in Ukraine. Although there are some drawbacks in the regulation of this status, which remained in the law on amending the Constitution of Ukraine. For example, the improvement of advocacy status. What is the reason for that? Why was it done at the constitutional level? What international standards were taken into account?

Another issue is that **amending the Constitution in the part of justice makes our judicial branch too independent**. The mechanism of checks and balances provided by the current Constitution concerns the appointment of judges when the first appointment was made by the President, and perpetual appointments by the Parliament. Sometimes it works, sometimes not; sometimes there were some political aspects involved, and today we do not have this mechanism of checks and balances, although, at the meeting of the Constitutional Commission, I offered to introduce the impeachment of judges in Ukraine, like in Great Britain and the USA, where the judicial branch is not devoid of absolute independence through the establishment of this element.

I see risks in the operation of our judicial branch in the future. It is becoming too independent. Some negative consequences are possible in the future.

I fully share the opinion that **today we should talk about what to do when the amendments are adopted**. We should think of their practical implementation. Of course, this is the implementation of the amendments to the Constitution in the current legislation. And again, there are risks. Members of the Constitutional Commission and Working Group on Justice present here remember our lively discussion at the meeting of the Working Group on the status of the Higher Administrative Court, and how the position was defended that the Administrative Court should not belong to the Supreme Court, and that there should be a Higher Administrative Court. The provision, enshrined in the amendments to the Constitution about the Supreme Court and higher specialised courts was considered in that sense that this will be the Higher Administrative Court. And what do we have? The Administrative Court is considered a specialised court of the Supreme Court in the Law "On Judicial System and Status of Judges".

We provided for the constitutional complaint. So that this idea would not be neutralised when applied through the adoption of a respective law on the Constitutional Court of Ukraine or any other law. The idea of the constitutional complaint is not properly executed in this draft law. What is important is whether adopting perfect laws aimed at implementation of the amendments to the Constitution will ensure their proper practical implementation?

What will be the law on the regulation of the status of courts in Ukraine? Each of the newly adopted laws was considered to be democratic and taking into account the foreign practice of the operation of courts. At the same time, each of the adopted laws led to a drop in the level of trust towards our national courts, and distrust grew. Therefore, it is highly important that civil institutions and the community of scholars speak more about the problems arising during the implementation of judicial reform in Ukraine. So that we don't have any "sham constitutionalism" or "constitutional graphomania" when we amend the Constitution and superb laws, but the issues of contitutionalism of society and social relations remain unsolved. ■

PUBLIC OPINION ON THE JUDICIAL REFORM AND CONSTITUTIONAL PROTECTION OF HUMAN AND CIVIL RIGHTS

The judicial reform cannot happen without public support. It is therefore important to implement reforms while falling back on the public's opinion of the flaws of the existing judicial system and ways to reform it. With this in mind, the Razumkov Centre's Sociological Service has conducted an opinion poll.[1]

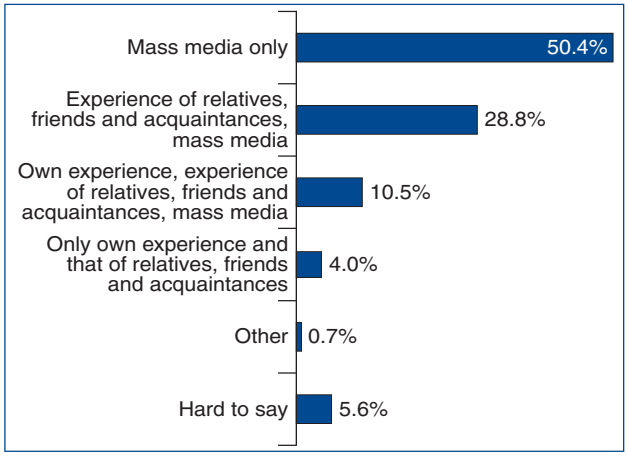
Pollsters also studied the public opinion on constitutional protection of human and citizen rights. The tables and diagrams below summarize the results of the public opinion poll.[2]

PUBLIC OPINION ON THE JUDICIAL REFORM

Sources of information about the judicial system

The public attitude towards the judicial system is shaped primarily under the influence of the mass media. 50% of those polled have said that the mass media are their only source of information about the work of courts; 29% identified the experience of their relatives, friends and acquaintances as well as the mass media as their source, 11% – their own experience as well as that of their relatives, friends and acquaintances as well as the mass media, and only 4% have said that their own experience and that of their relatives, friends and acquaintances is their source of information (unaffected by the mass media).

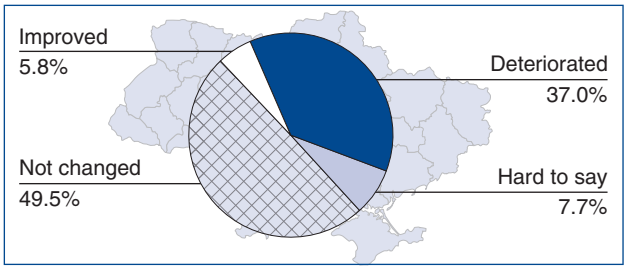
What is your source of information about the work of courts in Ukraine?
% of respondents



Assessment of the existing judicial system

Courts and prosecutor's offices in Ukraine are among institutions enjoying some of the lowest levels of public trust: only 11% of those polled expressed trust in courts and 10% – in prosecutor's offices.[3] Moreover, only 6% of those polled believe that the state of justice in the country has improved between March 2014 and March 2016, one-half of the respondents believe it has not changed, while 37% think that it has deteriorated. Two-thirds (66%) of those polled expressed a negative attitude towards the existing judicial system, and only 6% shared a positive attitude while 19% said they were indifferent.

Between March 2014 and March 2016, the state of justice in Ukraine has...
% of respondents



The level of trust in the judicial system is low in all regions of Ukraine without exception, much like the low percentage of respondents in all regions who have seen positive changes in the judicial system over the past two years, and the high percentage of those who have expressed a negative attitude towards the existing judicial system.

[1] The poll was conducted on 22-26 April 2016 in all regions of Ukraine except Crimea and occupied territories of Donetsk and Luhansk oblasts. A total of 2,018 respondents aged 18 or older were surveyed. The theoretical sample error does not exceed 2.3%.

[2] Although the tables and diagrams do not reflect the regional distribution, region-specific data are cited in the text in case of significant differences.

The following regional division of the territory was used: **West:** Volyn, Zakarpattia, Ivano-Frankivsk, Lviv, Rivne, Ternopil, Chernivtsi oblasts; **Centre:** Kyiv, Vinnytsia, Zhytomyr, Kyiv, Kirovohrad, Poltava, Sumy, Khmelnytsk, Cherkassy, Chernihiv oblasts; **South:** Mykolayiv, Odesa, Kherson oblasts; **East:** Dnipro, Zaporizhia, Kharkiv oblasts; **Donbas:** Donetsk, Luhansk oblasts.

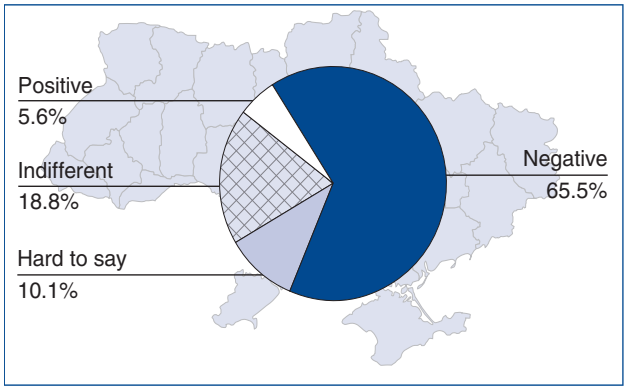
[3] Sum of responses "*I trust them*" and "*I sooner trust them*".

To what extent do you trust the social institutions listed?
% of respondents

	I trust them	I sooner trust them	I sooner distrust them	I distrust them	Hard to say	BALANCE*
Volunteer organisations	13.6	50.1	12.8	11.2	12.4	**39.7**
Armed Forces of Ukraine	12.1	49.7	15.7	14.1	8.3	**32.0**
Church	19.7	40.8	16.2	12.6	10.6	**31.7**
Volunteer battalions	17.1	41.4	13.4	17.3	10.7	**27.8**
National Guard of Ukraine	13.2	44.1	17.0	15.2	10.4	**25.1**
Patrol police (the new police)	7.8	36.1	18.0	14.9	23.2	**11.0**
Non-governmental organisations	4.9	41.9	23.4	14.8	15.0	**8.6**
Ukrainian mass media	4.4	40.1	27.1	21.0	7.4	**-3.6**
Local government agencies	4.0	33.5	27.2	23.5	11.8	**-13.2**
Security Service of Ukraine	3.6	27.5	24.1	30.5	14.3	**-23.5**
Western mass media	3.1	25.1	25.6	26.3	19.9	**-23.7**
District state administrations	2.0	26.3	33.6	25.6	12.5	**-30.9**
National Anti-Corruption Bureau of Ukraine (NABU)	3.9	17.7	26.0	29.6	22.7	**-34.0**
Trade unions	2.7	19.5	31.0	26.6	20.2	**-35.4**
Regional state administrations	1.4	23.8	34.9	28.6	11.4	**-38.3**
Police	2.5	22.2	31.1	34.2	9.9	**-40.6**
President of Ukraine	2.8	21.5	31.8	37.2	6.7	**-44.7**
Government of Ukraine	1.3	14.5	30.8	44.1	9.4	**-59.1**
Ukrainian Parliament	0.6	14.0	33.8	46.4	5.4	**-65.6**
Political parties	0.7	9.0	34.4	43.9	12.0	**-68.6**
National Bank of Ukraine	1.3	9.9	28.5	51.6	8.6	**-68.9**
Courts	1.7	8.8	29.4	53.8	6.4	**-72.7**
Commercial banks	1.0	9.1	31.0	51.9	7.1	**-72.8**
Prosecutor's office	1.2	8.7	32.1	52.2	5.8	**-74.4**
Russian mass media	0.5	5.8	26.0	57.6	10.2	**-77.3**
Public officials	0.5	6.9	37.5	49.6	5.6	**-79.7**

* Calculated as the difference between trust ("*I trust them*" + "*I sooner trust them*") and distrust ("*I distrust them*" + "*I sooner distrust them*").

What is your attitude towards the existing judicial system in Ukraine?
% of respondents



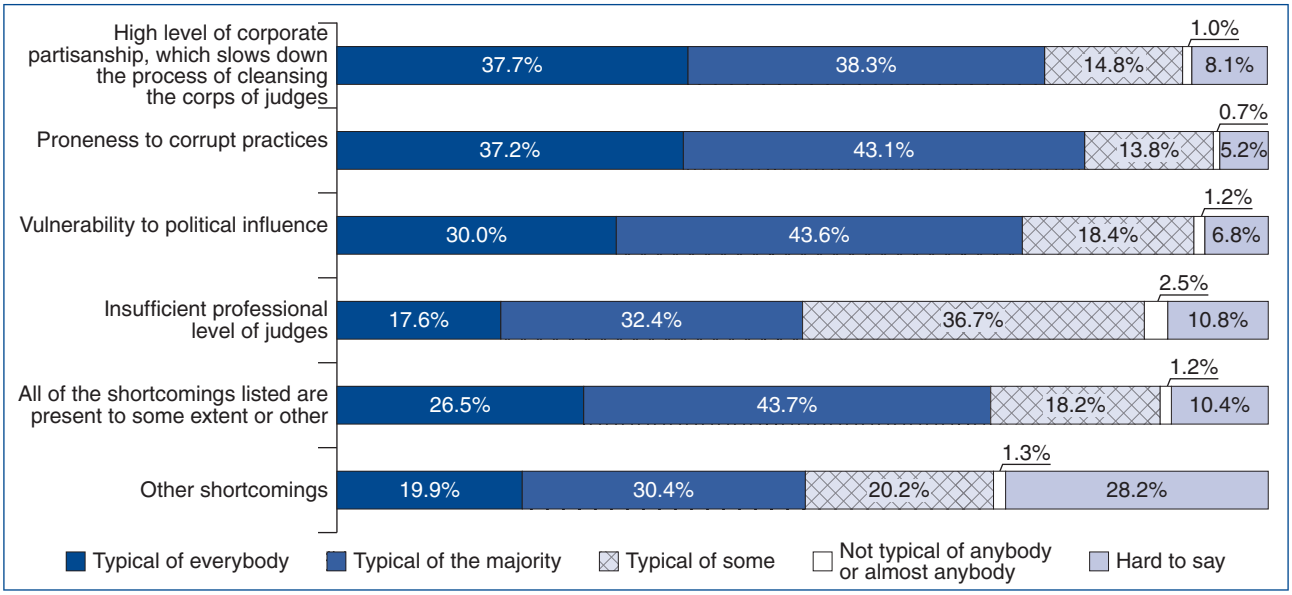
80% of those polled believe that the majority of judges and courts (or all of them) are prone to corrupt practices; 76% have said the system has a high level of corporate partisanship, which slows down the process of cleansing the corps of judges; 74% have remarked on the system's vulnerability to political influence; 50% – inadequate professional level of judges; 70% – all of the shortcomings combined.[4]

When asked what it is that judges are guided by when reaching their verdicts, the relative majority (41%) of respondents have said "personal gain", 14% – the financial and/or official status of the parties, 8% – instructions from the presiding judge, 7% – the political situation in the country. Only 14% of those polled believe that judges are primarily guided by the circumstances of the case and by law, and 6% – by law.

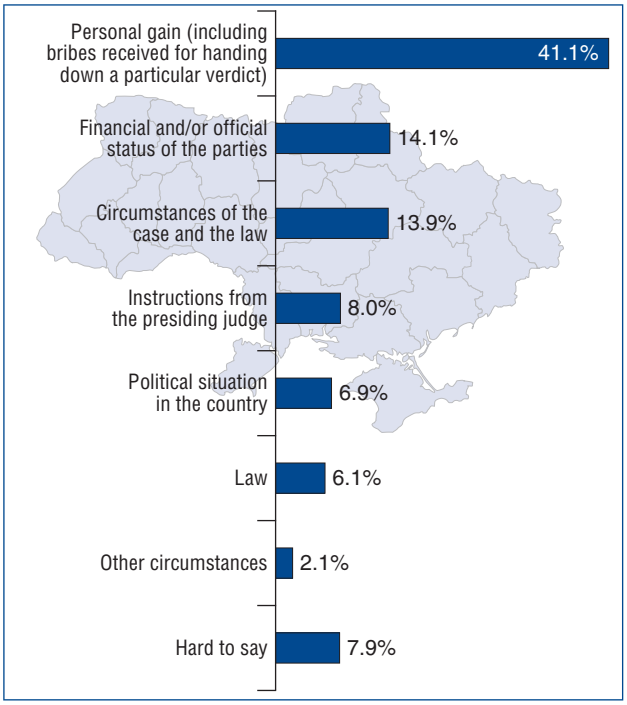
These results indicate that a reform of the judicial system is long overdue.

4 The sum of the answers "*typical of everybody*" and "*typical of the majority*".

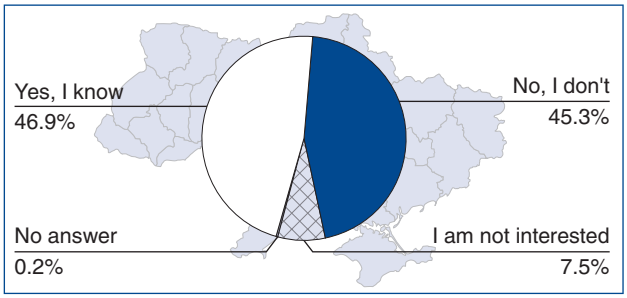
How typical are these flaws of judges and courts?
% of respondents



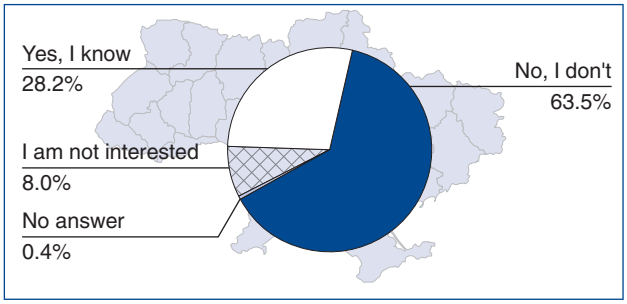
What are judges most often guided by when reaching a verdict?
% of respondents



Do you know which types of cases are tried by commercial and administrative courts?
% of respondents



Do you know of the requirements that a candidate for the position of a judge must meet?
% of respondents



Level of awareness about the proposed constitutional amendments, assessment of what motivates the authors of these amendments, and potential consequences of the proposed amendments

Overall, the level of competence of a rank-and-file citizen in matters concerned with the organisation of the judicial system is not too high. For example, fewer than one-half of those polled (47%) are aware of the types of disputes solved by commercial and administrative courts. Only 28% know of the requirements that a candidate for the position of a judge must meet.

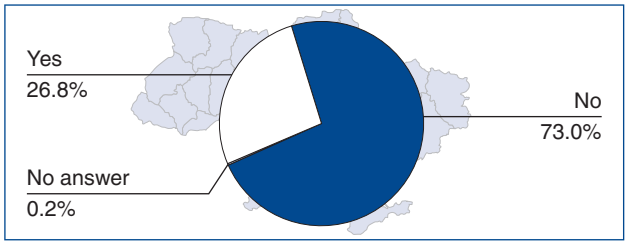
Only one in four (27%) is aware that the Ukrainian Parliament has given its preliminary approval to the Law of Ukraine "*On Amendments to the Constitution of Ukraine – on justice*". The highest level of awareness has been recorded in the East (35%), 20% or higher in other regions (Donbas), and up to 28% in the Centre.

In assessing the motives of the sponsors of the constitutional amendments, 21% of respondents (32% of those who are aware that the Ukrainian Parliament has given its preliminary approval to the Law of Ukraine "*On Amendments to the Constitution of Ukraine – on justice*") believe that the reform initiators are

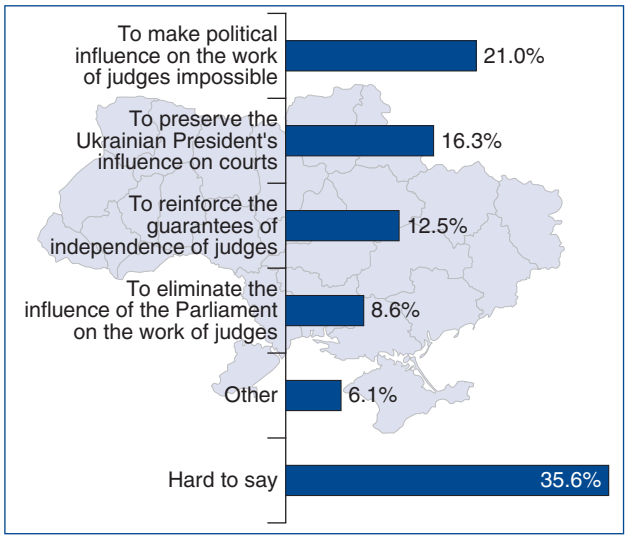
primarily guided by the intent to rule out political influence on the work of judges, 13% and 22%, respectively, have said that their motive is to reinforce the guarantees of independence of judges, while 9% and 11%, respectively, believe that they aim to eliminate the influence that the Parliament has on judges. However, 16% and 12%, respectively, have said that their key motive is a desire to help the President of Ukraine retain influence over judges (the latter opinion has been most often expressed by residents of the South – 28% of citizens in this region).

Respondents are quite reserved in their expectations of the impact of constitutional amendments: 39% of those polled believe that they will not influence the work of judges in any way, 16% expect positive changes while 10% await negative changes. A fairly large share of respondents (35%) were unable to answer this question.

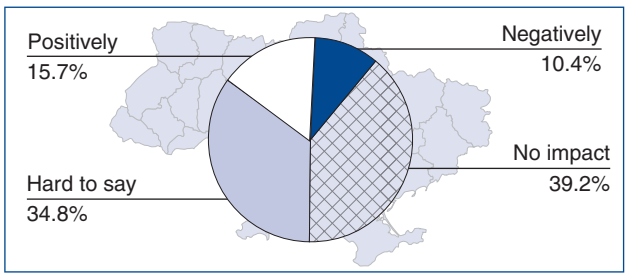
Are you aware that the Ukrainian Parliament has given its preliminary approval to the Law of Ukraine "*On Amendments to the Constitution of Ukraine – on justice*"?
% of respondents



What is the goal of the authors of amendments to the Constitution of Ukraine?
% of respondents



How exactly will the amendments to the Constitution of Ukraine impact the work of judges?
% of respondents

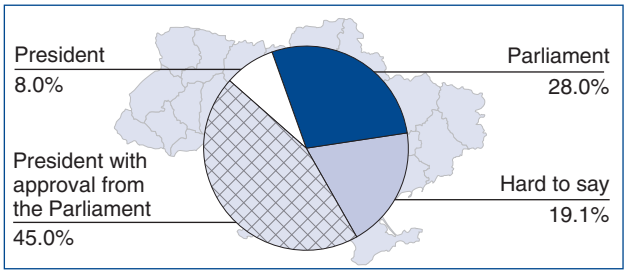


Meanwhile, among those respondents who are aware that the Ukrainian Parliament has given its preliminary approval to the Law of Ukraine "*On Amendments to the Constitution of Ukraine – on justice*", a higher percentage of those polled (36%) expect positive changes to happen, compared to all of the surveyed population. Only 11% of representatives of this group expect negative changes, while 35% believe that they will not influence the work of judges in any way.

Assessment of individual aspects of the judicial reform by citizens

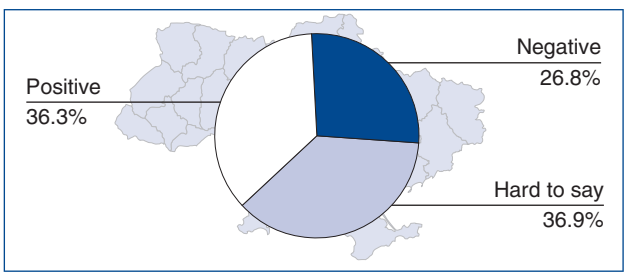
Almost one-half of those polled (45%) believe that the President of Ukraine should appoint the Prosecutor General with approval from the Parliament; 28% believe this is up to the Parliament, and 8% – to the President alone. In other words, **a relative majority of respondents are satisfied with the existing procedure for appointing the Prosecutor General**. The only exception is the South where a relative majority (46%) are in favour of having the Prosecutor General appointed by the Parliament.

Who should appoint the Prosecutor General of Ukraine?
% of respondents



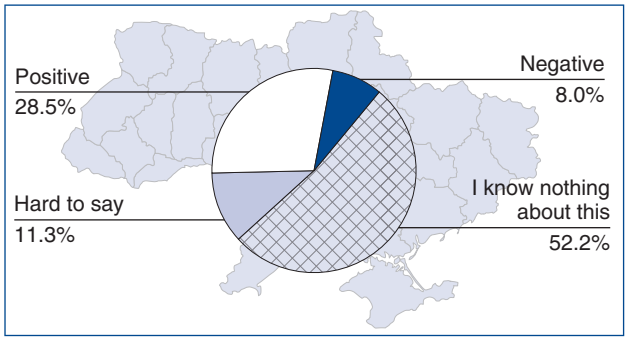
More than a third (36%) of respondents are in favour of the proposed constitutional amendment whereby "only an attorney shall represent another person in court and defend this person against a criminal indictment". 27% of those polled have expressed a negative attitude towards this proposal, while 37% declined to answer. This proposal has met with more positive than negative attitude among residents of the West (47% and 22%, respectively), South (35% and 22%, respectively), and East (37% and 31%, respectively). In the Central region (33% and 30%) and in the Donbas (30% and 26%, respectively), there is no statistically significant difference between the percentages of proponents and opponents of this proposal.

What is your attitude towards the proposal to introduce a constitutional amendment whereby "ONLY an attorney shall represent another person in court and defend this person against a criminal indictment"?
% of respondents



A little more than half (52%) of respondents, when asked: **"What is your attitude towards the broader powers of the Constitutional Court of Ukraine proposed by the constitutional amendments?"** replied "I know nothing about this". 29% of respondents have expressed a positive attitude, and 8% – a negative attitude. This proposal is supported most often by residents of the country's East (37%) and South (35%).

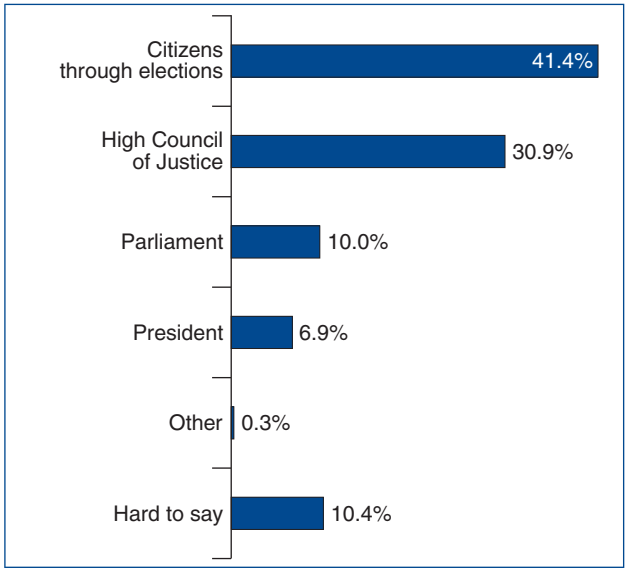
What is your attitude towards the broader powers of the Constitutional Court of Ukraine proposed by the constitutional amendments?
% of respondents



In the context of the judicial reform, a great deal of attention is devoted to **putting in place such a procedure for appointing judges and enabling the public to monitor their work, which would minimize the opportunities for corrupt practices**.

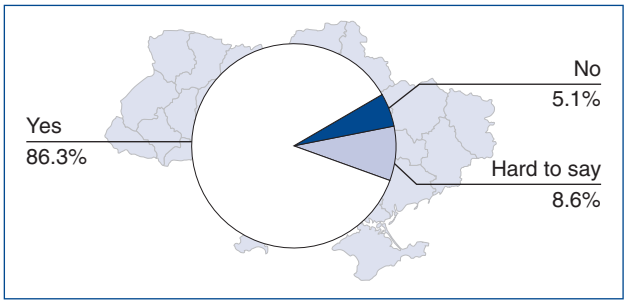
A relative majority (41%) of respondents believe that judges should be appointed to their positions by citizens through elections. Close to a third (31%) prefer to reserve this function for the High Council of Justice, and only 10% for the Parliament and 7% for the President.

Who should appoint judges to their positions?
% of respondents



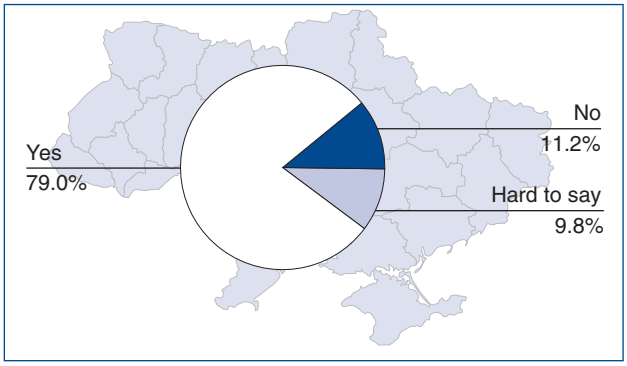
An overwhelming majority (86%) of those polled agree that failure to present proof that their property comes from legitimate sources should be grounds for dismissing a judge (only 5% of respondents disagree).

Do you agree that failure to present proof that their property comes from legitimate sources should be grounds for dismissing a judge?
% of respondents



Likewise, an overwhelming majority (79%) of respondents believe that a candidate for the position of a judge should have lived in Ukraine during the term prescribed by law prior to appointment (with 11% disagreeing).

Do you support the opinion that a candidate for the position of a judge should have lived in Ukraine during the term prescribed by law prior to appointment?
% of respondents



Thus, courts and prosecutor's offices in Ukraine are among institutions enjoying some of the lowest levels of public trust. Ukrainian citizens have named corruption, corporate partisanship, and dependence on public authorities (and, as a consequence, serving of their interests) among the biggest flaws of the judicial system. All of this is evidence of the need for fundamental reforms of the judicial system.

The public's expectations of the passage of the Draft Law of Ukraine *"On Amendments to the Constitution of Ukraine – on justice"* are quite reserved: a relative majority of respondents believe that these amendments will not have any impact on the work of judges. At the same time, there are reasons to expect that a higher level of public awareness about the nature of the proposed amendments could improve the society's attitude towards them.

In the context of the judicial reform, a great deal of attention is devoted to putting in place such a procedure for appointing judges and enabling the public to monitor their work, which would minimize the opportunities for corrupt practices.

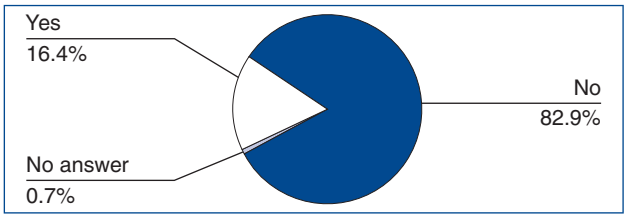
PUBLIC OPINION ON CONSTITUTIONAL PROTECTION OF HUMAN AND CIVIL RIGHTS

Constitutional protection of fundamental human rights

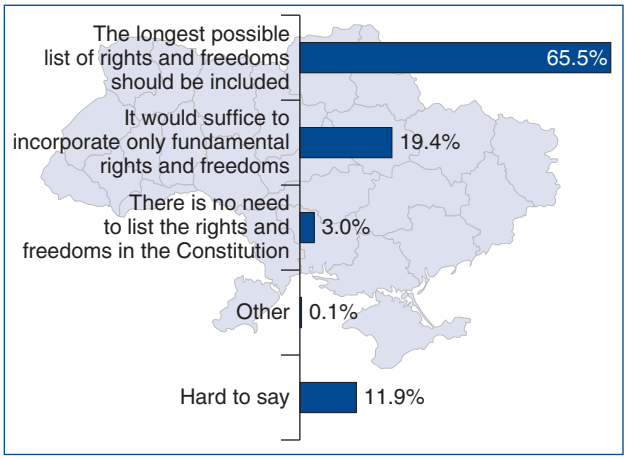
Although only 16% of respondents have said that they have quoted the text of the Constitution of Ukraine in defence of their rights at least once, two-thirds (66%) of those polled believe that the Constitution of Ukraine should incorporate the longest possible list of human and civil rights and freedoms. Only one in five (19%) believes that it would suffice to list only fundamental rights and freedoms, and only 3% are of the opinion that there is no need whatsoever to list the rights and freedoms in the Constitution.

An absolute majority (97%) of respondents believe that the Constitution should guarantee the right to healthcare, medical assistance and health insurance (90% believe that it should guarantee the right to free medical care), 97% – the right to social security, 96% – the right to employment, 95% – the right to accommodation, 94% – the right to private property, 92% – the right to leisure, 92% – the right to adequate standards of living, 90% – the right to free education, 88% – the right to private enterprise, and 82% – the right to strike. A somewhat lower percentage of respondents in the Donbas (compared to the average nationwide levels) have spoken in favour of the need for constitutional guarantees of certain economic rights having to do with the market economy: the right to private property (85%), the right to private enterprise (74%), the right to strike (67%).

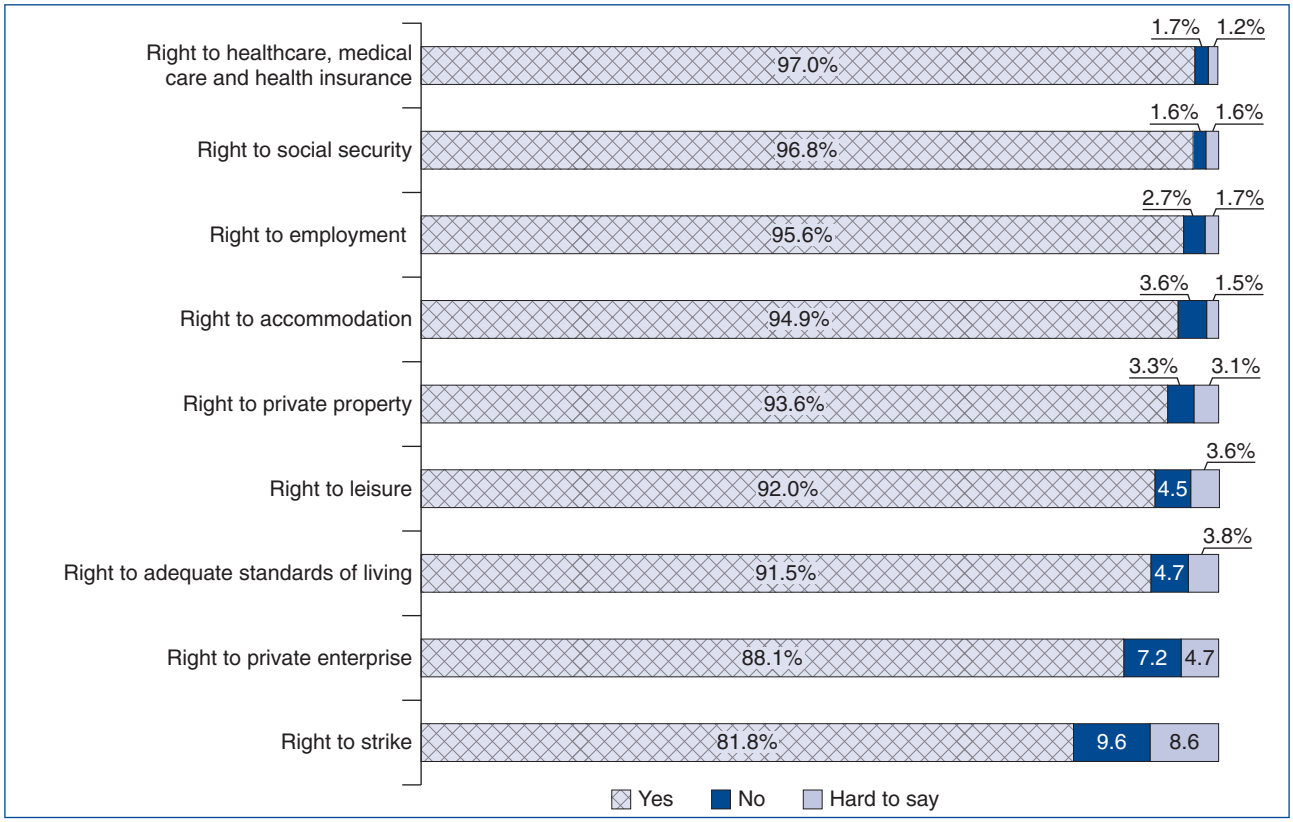
Have you quoted the text of the Constitution of Ukraine in defence of your rights?
% of respondents



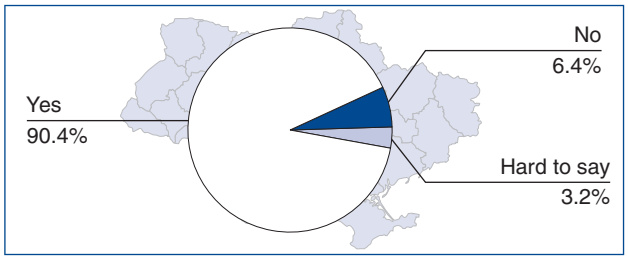
Should the Constitution of Ukraine incorporate the longest possible list of human and citizen rights and freedoms? Or would it suffice to include only the fundamental ones?
% of respondents



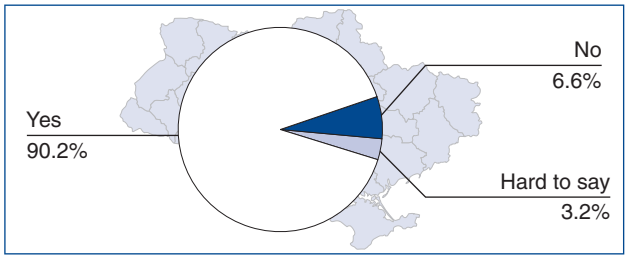
Should the Constitution guarantee the following socio-economic rights?
% of respondents



Do you believe that the Constitution should guarantee the right to free medical care?
% of respondents

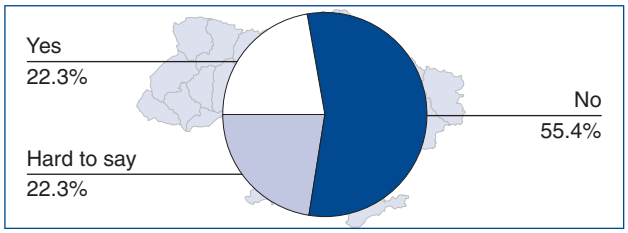


Do you believe that the Constitution should guarantee the right to free education?
% of respondents



A majority (55%) of respondents do not support the proposal to incorporate provisions "on rights in a democratic society" into the Constitution because our society does not fully meet the democratic standards. Only 22% of respondents support this proposal, most often in the country's South (35%) and East (37%). Moreover, in the South the percentage of those who support this proposal equals the percentage of those who oppose it (in all the other regions, this proposal was opposed by a majority or relative majority of those polled).

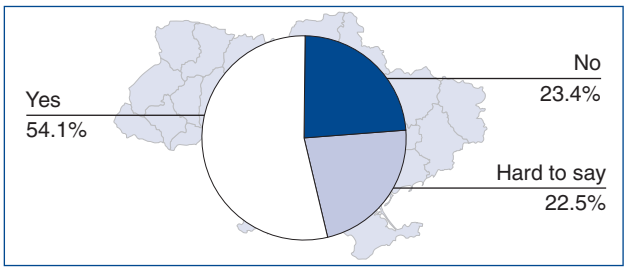
It has been proposed not to incorporate provisions "on rights in a democratic society" into the Constitution because our society does not fully meet the democratic standards. Do you support this proposal?
% of respondents



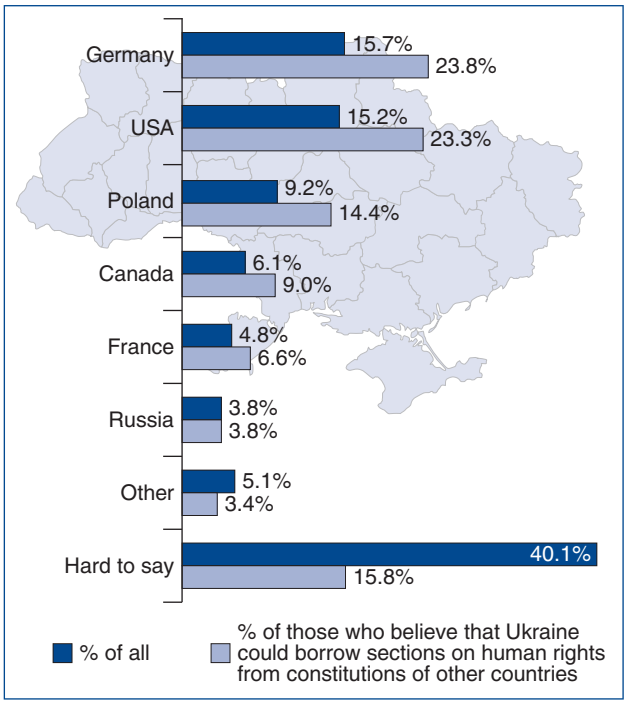
54% of those polled believe that Ukraine should borrow a section on human rights from existing constitutions of certain countries (23% oppose this proposal). This opinion is most often shared by residents of the Western region (72%) and least often by residents of the Donbas (40%). Most Ukrainian citizens would like to borrow sections on human rights from the constitutions of Germany (16% of those polled), USA (15%), and Poland (9%).

A relative majority (48%) of respondents believe that the Constitution of Ukraine should state that the fundamental human rights also apply to legal entities in particular cases (only 18% oppose this proposal). This idea has less support in the Donbas (37% and 25%, respectively).

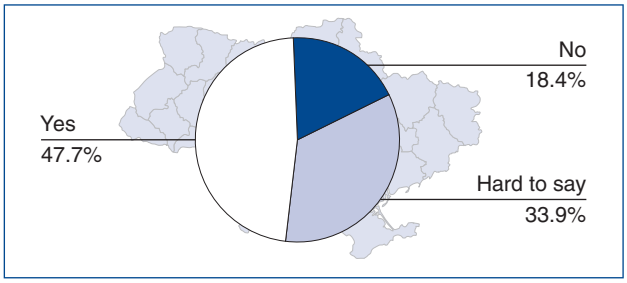
Do you believe that Ukraine should borrow sections on human rights from existing constitutions of some countries?
% of respondents



If you believe that Ukraine should borrow the section on human rights from constitutions of other countries, the constitution of which country of those listed below would you prefer?
% of respondents

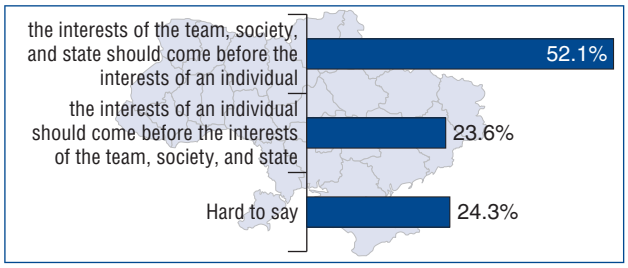


Should the Constitution of Ukraine stipulate that the fundamental human rights also apply to legal entities in certain cases?
% of respondents



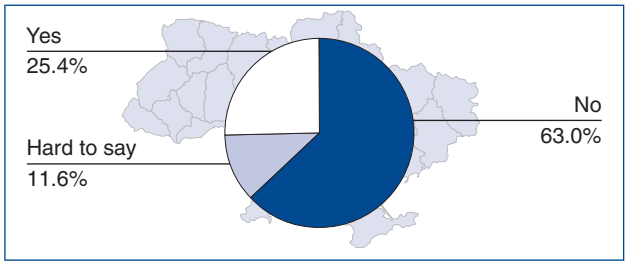
When it comes to the protection of human rights, Ukrainian citizens are more likely to say that the interests of the team, society, and state should come before the interests of an individual (52% of respondents have said so, and this viewpoint predominates in all of the country's regions). Only 24% believe that the interests of an individual should come before the interests of the team, society, and state.

In the majority of cases...
% of respondents



This approach in many ways explains why only a quarter of those polled support the proposal of constitutional entrenchment of the right to bear arms (while 63% oppose it). Residents of the Western region have spoken in favour of the constitutional entrenchment of this right more often than those of other regions (34%), although the majority of respondents in this region (58%) oppose this idea.

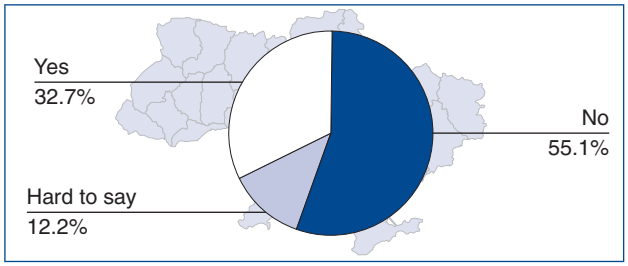
Should the Constitution of Ukraine entrench the "human right to bear arms"?
% of respondents



Dual citizenship and change of citizenship

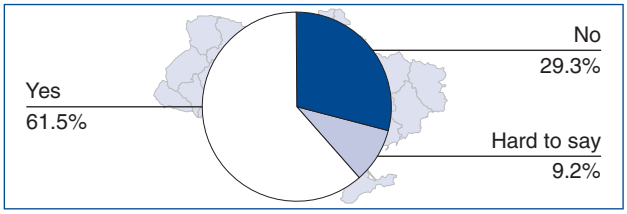
The respondents are also obviously guided by the priority of society's interests in that the majority of them (55%) reject the possibility of a dual citizenship (33% of those polled have spoken in favour of a dual citizenship). The South is the only region where a majority of respondents (51%) support the dual citizenship proposal. 62% of Ukrainian citizens believe that "only one citizenship (Ukrainian) should be recognized in Ukraine".

Should Ukraine allow its citizens to have dual citizenships (i.e., allow Ukrainian citizens to simultaneously be citizens of another country)?
% of respondents

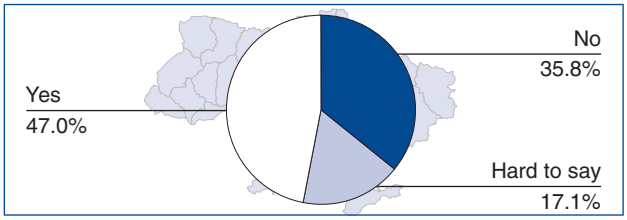


The same reasoning can explain support for the proposal to deprive a person of his or her citizenship on certain grounds (47% of those polled support the incorporation of this provision in the Constitution while 36% reject it). Only in the East the majority (52%) of respondents oppose this, while in the Donbas there is no statistically significant difference between the percentages of proponents and opponents of this idea, whereas in other regions more people support it.

Do you believe that only one citizenship (Ukrainian) should be recognized in Ukraine?
% of respondents



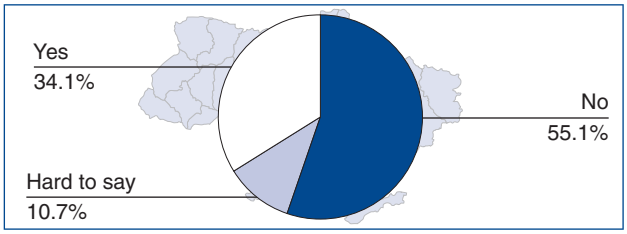
The Constitution of Ukraine states that "a citizen of Ukraine may not be deprived of citizenship" (Part 1, Article 25). Do you believe that the Constitution should allow depriving a person of Ukrainian citizenship on certain grounds?
% of respondents



Attitude toward the proposal of obligatory voting in elections

However, the fact that a majority (55%) of respondents do not support the constitutional amendment whereby citizens should have the obligation (and not the right) to vote in elections and referendums (i.e., failure to vote in elections would constitute a violation of the law) is at odds with the priority of social interests over those of an individual. This proposal is supported by only a third (34%) of those polled.

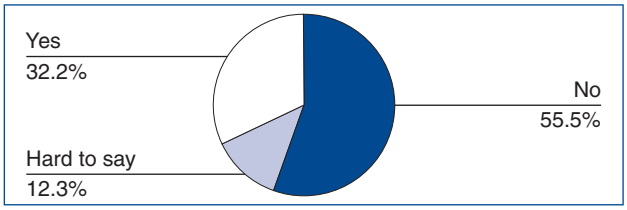
Do you believe that it should be the obligation of citizens (and not a right) to participate in elections and referendums? (In other words, failure to vote would constitute a violation of the law)?
% of respondents



Protection of the freedom of speech

The majority of respondents (56%) do not believe that the freedom of speech should be limited out of moral considerations (while 32% of those polled support this proposal). A majority or relative majority of residents of all regions have spoken against limiting the freedom of speech out of moral considerations.

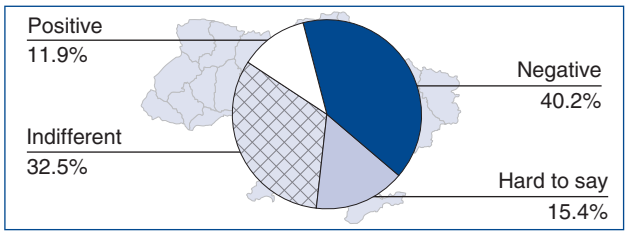
Do you believe that freedom of speech should be limited out of moral considerations?
% of respondents



Problem of the definition of marriage in the Constitution

A relative majority of respondents (40%) have responded negatively to the proposal to remove from the Constitution the definition of marriage as being "based on the free will of a woman and a man" (Part 1, Article 51) and define marriage in another law. 12% of respondents have responded positively to this proposal while 33% have expressed indifference. Women (44%) are more likely to take a negative view of this proposal compared to men (36%), whereas men have expressed an indifferent attitude (28% and 38%, respectively). The percentage of those with a positive attitude toward this is the same among women and men (12% each).

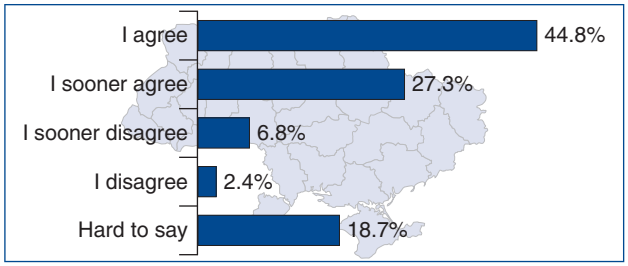
The draft constitutional amendments propose removing the concept of "marriage" that is "based on the free will of a woman and a man" (Part 1, Article 51). It is proposed to define "marriage" in a different law. What is your attitude toward this proposal?
% of respondents



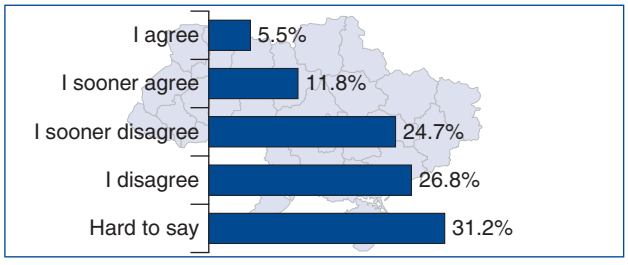
72% of those polled (an equal number of women and men) agree[5] with the following provision of the Constitution of Ukraine in its current wording: "Marriage is based on the free will of a woman and a man", while 9% disagree.[6]

52% of respondents (54% of women and 48% of men) would not support the removal of this provision from the Constitution (only 17% of respondents would support it: 17% and 18%, respectively).

To what extent do you agree with the following provisions in the current version of the Constitution of Ukraine? "Marriage is based on the free will of a woman and a man"?
% of respondents



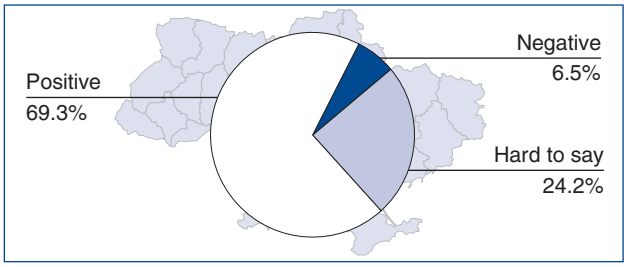
To what extent do you agree with the removal of this provision from the Constitution of Ukraine?
% of respondents



Allowing citizens to file complaints with the Constitutional Court

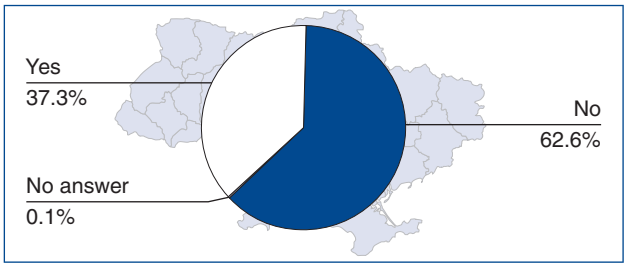
A citizen's ability to file a complaint with the Constitutional Court is one of the ways in which citizens can defend their rights. A majority (69%) of respondents have spoken in favour of allowing citizens to file complaints with the Constitutional Court (with only 7% disapproving of this proposal).

What is your attitude towards the proposal to allow citizens to file complaints with the Constitutional Court?
% of respondents



Meanwhile, only 37% of those polled understand the meaning of a constitutional complaint. In other words, if citizens are allowed to file constitutional complaints, this would require conducting an awareness raising campaign focusing on the ways in which citizens can exercise this right.

Do you know what a constitutional complaint is?
% of respondents



Thus, the overwhelming majority of Ukrainian citizens believe that the Constitution of Ukraine should establish the broadest possible range of human and citizen rights and freedoms. Citizens believe that the Constitution should guarantee such rights as the right to healthcare, free medical care, health insurance, free education, social security, labor, accommodation, private property, adequate standard of living, leisure, the right to private enterprise and the right to strike.

In forming their attitude towards protection of human rights, Ukrainians tend to proceed from the premise that the interests of the team, society and state should come before the interests of an individual.

This approach in many ways explains why the majority of respondents object to the constitutional entrenchment of the right to bear arms, reject the possibility of dual citizenship, and support the proposal to deprive people of their citizenship on certain grounds.

An overwhelming majority of respondents have expressed a positive attitude towards the proposal to allow citizens to file complaints with the Constitutional Court. ■

[5] Sum of responses "*I agree*" and "*I sooner agree*".

[6] Sum of responses "*I disagree*" and "*I sooner disagree*".

AMENDMENTS TO THE CONSTITUTION ON JUSTICE: EXPERT OPINIONS

In May 2016, the Razumkov Centre conducted two rounds of expert interviews as part of the Project "Constitutional Process in Ukraine: Improvement of the Foundation of Justice, Rights, Freedoms and Liabilities of a Person and a Citizen".

The interviews aimed to find out whether or not the constitutional amendments proposed in the Draft Law of Ukraine "*On Amendments to the Constitution of Ukraine – on justice*" No.3524 dated 25 November 2015 are appropriate and justified.

We posed the following questions to the experts:

1. What is your evaluation of provisions of the Draft Law of Ukraine "*On Amendments to the Constitution of Ukraine – on justice*" No.3524 dated 25 November 2015 (Article 125 of the Constitution), under which the judicial system would no longer be defined by the Constitution and this matter would be regulated by laws?
2. Do you support the definition proposed by the Draft Law "*On Amendments to the Constitution of Ukraine – on justice*" for the place of prosecution in the system of separation of powers (it proposes abolishing Section VII "Prosecution" and incorporating the prosecution-related provisions in Section VIII "Justice") and the prosecution powers proposed by it?

   Would it be worthwhile to institute at the constitutional level the requirements for candidates for the prosecutor's office by analogy with requirements for candidates for the position of a judge?
3. How do you feel about the provisions of the Draft Law "*On Amendments to the Constitution of Ukraine – on justice*" (Article 131-2), according to which only an attorney would represent another person in court?

The following are texts of the answers given by interviewees in alphabetical order.[1]

CONSTITUTIONAL AMENDMENTS CAN BE CURRENTLY DISCUSSED AT A THEORETICAL LEVEL ONLY

Oleh BEREZIUK,
Head of the Ukrainian Legal Society

The very idea of revising the Constitution or its core provisions is currently unacceptable because Art. 157 of the Constitution prohibits any constitutional amendments in time of war or emergency. The legislators acted in a logical and reasonable manner in establishing this prohibition while being mindful of the fact that **politically balanced decisions cannot be made under the conditions of social and political volatility**.

The existing signs of external aggression against Ukraine serve as legal grounds for declaring martial law. The formal absence of a relevant regulatory act does not justify saying that we are not in a state of martial law. It is merely an indication of the Ukrainian President's improper response to the annexation of Crimea and partial occupation of the Luhansk and Donetsk regions. Considering the existence of legal grounds for instituting martial law, it is safe to say that the issue of constitutional amendments can be currently discussed at a theoretical level only. Also bear in mind that all academically substantiated comments and proposals regarding the constitutional amendments will be of practical significance only after Crimea is reclaimed and armed hostilities end in Ukraine's east.

1. Speaking in terms of the need to implement a judicial reform, this reform should be conducted in a balanced and careful manner. Ukraine is a democratic state ruled by law, which is why the judicial branch of power should play the decisive role in protecting the fundamental human rights and freedoms.

As the judicial reform is implemented, one should focus on the need to minimize the dependence of the judiciary on other branches of power. To ensure that courts issue fair and enforceable rulings, judges have to be really immune to influence from the Parliament and Government members. Since the Ukrainian Parliament members, the Cabinet of Ministers and the President have the power of legislative initiative, increasing the dependence of

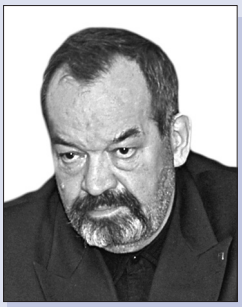
[1] The answers are quoted here with their style retained, albeit with some editorial changes.

courts on political influences would hinder democratic process in Ukraine. If the matter of the judicial system is taken outside the scope of the Constitution, this could result in the passage of laws that would limit the influence of the judiciary on socio-political processes, which in some cases could prevent the courts from handing down fair verdicts and rulings. It is safe to say that **downgrading the fundamental issues of the judicial system to the level of an ordinary law is unacceptable**.

2. The proposal to incorporate the constitutional section "On Prosecution" into the "Justice" section is justified in general, since a prosecutor, much like a judge, is a servant of justice, and whatever he does should be aimed at ascertaining the objective circumstances of the case and helping the court reach a lawful and fair decision. I also support the proposal that the requirements for candidates for the prosecutor's office should be the same as requirements for candidates for the position of a judge.

3. The institution of the legal provision to the effect that only an attorney may represent a person's interests in court is acceptable, since the **defender must have a higher legal education and practical work experience in order to protect human rights and freedoms in a proper manner**. Only in this case can we hope that he will perform his duties effectively. This would also expedite the trial of the case. The experience of other countries such as Switzerland proves that this approach is correct. A qualified attorney can represent a person in court in a more professional and responsible manner, which can reduce the amount of litigation and help courts reach lawful and fair decisions. ■

THE JUDICIAL SYSTEM SHOULD BE DEFINED BY CONSTITUTIONAL PROVISIONS ALONE



Danylo KURDELCHUK,
President of the Ukrainian Bar Association for Foreign Affairs

1. The first thing that catches the eye is the deliberate intention of the draft authors to retain (conserve) the four-level judicial system, which complicates the defence of citizens, makes it impossible to try cases in courts within reasonable time frames, which objectively results in violations of the rights to a fair trial and the right to a hearing within a reasonable time (Paragraph 1, Article 6 of the European Convention on Human Rights[2]).

I cannot help but recall the institution of the four-tiered system when the previous regime attempted to "tame" the then incumbent presiding judge of the Supreme Court of Ukraine[3] by not merely resorting to pressure (which included an arrest of a member of the judge's family) but also by taking specific steps – contrary to the Constitution and common sense – to liquidate the Supreme Court (the highest judicial authority of general jurisdiction) by reducing the number of Supreme Court judges and practically restricting their powers.[4]

The creation of higher specialized courts with functions of the Supreme Court inevitably complicated the job of defending the rights of citizens. One of our international colleagues commented jocularly: "Mr Portnov has built a triangular house", meaning the creation of higher courts of three and not four jurisdictions and the merger of the civil and criminal jurisdictions.

Note that the **draft submitted by the President of Ukraine clearly shows the intent to preserve the four-tier judicial system that has proven in effective and caused jurisdictional problems**.

Meanwhile, the wording "higher specialized courts may operate under the Law" creates real possibilities for political manipulations by making amendments to laws on the status and jurisdiction of such higher courts depending on the political situation. If placed in the hands of politicians, this would become an extremely dangerous tool for society.

The judicial system should therefore be defined by constitutional provisions alone: **the judiciary should be regulated in the same way as the legislative and executive branches.** The regulation of the triad of all branches of power should be logical and appropriate.

An attempt at minimizing the role of the judicial branch of power can be discerned in the proposal to curtail the name of the highest judicial instance, the Supreme Court of Ukraine, by removing the words "of Ukraine". This controversial proposal could have been voted upon if the author of the draft law had simultaneously proposed curtailing the title of the President, the name of the Parliament, the Cabinet of Ministers, and the National Bank by removing the name of the country.

2. As for the place of prosecution in the system of power, after the powers of prosecutors in general and the Office of the Prosecutor General in particular have been curtailed, it would be logical to incorporate the provisions on prosecution as an institution into the "Justice" section, thereby defining its key role as an organic component of a fair and impartial court.

It would therefore be logical to define prosecution and attorneys in the "Justice" section while including a reference to laws of Ukraine that regulate their work. Such laws will stipulate the qualification requirements for candidates for the prosecutor's office. In addition, Ukraine has created new law enforcement agencies – the National Anti-Corruption Bureau of Ukraine, the specialized anti-corruption prosecutor's office and the special bureau of investigations – whose functions and status have certain things in common with the prosecutor's office.

[2] The European Council Convention for the Protection of Human Rights and Fundamental Freedoms. Signed on 4 November 1950; ratified by Ukraine on 17 July 1997, and became binding on Ukraine on 11 September 1997. (*http://zakon3.rada.gov.ua/laws/show/995_004*) – *Ed.*

[3] The individuals in question are V. Onopenko (who served as the Supreme Court Presiding Judge from October 2006 to September 2011) and his son-in-law E. Korniychuk (who was arrested in December 2010 on corruption charges. He spent several months behind bars at Lukyanivske Detention Centre). – *Ed.*

[4] The author means the passage of the Law "On Judicial System and Status of Judges" of 7 July 2010, which is in effect to this day with a few amendments. – *Ed.*

Objectively speaking, attorneys are also an organic component of justice, whose involvement insures an adversarial process and a presumption of an impartial court trial.

3. I support the proposal that only an attorney may represent another person in court, bearing in mind certain exceptions to this rule.

Last but not least, let us highlight another key feature of Draft Law No.3524: throughout the draft law one can clearly trace the intention of the Guarantor of the Constitution (President of Ukraine) to retain as many presidential powers as possible, e.g. the so-called ceremonial function of appointing judges. From time to time, this seems to be something more than a simple ceremonial function in practice. The President may use so-called technical delays, data checks, etc. while reviewing specific candidates.

On another level, it seems illogical to postpone until April 2019 and further complicate the procedure for refreshing the composition of the High Council of Justice, which inherits its primary functions from the High Council of Justice. It would be reasonable and expedient to establish, at most, a one-year or, even better, six-month term for appointing (electing) High Council of Justice members in light of the importance of this agency when it comes to supporting and guaranteeing normal operation of the Ukrainian judicial system as a whole.

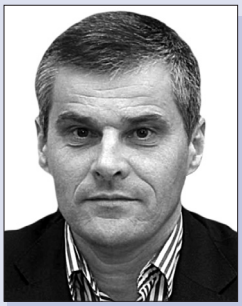
We attach fundamental importance to the possible recognition of the jurisdiction of the International Criminal Court on the terms outlined in the Rome Statute via a direct stipulation in Article 124 of the Constitution of Ukraine.

Numerous discussions and hearings at state institutions and in the expert community point to the existence of a fundamental consensus between the representatives of the society and authorities as to the urgent need to recognize the jurisdiction of the International Criminal Court in the face of aggression against Ukraine and treachery committed by many former high-ranking officials in Ukraine.

A joint hearing attended by representatives of four parliamentary committees, the Office of the Prosecutor General, the Ministry of Justice and the Security Service of Ukraine last summer produced some telling results.[5] The participants demonstrated a unanimous consensus regarding the complete recognition of the jurisdiction of the International Criminal Court.

Unfortunately, this position has been not met with support in Parliament. ■

PROPOSED CONSTITUTIONAL AMENDMENTS WILL NOT RESOLVE EXISTING PROBLEMS IN THE FIELD OF JUSTICE



Mykola MELNYK,
Judge at the Constitutional Court of Ukraine

1. The introduction of the constitutional amendments regarding the judicial system Ukraine under the Draft Law of Ukraine "On Amendments to the Constitution of Ukraine – on justice" could result in a restriction of the right to judicial protection (Articles 8 and 55, Constitution of Ukraine).

The fact of the matter is that the fundamental idea of a constitutional system (and, by extension, the main objective of the constitution of each country) is enforcement of human and citizen rights and freedoms through effective limitation of state power, which is accomplished primarily through defining the system of power and the principles on which it is organized. Expounding on the principle of execution of state power in Ukraine, its separation into the legislative, executive and judiciary branches of power, the legislator defined in the Constitution of Ukraine a system of agencies for each one of those branches of power and the principles by which they operate.

For instance, Article 125 of the Constitution stipulates that the system of courts of general jurisdiction in Ukraine consists of local courts, courts of appeal, higher specialized courts and the Supreme Court of Ukraine.

Instead, the amendments to Article 125 of the Constitution proposed by the draft law in question give rise to uncertainty as to the system of agencies that have to administer justice.

First, unlike the Constitution of Ukraine, the proposed amendments do **not make it clear what type of judicial system will exist in Ukraine – a three-tier or four-tier one** (although other variations are not ruled out), and whether or not it will include general courts or only specialized courts. The proposed wording of Article 125 of the Constitution paints many scenarios for building the future judicial system. On the one hand, it appears to create opportunities for modifying the existing judicial system of Ukraine; on the other, it permits conservation of the old system. In particular, it proposes changing the wording of Part 3, Article 125 of the Constitution of Ukraine, according to which "*a higher judicial authority for specialized courts are the relevant higher courts*", by replacing it with "*higher specialized courts may operate under the Law*";

[5] The author is obviously referring to a series of roundtable discussions dealing with the ratification of the Rome Statute and Ukraine's accession to the International Criminal Court (ICC), which were staged by the Parliamentary Committee on Foreign Affairs jointly with the Parliamentary Committee on Legislative Support of Law Enforcement, the Parliamentary Committee on Legal Policy and Justice, the Parliamentary Committee on Human Rights, Ethnic Minorities and Inter-ethnic Relations, which were attended by representatives of the Office of the Prosecutor General, the Ministry of Justice and the Security Service of Ukraine in January, June and December 2015. See: Last year the Foreign Affairs Committee monitored observance and implementation of the Constitution and laws of Ukraine, held a number of workshops, committee hearings, roundtables discussions and joint meetings. – Official website of the Ukrainian Parliament, *http://rada.gov.ua/news/Novyny/122897.html*. – *Ed*.

as well as use the word combinations "judges of specialized courts" (Part 4, Article 127), "courts of the cassation instance" (Subclause 11, Clause 161, Section XV "Transitional Provisions" of the Draft Law).

Second, the draft law does not make any mention of courts of the first and appellate instances, which hypothetically does not rule out unforeseen amendments to Ukrainian laws defining the judicial system of Ukraine. The proposed wording of Article 125 of the Constitution provides for the existence of only two types of courts: the Supreme Court and administrative courts, whereas the Constitution of Ukraine defines all elements of the Ukrainian judicial system: the Supreme Court, higher specialized courts, courts of appeal and local courts. In this way, the Constitution informs citizens about which judicial authorities will enforce their right to judicial protection. The amendments proposed by the Draft Law deprive citizens of this opportunity.

Third, despite the stipulation in the draft law that the Supreme Court is the highest court in the judicial system of Ukraine, **the status of the Supreme Court and its procedural interaction with higher specialized courts remain unclear from the proposed innovations.** These shortcomings become more obvious if you consider the Constitutional Court of Ukraine Ruling No.8 of 11 March 2010, according to which "the constitutional status of the Supreme Court of Ukraine does not imply that the legislator has vested in it the powers of the court of the cassation instance in respect of rulings issued by higher specialized courts, which exercise the powers of the cassation instance". The understanding of the future status of the Supreme Court is further complicated by the amendment proposed by the law to the provisions of Section XV "Transitional Provisions" of the Constitution, which mentions "the Supreme Court and courts of the cassation instance" (Subclause 11, Clause 161), which prompts a conclusion that the Supreme Court will not be a court of the cassation instance. At the same time, the specific status of the Supreme Court (other than a general declaration to the effect that it is the highest court in the judicial system of Ukraine) is not defined by this or other provisions of the draft law.

In other words, the problem of creating a single judicial system, ensuring equal application of laws by all courts and providing effective judicial application for fundamental human rights and freedoms remains open.

Also note that the renaming of the Supreme Court of Ukraine as the Supreme Court would create legal preconditions for reorganizing the country's highest judicial authority and modifying its composition and powers, which may devalue the constitutional status of the Supreme Court of Ukraine the way it already happened in 2010-2013.

Fourth, the proposed wording of Article 125 of the Constitution does not make it clear what place is reserved for administrative courts in the judicial system of Ukraine, or the degree of autonomy of the subsystem of administrative courts, the structure of this subsystem (particularly the fact that it includes the Higher Administrative Court of Ukraine), or the possibility of having the decisions of said courts revised by the Supreme Court.

Thus, the new judicial system of Ukraine proposed by the draft law lacks clarity, coherence, determination and completion. If implemented in practice, it would cause: (1) the actual removal from the text of the Constitution of Ukraine of a clear definition of the judicial system of Ukraine, which would contravene the very nature of the Constitution as a fundamental law of the state designed to establish the underpinnings of the constitutional system, including the fundamental principles of the judicial system; (2) a lack of constitutional definition of the system of courts; (3) preconditions at the constitutional level for judicial system transformations that could further complicate access to justice and cause a deterioration in judicial protection of human and citizen rights and freedoms. The risk of such transformations is further amplified by the fact that, beginning on 31 December 2017, courts will be formed, reorganized and liquidated by the President of Ukraine and not according to law.

2. Abolition of Section VII "Prosecution" and incorporation of prosecution-related provisions in Section VIII "Justice" of the Constitution of Ukraine does not change anything essentially, since prosecution is not "built into" justice but is merely moved to the section on justice.

At the same time, **proposals regarding the new powers of the prosecutor's office cause major reservations**. The draft law proposes vesting the prosecutor's office with powers to organize and conduct procedural management of the pre-trial investigation. Essentially this means that, unlike the current constitutional regulation (Article 121 of the Constitution), the pre-trial investigation functions will be effectively reserved for the prosecutor's office by the Constitution of Ukraine.

The institution of "management of the pre-trial investigation" was introduced in Ukrainian law by the 2012 Code of Criminal Procedure of Ukraine. Prior to that, the prosecutor's office performed the function of "supervising the observance of laws by agencies conducting detective activities, interrogations and pre-trial investigations" defined in Part 3, Article 121 of the Constitution.

Part 2, Article 36 of the Code of Criminal Procedure of Ukraine states that the prosecutor shall supervise the observance of laws during a pre-trial investigation in the form of *procedural management* of the pre-trial investigation. In addition to the purely supervisory powers, the prosecutor has the right to perform the entire range of activities that essentially constitute a pre-trial investigation. In particular, the prosecutor is authorized to: commence a pre-trial investigation; personally conduct investigatory (detective) and procedural activities; authorize the relevant operational units to conduct investigatory (detective) activities and secret investigatory (detective) activities; make procedural decisions, including decisions to discontinue criminal proceedings and extend the time frame of the pre-trial investigation; file motions with the investigator and the judge requesting investigatory (detective) activities, secret investigatory (detective) activities and other procedural activities; inform a person that he or she is a suspect; prepare the indictment; present the indictment in court.

The ability of the prosecutor's office to conduct a pre-trial investigation is also implied by the function of organizing a pre-trial investigation, which is currently performed by the head of the pre-trial investigation agency, since according to Article 39 of the Code of Criminal Procedure of Ukraine in addition to organisational

and administrative powers he has the right to "conduct a pre-trial investigation by using the powers of the investigator in doing so".

Thus, the right to conduct and organize a pre-trial investigation and perform procedural management of a pre-trial investigation enable the prosecutor to personally conduct a full pre-trial investigation from start to end. The fact that the function of organisation and procedural management of a pre-trial investigation is not limited to supervising this investigation is also confirmed by the proposed draft law, which vests the prosecutor's office with powers to "oversee the secret and other investigatory and detective activities of the law enforcement agencies" and "address other matters during criminal proceedings in the manner prescribed by law" (proposed by the draft law to supplement Article 131[1] of the Constitution).

The proposed powers of the prosecutor's office to conduct a pre-trial investigation will adversely affect the institutional capability of the prosecutor's office and cause it to combine two mutually exclusive functions: conducting a pre-trial investigation and supervising it. When they are combined with the function of public prosecution in court, this **would create constitutional preconditions for a violation of the principle of an impartial, complete and comprehensive investigation**, all sorts of abuses of office during this investigation, which may limit or deprive people of their rights guaranteed by the Constitution of Ukraine: the right to defence against prosecution, the right to presumption of innocence and the right to judicial protection (Articles 55, 59, 62 and 63 of the Constitution of Ukraine).

3. The legal rationale behind the proposal to include a constitutional stipulation that an attorney only shall represent another person in court is rather questionable. While this could be acceptable in the context of defence against criminal prosecution, when it comes to other representation (any kind) of a person in court this is debatable, at the very least, from the perspective of Article 59 of the Convention. We must also bear in mind the position of the Constitutional Court, which issued its Ruling No.23 of 30 September 2009 in a case involving the right to legal assistance, emphasizing the fact that "the right to legal assistance is the possibility guaranteed by the state for each person to receive such legal assistance in the volume and forms determined by this person irrespectively of the nature of legal relations with other subjects of law".

In general, the constitutional amendments proposed by the draft law in question will not resolve existing problems in the field of justice and will not help reach the declared goals: creating an independent judiciary in Ukraine by depoliticizing it, guaranteeing every person the right to a fair trial by an independent and impartial court.

The method chosen by the subject of legislative initiative for resolving the problems that have been outlined correctly for the most part will not eliminate political influence on the judiciary and will not make it independent of political institutions. On the contrary, it will exacerbate this problem and make it even more socially dangerous, as it will undermine the existing balance (the system of checks and balances) of political influence through non-symmetrical redistribution of relevant powers in favour of the Ukrainian President. Should the bill be passed into law, the diversified political influence on the judiciary would become concentrated, which will only increase the dependence of the judiciary as evidenced by the so-called judicial reform of 2010.

If introduced, the innovations proposed in the draft law would potentially threaten the constitutional system of Ukraine, namely its fundamental constitutional principle whereby "state power in Ukraine is exercised based on the principles of its separation into the legislative, executive and judicial branches of power", further politicize the judiciary, make judges even more dependent, complicate access to justice, and create additional risks and threats for the constitutional legal status of an individual and citizen in Ukraine, since it provides for restriction (and in some cases cancellation) of human and civil rights and freedoms (particularly the right to judicial protection), the right to legal assistance, the right to defence against accusations (Articles 6, 8, 55, 59, 63 and 129 of the Constitution of Ukraine).

It is worth noting that the draft law backs up a clearly manifested trend of the current phase of the constitutional reform, which had been revealed by previous legislative initiatives to amend the Constitution examined by the Constitutional Court in 2015.[6] On the one hand, it involves a decreasing independence of the judicial and legislative branches of power, a curtailment of powers of the parliament and, on the other – growing powers of the President and his mounting political influence in the system of state power. Under the conditions of a weak democracy, socio-political volatility, lack of an effective legal system or a fully effective principle of the rule of law, this could create preconditions for ignoring the basic constitutional principle according to which state power in Ukraine is exercised on the basis of its separation into legislative, executive and judiciary powers. ■

THE SYSTEM OF JUDICIAL AUTHORITIES MUST HAVE A CONSTITUTIONAL DEFINITION

Lidiya MOSKVYCH,
Chair at the Judicial and Law Enforcement Agencies Management Department, Yaroslav Mudryi National Law University

1. The draft amendments to the Constitution propose removing from the text of the current Constitution of Ukraine the provisions on local courts and courts of appeal, while keeping only the provision on the status of the highest court in the judicial system – the Supreme Court. If you consult the practice of European countries in matters of constitutional regulation of the judicial

[6] See draft laws "*On Amendments to the Constitution of Ukraine (Regarding the Immunity of Ukrainian Parliament Members and Judges)*" (Reg. No.1776 of 16 January 2015) and "*On Amendments to the Constitution of Ukraine (Regarding the Decentralisation of Government)*" (Reg. No.2217a of 15 July 2015).

system, two major trends can be signed out: they either mention all courts that work (may work) in the country, or focus on only the highest of all courts; constitutional provisions include references to laws in respect of all other courts. A common pattern can be identified: the existence of a *system* of courts, particularly lower courts, is declared in virtually all constitutions. **Removing from the Constitution of Ukraine the provisions regarding local courts and courts of appeal would be unjustified and could potentially cast doubt on the legal definition and stable operation of one branches of state power, giving rise to the risk of loss of independence by this branch of power and the independence of the entities vested with judicial authority.** The principle of parity of the branches of power requires an equal approach to their constitutional definitions. Despite the multi-branched court system, each court (and not just the highest court) is vested with judicial authority, which is why I believe that the system of institutions belonging to one of the branches of state power – the judiciary – must have a constitutional definition, at least at the level of a mention and reference to a law. I believe it necessary to preserve the wording of Article 125 of the Constitution of Ukraine: "Courts of appeal and local courts shall operate in accordance with the law".

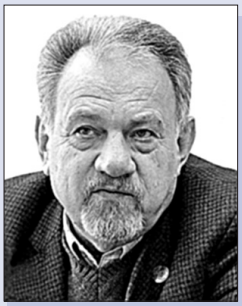
2. The issue of determining the place of the prosecutor's office in the system of separation of power has been relevant ever since the adoption of the Constitution of Ukraine. There is no single universal model for the status of the prosecutor's office. That's why Ukraine has to choose between preserving the existing status of the prosecutor's office or transforming it into an institution tasked with creating conditions for the administration of justice. The wording of the draft law indicates that the legislator intends to make systemic changes when it comes to the role of the prosecutor's office. In particularly, we wholly support the abolishment of the supervisory function at the pre-trial investigation stage, and its transformation into the function of procedural management is quite appropriate, since this function better reflects the specifics of the prosecutor's tasks at the pre-trial investigation stage as opposed to the supervisory function. To give a general assessment of the strategic vision of the transformation of the prosecutor's office proposed by the draft law, I consider it to be positive. These changes are long overdue and had been planned by the authors of the Constitution of Ukraine. However, much time has elapsed, and **more drastic measures need to be taken to transform the prosecutor's office.** The legislator has already prepared the necessary preconditions, particularly by passing the new 2012 Code of Criminal Procedure of Ukraine. Implementation of the constitutional amendments would primarily reinforce the adversarial principles of justice and the arbitral function of the court. However, the status of a prosecutor's office in the system of judiciary power requires more guarantees of its independence, including political independence. For this reason, we do not support preserving the institute of the vote of no-confidence in the Prosecutor General of Ukraine, since it undermines the entire concept of transformation of the prosecutor's office from a political institution into an institution of justice.

We are also unable to support the provision that deprives the prosecutor's office of the function of supervision over observance of the law during enforcement of court decisions in criminal cases. We believe this is illogical because the prosecutor is present at the stages of pre-trial and criminal proceedings but is absent at the stage of enforcement of the verdict. We could not find a reasonable explanation for this position of the authors of the draft law. We have reservations about the limitation of the representative function of the prosecutor's office. While supporting in general the idea of transferring the functions of defending the rights and interests of individuals to attorneys, we have certain doubts as to whether or not this would deprive residents of district centres and villages of legal assistance (including assistance from public attorneys). Are attorneys capable of providing legal assistance of appropriate quality (including fee legal assistance) all over the nation? Won't the limitations of the representative function of the prosecutor's office create obstacles for access to justice? The potential risk of this is substantial.

As to the introduction at the constitutional level of qualification requirements for candidates for the position of a prosecutor similar to requirements for candidates for the position of a judge, there is no need for this, much like for the constitutional definition of professional requirements for attorneys. Judges are vested with the powers of one of the branches of state power, which is why constitutional regulation of qualification requirements for the position of a judge is perfectly justified. As for prosecutors, it would suffice for qualification requirements for the position of a prosecutor to be defined by law.

3. As to the idea that only an attorney may represent another person in court, it is reasonable in general, since it establishes higher standards for professional defence of rights and interests of defendants and for effective administration of justice. From the practical perspective, however, it raises concerns regarding the availability of legal assistance to all groups of the population all over the country. **Before making a final decision, the legislator should analyse the performance of secondary legal assistance centres and study the opinions of their potential customers.** ■

PARLIAMENT MEMBERS MAKE LEGISLATIVE AMENDMENTS TO REGULATIONS GOVERNING THE JUDICIARY DURING ALMOST EVERY CONVOCATION



Volodymyr SUCHCHENKO,
Lecturer at the Department of Legal Sciences, National University of the Kyiv-Mohyla Academy
Executive Director of the Centre for Rule of Law Problems Research

1. An analysis of the provisions of Article 125 of the Draft Law of Ukraine "*On Amendments to the Constitution of Ukraine – on justice*", the judicial system laws currently in effect and laws regulating the judicial proceedings (procedural laws) as well as practical operation of the judicial system in Ukraine prompts the following conclusion.

First, the change of political elites and high-ranking public administrators that happens in the wake of both regular and early parliamentary or presidential elections results in a situation where parliament members

(of almost every new convocation) and new presidents are eager to make legislative amendments to the regulation of the functions of the judiciary branch of power.

Second, neither legislators nor the legal community (scholars and practicing experts) have an established and clear concept for building the judiciary branch of power, even though (in my opinion) the majority gravitates towards a three-tier system.

Third, a study of the structure of the judiciary branch of power in other continental law countries – the EU and the Anglo-Saxon legal family – and the history of justice in Ukrainian territory (as far back as the age of Cossacks) gives reasons to opt for this particular system: court of the first instance – court of appeal – court of cassation (second appeal).

There is also a need to entrench in the Constitution the possibility of establishing magistrate courts to be tasked with examining domestic, civil and common law disputes involving relations among people.

In my opinion, this kind of system would be the most accessible for Ukrainian citizens.

The judicial system in Ukraine is based on the principles of territoriality and specialisation and is defined by the law. A court is formed, reorganized or liquidated by a law, the draft of which is submitted to the Ukrainian Parliament by the President of Ukraine after consulting the High Council of Justice. The Supreme Court is the highest court in the judicial system of Ukraine. Higher specialized courts may operate under law. Administrative courts are tasked with protecting the rights, freedoms and interests of individuals in the field of public law relations. The establishment of extraordinary and special courts is prohibited.

I consider such approaches acceptable in terms of their possible future amendment through laws and not through constitutional amendments.

The creation of vertical administrative courts also deserves to be supported in light of the fact that – in the absence of established democratic traditions of society's political culture and public administration – the development of the executive branch of power and local government agencies will take quite some time, which is why protecting the human and citizen rights and fundamental freedoms against arbitrariness of public officials and government institutions will require the dedicated attention and judicial judgment of an impartial specialized court.

Commercial courts should be liquidated. **Specialisation of courts should happen inside the judicial system itself.** I like the American experience in this regard when judges of the first instance specialize for 1-2 years in examining a certain category of disputes (legal relations) and then change their specialisation according to schedule (by a random draw). After working for at least 10 years in a court of the first instance, judges become versatile legal experts qualified for positions in courts of the second and third instances. A more clearly defined and stable specialisation in terms of the categories of cases should be in place in courts of appeal and cassation. This is accomplished by forming the appropriate "justice chambers" with the possibility of judges being transferred from one chamber to another.

2. I believe to be perfectly acceptable the proposal to abolish Section VII "Prosecution" in the Constitution and incorporating the relevant general provisions relating to the operation of prosecutorial agencies in the "Justice" Section.

The powers of prosecutorial agencies should be limited only by their procedural powers in respect of procedural management of pre-trial investigations and public prosecution during court proceedings.

In addition, I believe it necessary to supplement the "Justice" Section in particular with provisions regarding the operation of attorneys – as an institution of defence and representation of the interests of individuals (and legal entities) in legal relations among all subjects and during court proceedings, which would be totally independent of the state and report to a self-regulatory organisation.

Considering the experience of the majority of countries with developed legal systems and the experience of operation of the Ukrainian legal system and attempts to politicize it, I believe it necessary to introduce constitutional provisions detailing the requirements for candidates for the position of a prosecutor, which must be essentially identical to the requirements for candidates for the position of a judge.

3. As to the proposal that only attorneys may represent another person in court, I believe that – if and when magistrate courts are established – any citizens chosen by the parties would be able to represent the parties in such courts. In professional courts examining the most complicated legal disputes and relations, the parties should be represented only by professional attorneys, except when both parties to the proceedings (other than criminal proceedings) do not object to having their interests represented by a non-attorney.

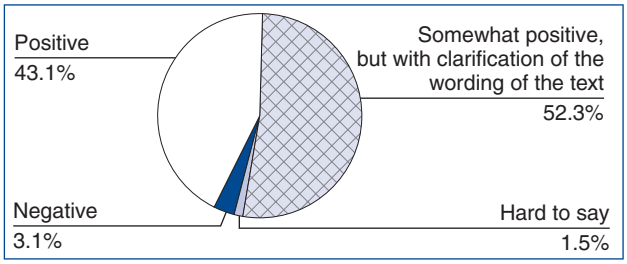
In conclusion, I find it appropriate and possible to note that we **need to channel the theoretical structure of existence of "constitutional laws" into the practical realm** by stipulating in the Constitution that laws on the judicial system and status of judges, on prosecution, on attorneys, on the Cabinet of Ministers, on the President and presidential impeachment, and on the Rules of Procedure of the Ukrainian Parliament shall become Constitutional laws and shall be passed (including any amendments thereto) by a qualified majority (two-thirds) of the constitutional composition of the country's legislature (Parliament). This procedure should keep members of parliament of each new convocation from "adapting" the constitutional provisions to their own or others' interests and agenda. ■

EXPERT OPINION ON JUDICIAL REFORM

An expert survey was conducted by the Razumkov Centre to determine the view of experts on amendments to the Constitution in respect of the system of justice.[1]

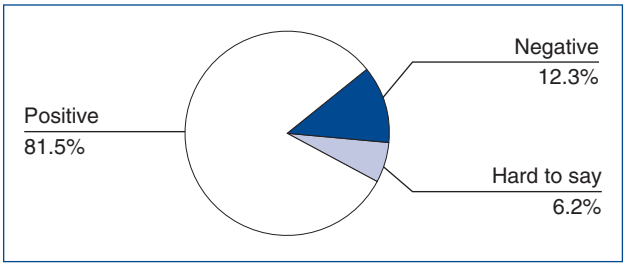
The expert community is generally positive about the idea of implementing the constitutional provision according to which detention, keeping the judge under custody or under arrest are only possible with the consent of the High Council of Justice, and the provision under which a judge cannot be held liable for a judicial decision (except in the case of committing a crime or a disciplinary offence). However, 52% of experts polled are in favor of clarifying the aforementioned provisions.

What is your attitude towards the suggestion to enshrine "the immunity of judges" in the Constitution of Ukraine as follows: "A judge shall not be detained or kept under custody or under arrest without the consent of the High Council of Justice until a guilty verdict is rendered by a court, except for the detention of a judge caught committing a serious or grave crime or immediately after it. A judge shall not be held liable for any decision adopted by him or her, except in the case of committing a crime or a disciplinary offence"?
% of experts polled



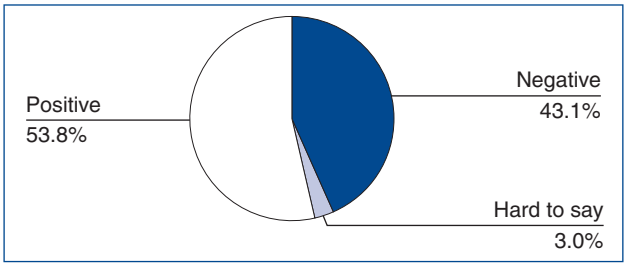
The proposal to empower the High Council of Justice to grant consent to detain, keep the judge under custody or under arrest until a guilty verdict is rendered by a court, received overwhelming support (82%) from the experts.

How do you assess the proposal to empower the High Council of Justice to grant consent to detain, keep the judge under custody or under arrest "until a guilty verdict is rendered by a court, except in cases in which the arrest was made during or immediately after the serious or grave crime was committed" (Art. 126, Para. 3)?
% of experts polled



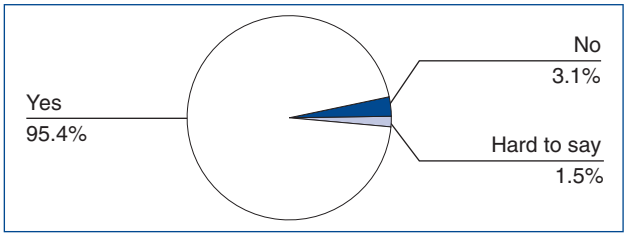
The introduction of "monopoly of advocacy" over court representation is supported by the majority (54%) of the experts polled; however it is not supported by 43% of them.

What is your attitude towards the following initiative of the President of Ukraine: "Only an advocate shall represent another person before the court and defend a person against prosecution"?
% of experts polled



Establishing the requirements aimed at increasing the level of qualification of judges, such as increasing the age of candidates to 30 years and professional experience to five years, as well as the introduction of the competitive principle in the judge selection process were supported by the vast majority (95%) of experts polled.

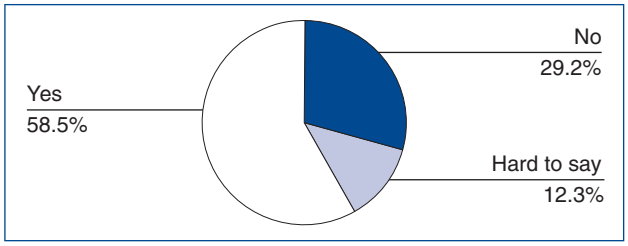
Do you support the suggested amendments to the Constitution regarding the requirements for the formation of the judiciary, including increasing the age of candidates from 25 to 30 years, professional legal experience from 3 to 5 years, the introduction of a competitive selection procedure for candidates, etc.?
% of experts polled



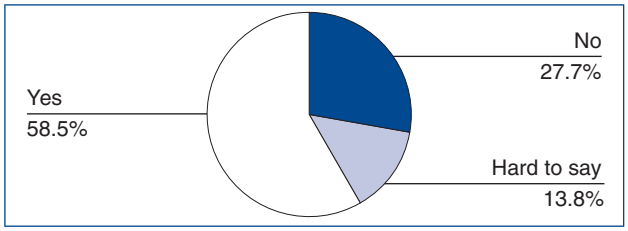
The majority (59%) of experts agree with the suggested grounds for a judge's dismissal, and support the idea that the list of grounds for a judge's dismissal should be supplemented with an anti-corruption component.

[1] The expert poll was conducted from April 21 to May 20, 2016. 58 experts, including scholars (higher-education teaching personnel, employees of research institutions), representatives of NGOs and think tanks, members of the Constitutional Commission, representatives of the judiciary, the prosecution service, the local bureau of justice, lawyers and notaries were polled.

Do you agree with the grounds for a judge's dismissal suggested in the draft amendments to the Constitution?
% of experts polled

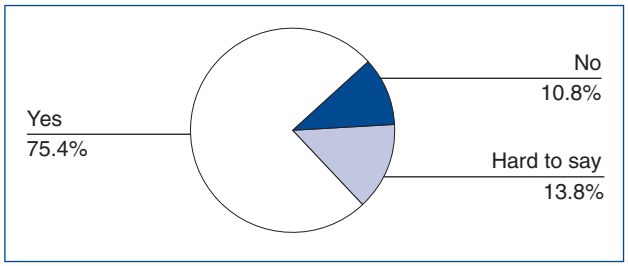


Do you agree that the list of reasons for a judge's dismissal must be complemented by the reason, according to which the judge should be dismissed from his or her post in case of the submission of evidence that his or her lifestyle does not correspond with his or her declared income?
% of experts polled



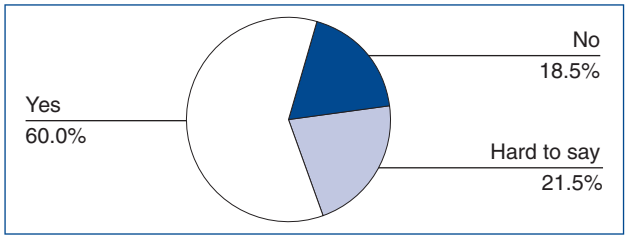
The powers of the Supreme Council of Justice proposed by the draft amendments to the Constitution were supported by the vast majority (75%) of the experts polled.

Do you consider the powers of the Supreme Council of Justice proposed by the draft amendments to the Constitution of Ukraine to be appropriate and reasonable?
% of experts polled



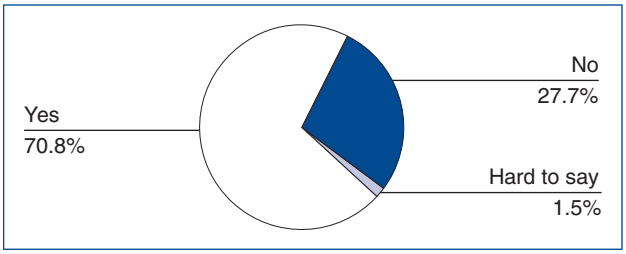
Resolutions such as changes to the powers of the state prosecutor's office and the cancellation of Section VII "Prosecutor's Office" was approved by 60% of the experts and disapproved by 19%.

Do you support changes to powers of the state prosecutor's office and the cancellation of Section VII "Prosecutor's office" with further inclusion of these provisions into the Section "Justice" of the Constitution provided by the draft amendments to the Constitution of Ukraine?
% of experts polled

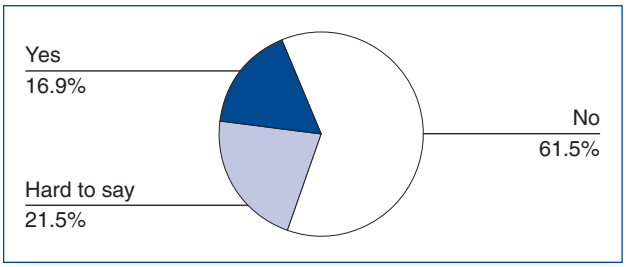


Among other constitutional innovations there was considerable expert support for the introduction of the Institute of constitutional complaint. This innovative legislation is supported by 71% of the experts, and not supported by 28% of them. 62% of experts believe that this institution will not hinder the ability of Ukrainian citizens to appeal to the European Court of Human Rights, while 17% share a different vision.

Do you support the introduction of the institute of constitutional complaint, that is, the right of a person to directly appeal to the Constitutional Court of Ukraine in case a person alleges that "the law of Ukraine applied in a final judicial decision in his or her case contravenes the Constitution of Ukraine (Art. 151, Para. 1)", proposed by the draft amendments to the Constitution of Ukraine?
% of experts polled

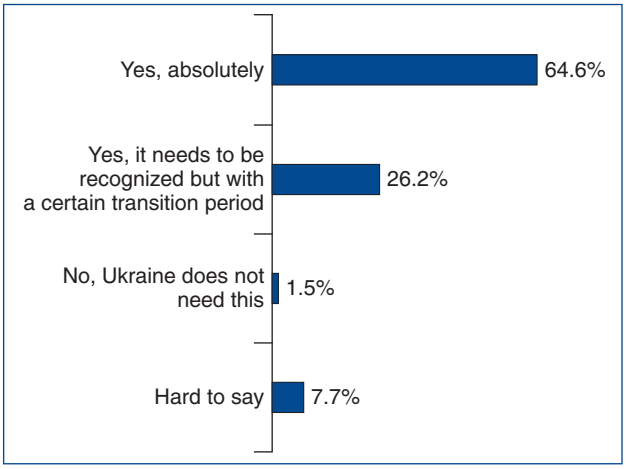


Can the institute of constitutional complaint hinder the ability of Ukrainian citizens to appeal to the European Court of Human Rights?
% of experts polled



The provisions on the recognition of the jurisdiction of the International Criminal Court by Ukraine are supported by the vast majority (91%) of experts.

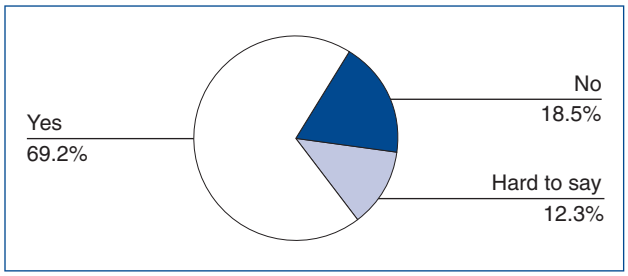
Do you support the provision of the draft amendments to the Constitution of Ukraine on the recognition of the jurisdiction of the International Criminal Court by Ukraine?
% of experts polled



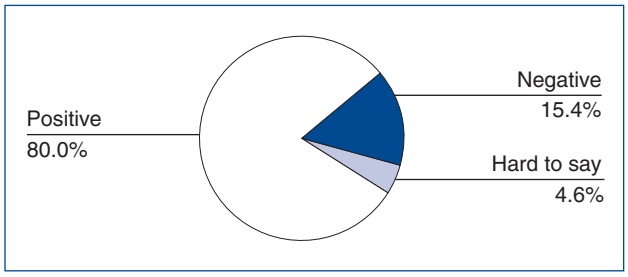
Constitutional innovations regarding the Constitutional Court received varying assessments from the experts. Most of the experts polled support empowering the Constitutional Court to adopt decisions on compliance of questions to be put to all-Ukrainian referendums with the Constitution (constitutionality) (69%). They are also supportive of the proposal to introduce the competitive selection of candidates for the post of judge of the Constitutional Court (80%).

At the same time, there are obvious disagreements as for the exclusive right of the Constitutional Court to take the oath of the Constitutional Court judge, to dismiss the judge from office, to give consent for the prosecution of the Constitutional Court judge. Slightly more than half of the experts agree with these innovations, 23% rate them negatively, and 26% were not able to answer.

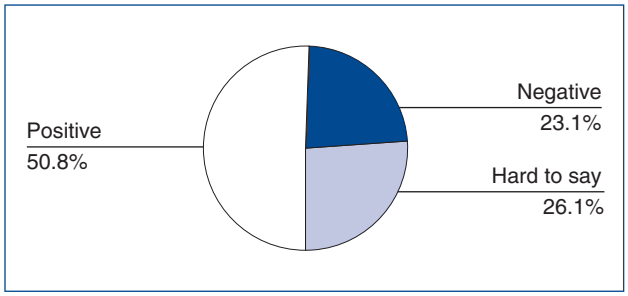
Do you support the proposal to empower the Constitutional Court of Ukraine to adopt decisions on the constitutionality of questions to be put to all-Ukrainian referendums at the people's initiative?
% of experts polled



What is your attitude towards the proposal to introduce a competitive selection procedure of candidates for the post of judge of the Constitutional Court of Ukraine?
% of experts polled

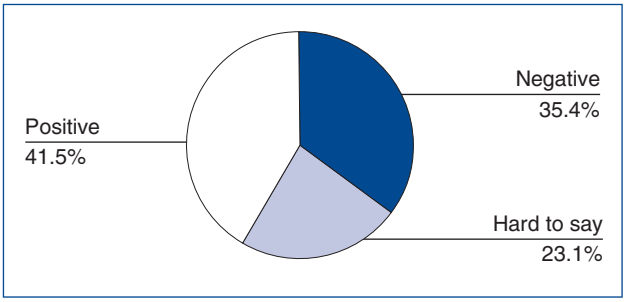


What is your attitude towards the empowerment of the Constitutional Court of Ukraine by the draft amendments to the Constitution to take the oath of the newly appointed judge of the CCU, dismiss the judge from the office and give consent by two-thirds of the composition of the court for their prosecution?
% of experts polled

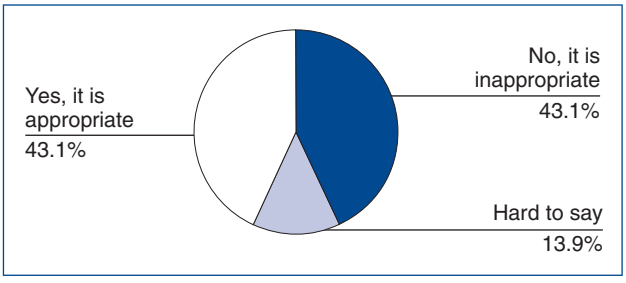


Among the experts polled there is no unambiguous support of the right of the President of Ukraine to establish, reorganize, and dissolve the courts, as well as to transfer a judge to another court within two years, but no later than by the end of 2017. While the number of experts, who support granting the President with the right to establish, reorganize, and dissolve the courts, prevail over the number of opponents (42% vs. 35%), expert opinion on the transfer of judges is split: 43% supported this provision and 43% did not.

What is your attitude to the following provision of the draft amendments to the Constitution of Ukraine:
"Until the new administrative-territorial system of Ukraine is implemented according to the amendments to the Constitution of Ukraine on decentralisation, but not later than by December 31, 2017, the establishment, reorganisation, and dissolution of courts shall be conducted by the President of Ukraine on the basis and under the procedure prescribed by law (Para. 16, Subpara. 16-1 of the Transitional Provisions)". By this time Art. 125, Para. 2 of the Constitution will be in force, stating that the "Court shall be established, reorganized and dissolved by law, whose draft shall be submitted to the Verkhovna Rada of Ukraine by the President of Ukraine after consultation with the High Council of Justice"**?**
% of experts polled

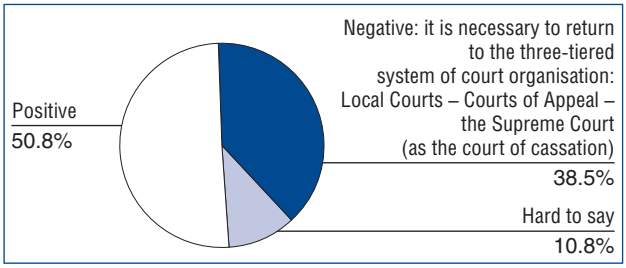


According to the "Transitional Provisions" of the draft amendments to the Constitution of Ukraine:
"Within two years the transfer of a judge to another court shall be exercised by the President of Ukraine on the basis of the submission by the High Council of Justice (Para. 16, Subpara. 7)". In the current version of the Constitution the President does not possess such authority. Once the amendments to the Constitution are made, the authority to transfer a judge to another court shall be exercised by the High Council of Justice (Art. 131, Section 1, Para. 8). Do you consider this provision to be appropriate**?**
% of experts polled



The idea to maintain the specialized courts system meets less opposition among the expert community. It is supported by 51% of the experts polled, while 39% advocate returning to the three-tiered system of court organisation.

What is your opinion towards the idea of further maintaining the system of specialized courts?
% of experts polled



As for the other questions regarding judicial reform, the expert opinions are as follows. Most experts supported the introduction of a jury (68%), the distribution of court jurisdiction on any disputes concerning the rights and obligations of individuals and on any criminal charge (62%). A relative majority (46%) of experts supported the termination of the prosecution's powers to organize and procedurally direct pre-trial investigations (37% of experts do not support this idea).

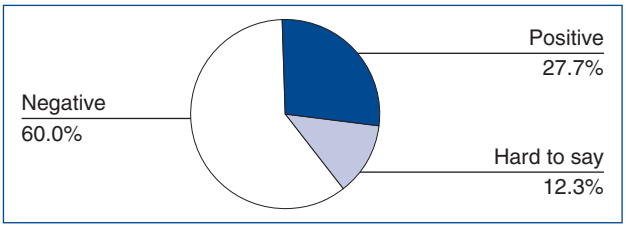
However, the vast majority (74%) of the experts do not support the election of judges by citizens and the majority of experts (60%) object to implementing full lustration of the judiciary.

60% of experts have a negative attitude towards the possibility abolishing the principle of "legality" from the list of the main principles of judicial proceedings.

The results of the expert poll regarding amendments to the Constitution of Ukraine on justice provide the basis for the following conclusions.

The majority of experts support the necessity of amendments such as: establishing the High Council of Justice (instead of the current High Council of Justitia) empowering it to grant consent to apprehend, detain or arrest a judge; changing the criteria for selecting candidates for the post of judge, as well as the introduction of competitive selection of the judges; changing powers of the prosecutor's office; introducing the institution of constitutional complaint; recognizing the jurisdiction of the International Criminal Court by Ukraine.

What is your opinion on the abolition of the principle of "legality" from the list of main principles of judicial proceedings?
% of experts polled



However, experts have doubts as to the introduction of the "monopoly of advocacy" to defend the interests of the people in court, and also about certain provisions regarding the work of the Constitutional Court of Ukraine – in particular about the exclusive right of the Constitutional Court to take the oath of the Constitutional Court judges, to give consent for their prosecution and to dismiss judges from office.

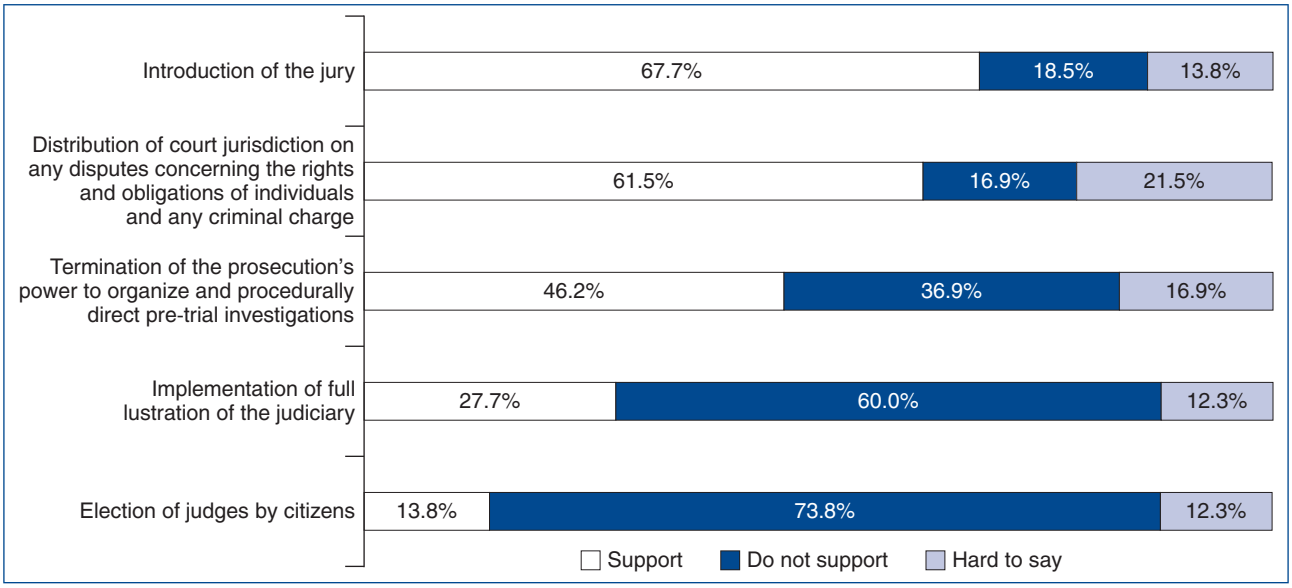
There is no clear support for the right of the President of Ukraine to establish, reorganize, and dissolve the courts until the new administrative-territorial system of Ukraine is implemented, or to transfer judges to another court within 2 years (according to the Transitional Provisions).

The experts do not support maintaining the system of specialized courts.

In addition, the expert community is very supportive of the idea of introducing the jury, and distributing court jurisdiction on any disputes concerning the rights and obligations of individuals and any criminal charge.

The election of judges by citizens and implementation of full lustration of the judiciary appeared to be unpopular among the experts.

What is your attitude towards each proposal?
% of experts polled



DRAFT AMENDMENTS TO THE CONSTITUTION OF UKRAINE ON HUMAN RIGHTS: EXPERT OPINIONS

In May 2016, the Razumkov Centre in the framework of the Project "Constitutional Process in Ukraine: Improvement of the Foundation of Justice, Rights, Freedoms and Liabilities of a Person and a Citizen" conducted two rounds of expert interviews focusing on constitutional amendments: one concerned with justice[1] and the other with human rights.

The Razumkov Centre addressed several questions to human rights scholars and experts to learn about their attitude towards the amendments to the Constitution of Ukraine proposed by the Working Group of the Constitutional Commission.

The interviews included three questions:

1. How do you feel about the proposal to entrench the human right to bear arms in the Constitution?
2. The Constitution of Ukraine names nine grounds discrimination on which is prohibited. The other grounds are subsumed under "or other grounds". In the draft amendments to the Constitution, this list has been expanded to include 18 grounds, with the remaining grounds subsumed under the same provision: "or other grounds". Would it be worthwhile to add one more ground to the list of 18 grounds: "belonging to sexual monitories"?
3. The 48 articles of Section II of the Constitution of Ukraine currently in effect set out the list of human rights and obligations. The draft amendments to Section II propose further expanding the scope of human rights while reducing the number of obligations to four (defend the homeland, do no harm, pay taxes and unfailingly observe the Constitution and laws). Do you support the proposed constitutional amendments?

The following are texts of the answers given by participants of the roundtable by correspondence in alphabetical order.[2]

HUMAN RIGHT TO BEAR ARMS, PROHIBITION OF DISCRIMINATION, EXPANSION OF THE LIST OF HUMAN RIGHTS

Heorhiy DYNYS,
Chair at the International Law Department, Uzhhorod National University

The conceptual groundwork for the constitutional provisions dealing with the **human right to bear arms, prohibition of discrimination against sexual minorities, and the list of human rights and obligations** in the proposed amendments to the Constitution of Ukraine (Section II) are the intrinsic and inalienable human rights: the right to life, the right to freedom and the right to property.

My positions regarding the proposed amendments to the Constitution of Ukraine aimed at improving the fundamentals of human and civil rights, freedoms and obligations are as follows:

1. Ukrainian citizens have the right to bear arms. The right to buy firearms, acquire title to firearms and ammunition in Ukrainian territory, the right to own and use firearms, the types of firearms, the fundamentals of circulation of firearms and ammunition, safekeeping of firearms, registration of firearms, resolution of disputes and liability for violations of firearm-related legislation are regulated by the law.

2. "Belonging to sexual minorities" may be included in the provision "or other grounds".

3. Implementation of a universal constitutional formula dealing with the human and civil rights and obligations.

Alternative: Passing a dedicated law that would include an extended list of human and civil rights and a limited number of obligations, which would secure the intrinsic and inalienable human rights and observance of international legal commitments reflected in the signed and ratified international treaties, conventions, agreements, pacts and charters pursuant to the Constitution of Ukraine. ■

[1] For details, see the feature "*Amendments to the Constitution on Justice: Expert Opinions*", which is included in this publication.

[2] The answers are quoted here with their style retained, albeit with some editorial changes and curtailments.

THE ISSUE IS NOT CONSTITUTIONAL ENTRENCHMENT OF A SPECIFIC RIGHT, BUT ENFORCEMENT OF THIS RIGHT

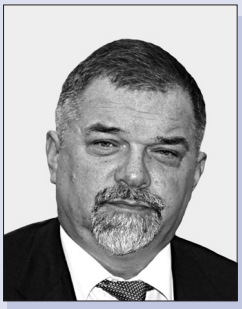
Natalia HUTOROVA,
Director of the Poltava Institute of Law, Academician with the National Academy of Juridical Sciences of Ukraine, Member of the European Society of Criminology and the all-Ukraine NGO "Association of Criminal Law"

1. While I support in general the legislative permission to own and, in some cases, bear arms, I believe that entrenching this right in the Constitution would be inexpedient. Considering that this right is not among the fundamental intrinsic human rights and that Ukraine has no prior experience using this right, I think it would be inadvisable to include it in Section II of the Constitution, which would imply the subsequent inability to limit this right.

2. The issue is not constitutional entrenchment of a specific right, but enforcement of this right. In light of this, I do not believe it necessary to expand this list, including by adding such ground as "belonging to sexual minorities". The latter term does not have a clear legal definition and can be interpreted differently, which creates the risk that this right would be abused.

3. Considering that it is practically infeasible to further amend Section II of the Constitution by limiting the rights and freedoms entrenched in it, I believe that it would be inexpedient to include such amendments and supplements. ■

UKRAINIAN SOCIETY HAS YET TO REALIZE THAT DEFENDING THEIR RIGHTS AND THEIR OWN CONSTITUTION IS THE DUTY OF ALL CITIZENS



Oleksandr ZADOROZHNIY,
Chairman of the Presidential Council of the Ukrainian Association for International Law, Chair at the International Law Department, Institute of International Relations at Taras Shevchenko Kyiv National University

1. The right to resistance and defence of personal rights is an intrinsic right that may not be infringed upon. Even the Preamble of the Universal Declaration of Human Rights mentions the possibility of "recourse, as a last resort, to rebellion against tyranny and oppression".[3] For this specific reason the right to bear arms will simultaneously serve as a guarantee against arbitrariness of the public authorities. For example, it is highly unlikely that the Yanukovych regime would resort to bloodshed during the Revolution of Dignity while knowing that the people are not defenceless.

We all know about the Second Amendment to the US Constitution, which took effect on 15 December 1791 and stipulates that the right of the people to own and bear arms shall not be restricted. This provision is also a guarantee of the democratic constitutional system of the USA. Unfortunately, Ukrainian society has yet to realize that defending their rights and their own Constitution is the duty of all citizens. Ukrainian higher-ups often take advantage of this ignorance.

Ukraine also faces the obvious problem of the population holding a very large number of unregistered firearms. It is unlikely that citizens will give up their firearms in the face of Russian aggression. **The only way out is to guarantee the human right to bear arms while simultaneously instituting stiffer penalties for illegal use of firearms and unregistered firearms.**

There is a readily available analogy in this matter: Would Russia dare occupy Ukraine's territory if Ukraine hadn't given up its nuclear weapons or if the Ukrainian army were one of the strongest in the world? Likewise, if a potential criminal (or the government) knows that any illegal encroachment will meet with proper retaliation, the chances of their happening will be much lower.

2. Prohibition of any sort of discrimination is a hallmark of a democratic state ruled by law. All the while, the **Constitution should not turn into a textbook or purely theoretical text**. Constitutional provisions have to meet the requirements for the text of the country's Fundamental Law.

The main goal of constitutional prohibition of discrimination is preventing it from happening on a day-to-day basis. When we discuss the list of the relevant grounds, we should refer to international acts. For example, Article 7 of the Universal Declaration of Human Rights reads: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination". In other words, this provision does not include any list of grounds. Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms[4] prohibits discrimination by stipulating: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". As you can see, the list of grounds in this article is fairly short, and no mention is made of "belonging to sexual minorities".

[3] Paragraph 3 "…it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law" of the Preamble of the Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948 – *Ed.*

[4] The European Council Convention for the Protection of Human Rights and Fundamental Freedoms was signed on 4 November 1950, ratified by Ukraine on 17 July 1997, and became binding on Ukraine on 11 September 1997. – *Ed.*

The main question is this: Can the abovementioned provisions effectively protect sexual minorities against discrimination? Undoubtedly, the answer is yes.

In other words, **the attempt to enumerate in the constitutional article all the grounds on which discrimination is possible** is not only unreasonable but also unrealistic. Moreover, the Constitution could emphasize a particular ground for discrimination if this were the biggest problem in Ukraine. And yet this issue has been non-existent in Ukraine (both historically and currently).

For this exact reason, the following provision would be sufficient for the Constitution: "**Any discrimination shall be prohibited**". In this case, any list would sooner restrict the rights and could never be exhaustive.

3. International human rights documents currently in effect include fairly short lists of rights and freedoms. And yet they cover virtually all forms of legal relations in practice.

The Ukrainian leadership has been recently operating with an incorrect understanding of constitutional guarantees of rights and freedoms. After all, an extensive list of rights and freedoms does not always equate to effective protection of such rights and freedoms. **The Constitution cannot and should not cover everything.** On the contrary, an extensive list of rights can sometimes impose certain restrictions.

It should be noted that human rights and freedoms are often intrinsically interconnected. That's why infringement on a particular right also causes a number of other rights to be violated. In other words, a compact yet reasonably formulated constitutional section on human rights and obligations could regulate this field effectively. What's more, this section would not be merely declarative, and we undoubtedly need a constitution with a direct effect. All citizens would be aware and cognizant of all of their constitutional rights.

Put simply, **a more urgent problem is not expanding the list of rights and freedoms but implementing a system of constitutional guarantees of enforcement and exercise of such rights and institution of liability for violations of such rights**.

The list of obligations can also be as short as possible. In fact, the obligation to observe the Constitution and laws unfailingly extends to all social relations. At the same time, the obligation to defend the homeland is of vital importance in the face of Russian aggression. As mentioned previously, there is also the essential obligation (not right) to defend one's own rights and the constitutional democratic system of government. ■


Roundtable, 22 June 2016

THE STATE SHOULD NOT SHIFT THE RESPONSIBILITY FOR PROTECTION OF PEOPLE AGAINST CRIME TO PEOPLE THEMSELVES

Natalia KRESTOVSKA,
Professor at the Theory of State and Law Department, Odesa National Academy of Law

1. I do not support the proposal to entrench the human right to bear arms in the Constitution.

First, in doing so the state would be shifting the responsibility for protection of people against crime to the people themselves.

Second, the ease of access to firearms would cause an abrupt increase in the number of homicides and severe bodily injuries. Statistically, the majority of crimes are domestic in nature (domestic violence, drunken brawls, etc.). Where people currently settle their disputes with fists, they would be able to do so with the use of firearms. After all, a frying pan to the head offers the victim more chances of survival compared to a pistol shot.

Third, I estimate that the number of people that doctors describe as being "too healthy to be considered ill but too ill to qualify as healthy" is fairly high (there are no statistics of course, which is why I base my judgments on my own experience[5]). The consequences of the use of firearms by such persons could be disastrous.

Fourth, the majority of crimes have to do with theft, including burglaries. Owning firearms will do nothing to stop them, since burglary is a secret theft of property when the owner is unaware of the criminal's actions. So how could the owner stop the crime with firearms? In 99% of all cases, burglaries happen when owners are away. You can't use firearms against pickpockets, either.

Fifth, to use firearms properly one has to not only be familiar with relevant laws but also master the appropriate techniques and be psychologically prepared to shoot a living person. This requires monthly (and better yet, weekly) practice. You have to be psychologically prepared for this type of attack. Otherwise, an armed criminal will shoot before the person trying to defend himself has a chance to do so.

2. I believe that this ground for discrimination should be included.

The arguments in favour are detailed in O. Uvarova's article titled *Gender Identity and Sexual Orientation as Grounds for Discrimination: Discussion of the*

[5] At any rate, there is a person like that in the block where I live, in a perfectly safe city neighbourhood (12 apartments with up to 20 residents in all). There was one incident in which this person used a less-than-lethal weapon in a manner that was absolutely unjustified. Such persons are guaranteed not to be subject to any restrictions vis-a-vis ownership of firearms, since they obviously have legal capacity.

Draft Constitution of Ukraine, whose key points I support for the most part.[6]

Still, I have certain reservations regarding the terminology. *First*, the term "belonging to minorities" itself (any kind of minority) appears somewhat discriminatory to me from the outset.

Second, the term "orientation",[7] in my opinion, is at odds with the list of terminology used in the draft of Article 43, which states that an individual identifies with a particular social group or community (based on race, origin, etc.).

I propose replacing it with the terms "sexual and/or gender identity". After all, an identity is the result of an individual identifying with groups and communities which he or she perceives to be "their own" and to which they are most likely to refer as "we". In other words, this term has a social significance unlike the term "orientation".

3. I do not support the proposal that the list of obligations be shortened.

Only the obligation to receive a complete general secondary education has been removed from the text of Articles 64 to 68.

In an information society to which we are progressing (albeit not always thanks to policies of our government), an uneducated person does not stand a chance of surviving, let alone succeeding in life. It is no accident that the best-known ruling of the US Supreme Court in the case Brown vs. Board of Education of Topeka[8] defines access to education as a fundamental human right. However, the social reality is that many people need a nudge to exercise this right. Making it a constitutional obligation to receive education serves as just that kind of a nudge. The new constitutions of other countries usually include this obligation, although they fail to institute liability for failing to honour this obligation.

Abolishing this obligation would further reduce the value of education. This would also require abolishing administrative liability of parents for not creating the appropriate conditions for their children's education. It is a different matter that the system of education and educational laws are in dire need of revision, and yet their imperfections do not justify abolishing this obligation. ■

SPECIFICALLY DEFINED NON-DISCRIMINATION CRITERIA IN THE CONSTITUTION WILL CONTRIBUTE TO A MORE EFFECTIVE "ANTI-DISCRIMINATION" ARTICLE OF THE CONSTITUTION[9]

Petro RABINOVYCH,
Professor at Ivan Franko Lviv National University, Chair at the Lviv Laboratory of Human and Citizen Rights National Academy of Juridical Sciences of Ukraine

1. I take a dim view of the proposal to entrench the human right to bear arms in the Constitution, primarily because (1) the low level of awareness and culture among the majority of Ukrainian citizens does not give one reasons to hope that they will not abuse firearms in their possession (especially when intoxicated with alcohol or drugs or in a fit of passion); (2) the number of, so to speak, potential and actual criminals has increased considerably (as evidenced by the recent surge of crime in Ukraine), and (3) too many firearms have entered uncontrolled circulation now that the anti-terrorist operation is underway in Ukraine's east.

2. I agree with the proposal of the Working Group. I also believe it expedient to add another ground (criterion): "place of birth". After all, the latter is often different from the "place of residence". In general, specifically defined non-discrimination criteria in the Constitution will contribute to a more effective "anti-discrimination" article of the Constitution in terms of both ideological/awareness-raising and regulatory aspects. If the proposed (expanded) list of grounds

6 O. Uvarova. Gender Identity and Sexual Orientation as Grounds for Discrimination: Discussion of the Draft of the Constitution of Ukraine. – *Commons* web portal, 29 December 2015, *http://commons.com.ua/genderna-identichnist-i-seksualna-oriyentatsiya-yak-pidstavi-diskriminatsiyi-obgovorennya-proektu-konstitutsiyi-ukrayini*.

7 Proposed for discussion and used by O.Uvarova.

8 This is a reference to the court case (*Oliver Brown et al. v. Board of Education of Topeka et al.*) 347 U.S. 483 (1954). In 1954, the US Supreme Court ruled that segregation of black and white students was contrary to the Constitution. – *Ed.*

9 The author would like to emphasize that the answers given here do not just reflect his own opinion but also mirror the position of the Lviv Laboratory of Human and Citizen Rights, which the author has been heading for nearly 20 years. Mr Rabinovych also notes that his Laboratory has been for years working out proposals to optimize the "human rights" articles of the Constitution of Ukraine. Those proposals were repeatedly published in legal journals and in some of the issues of the Laboratory's *Works*. They were also used by the relevant Constitutional Assembly working group headed by Prof. V.Butkevych (of which Mr Rabinovych was also a member in 2012-2014). In their most accomplished form, our proposals materialized in the Draft Law of Ukraine "*On Amendments to the Constitution of Ukraine (Concerning Rights, Freedoms and Obligations)*", which was published (along with an executive summary and a comparison table) in the *Law of Ukraine* journal (Issue No.10, 2015), and were also submitted to the relevant committee of the Ukrainian Parliament.

discrimination on which is prohibited includes more grounds than the universal or European international human rights acts, this would only benefit each and every person and equality of all human beings.

3. I do not agree with the proposal to remove from the list of legal obligations of a human being (specifically only from the list of constitutional obligations) the obligation to respect state symbols, since this would be counterproductive in terms of ensuring a high level of public's respect for such symbols. As for the proposal to remove the constitutional prohibition of infringement on the rights and freedoms of others, this should not be removed if only on account that the rights and freedoms reflected in the current Constitution of Ukraine are not exhaustive (as expressly stated in the Constitution). Meanwhile, the reference to "honour and dignity" can be in fact removed because they are covered by the broader concepts of human rights and freedoms. ■

PEOPLE SHOULD HAVE A CHANCE TO DEFEND THE INDEPENDENCE AND NATIONAL SOVEREIGNTY OF UKRAINE WITH FIREARMS IN THEIR HANDS

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1. Despite being one of the most heatedly debated problems in Ukrainian society, the issue concerning the right of citizens to bear arms has thus far failed to attract a majority of proponents or opponents. Note, however, that the number of supporters of legislation that would grant this right is constantly rising. The Constitutional Commission – while fulfilling the assignment of the President of Ukraine, who has delegated the analysis of this problem to the Commission in response to a public petition – has spoken against entrenching this right in the text of the future Constitution but supported the need to regulate this issue using a dedicated regulatory act.

This approach cannot be considered optimal. The reasons for this statement are as follows:

• *A free nation has the right to defend themselves against dictatorship and criminal leadership.* This argument belongs sooner in the political and ideological realm than in the legal domain. Yet this is an extremely poignant issue for Ukraine that has seen some of the most tumultuous years in its recent history. The Revolution of Dignity – essentially an uprising of the people against dictatorship and rule by criminals – pitted the peaceful unarmed Ukrainian people against the heavily-armed machine of the dictatorship of Yanukovych, whom Kremlin puppeteers incited to commit bloodshed. This resulted in hundreds of the

best sons and daughters of the Ukrainian nation getting killed or wounded. This scenario was possible only in a situation where the criminal leadership was absolutely certain that it would not meet with appropriate armed resistance from the people. Armed with only sticks and wooden shields, the people faced bullets. Obviously, if citizens had the right to bear firearms, the course of events would have been much different. The leadership would have thought twice before using firearms against peaceful protesters.

Speaking of this experience, the authors of the proposed amendments frequently cite the Second Amendment of the United States Constitution, which reads: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed". Effectively, this provision sets forth the right to defend democracy and rule of law even through armed struggle against attempts to usurp power in the state or attempts to infringe on rights and freedoms of citizens.

• *Faced with Russian aggression against Ukraine, we have to be prepared to put up armed resistance against the aggressor.* The Russian aggression against Ukraine – particularly in its initial phase when the Ukrainian army, destroyed by the government of national traitors under Yanukovych, was virtually non-existent – led to a situation (in the conditions of an unarmed Ukrainian people) that almost ended in a national catastrophe – destruction of Ukraine as an independent state which would be later carved up by the enemy. Through inhuman efforts, the level of this threat has been greatly minimized but not eliminated altogether. Just like Switzerland, we have to be prepared to resist the aggressor at any time. We can draw parallels between Ukraine's surrender of its nuclear arsenal, the Russian aggression against Ukraine and the issue of arming the people, which would enable them to ward off the aggression. People should have a chance to defend the independence and national sovereignty of Ukraine with firearms in their hands. We should not forget the lessons of history as long as we have neighbours the likes of Russia. **Passage of a law regulating unrestricted circulation and concealed carry of firearms in Ukraine would become the first step toward creating a national defence army** – the kind that Switzerland has.

• *A person has the right to justifiable defence, the right to defend himself, his next of kin, fellow citizens, property, etc. against criminal encroachments.*

This is an intrinsic human right. Part 2, Article 27 of the current Constitution of Ukraine stipulates the right "to defend one's life and health, the life and health of other persons against criminal encroachments". The right to justifiable defence with the use of firearms – while observing the conditions of legitimacy of such use – is also provided by Article 36 of the Criminal Code of Ukraine. And yet the years-long practice of its application all the way since the Soviet times demonstrates the reluctance of criminal justice authorities to really apply it. **We can enforce the right to justifiable defence against criminal encroachments in a civilized manner only by passing a law that would allow ownership and concealed carry of short-barrelled firearms.** Numerous studies by both Ukrainian and international scholars conclusively prove a relationship between a criminal's decision to commit an attack and the criminal's expectation of possible resistance from the victim. The higher the probability of resistance, the lower the risk of an attack.

• *The existing state of legal protection fails to ensure an appropriate level of security for citizens.* It is apparently obvious that reorganisation of the law enforcement services and creation of the national police have not only reduced the crime rate but, on the contrary, have occurred against the backdrop of a rising crime rate. A rank-and-file citizen is effectively left one on one with the criminal who commits a criminal encroachment. Numerous news items appearing in the mass media are ample proof of this.

• *The concealed truth is that the public is actually armed today.* The lack of regulation of this matter in the presence of a large number of firearms that have been infiltrating the country en mass from the anti-terrorist operation zone in recent years turns a large share of the population into *de facto* criminals. We are facing a paradoxical situation where citizens who wish to defend their rights are forced to do so by resorting to criminal acts. Experts estimate that the number of illegal firearms currently held by the population is a mind-boggling 3 million pieces.[10] Even here we face a paradoxical situation: these illegal firearms are seldom used as a weapon of crime; even if they are used, it is not by rank-and-file citizens but by those who are firmly headed down the path of crime. Incidentally, Ukrainians *legally* own close to 2.5 million firearms.[11] No more than 0.1-0.3 of this enormous number of firearms are used to commit crimes each year. Consider one more circumstance. Sooner or later Donbas will be reintegrated into Ukraine. What should then be done with those millions of firearms that are currently "legitimately" (if you consider LNR/DNR regulations to be legitimate) held by citizens in these so-called republics? Voluntary surrender of those firearms is out of the question.

Conclusion. **Legislative entrenchment of the right of citizens to bear arms in the text of the future amendments to the Constitution of Ukraine would be aligned with the principal goals of the country's democratic evolution, guarantee its independence, sovereignty and territorial integrity, and contribute to greater respect for human rights and freedoms.**

2. One of the rules of legal technique to be always kept in mind when drafting any regulatory act is that it has to be clear and not open to ambiguous interpretation. A smart legislator always attempts to draft laws in a way that would make their interpretation unnecessary. With this in mind, I reject the phrase "or other grounds" used in the current wording and proposed for the future wording. This improper wording causes many problems and will cause even more in the future once the list of grounds for discrimination is expanded. **It, therefore, seems expedient to provide a specific list of grounds for discrimination**.

As for the possible inclusion of "belonging to sexual minorities" among the grounds for discrimination, this is indeed a complex issue because it finds itself at the centre of interaction of politics, faith, law, morals, etc. The negative attitude toward sexual minorities is in many ways due to the way representatives of this community conduct themselves (aggressively, too active, imposing, etc.). Nonetheless, to express my own opinion, I believe that this should be included among the grounds on which discrimination is possible. This position is primarily based on complete rejection of the legal positions in this matter, which had been used in such totalitarian countries as Hitler's Germany and the USSR. Just like representatives of sexual minorities were exterminated in Germany, belonging to a sexual minority in the USSR was a crime punishable under law. As we relinquish our past and build a democratic state ruled by law, we must not perpetuate any of the legal principles of totalitarian countries in our national legislation.

3. In a democratic country, the balance between constitutional rights and obligations of a human being must always be maintained with a clear predominance of rights over obligations (It is the other way around in a totalitarian state). It appears that the proposed list of obligations fully covers the entire range of problems and can be entrenched in the text of the future Constitution of Ukraine. ■

[10] Ukrainians hold 3.5 million illegal firearms – Association of Firearm Owners. – Korespondent.net, 23 January 2014, *http://korrespondent.net/ukraine/events/3296363-v-ukrayne-na-rukakh-35-mln-edynyts-nelehalnoho-oruzhyia-assotsyatsyia-vladeltsev-ohnestrelnoho-oruzhyia*; Ukrainians hold up to 20 million illegal firearms – expert. – RIA Novosti Ukraine, 5 April 2016, *http://rian.com.ua/society/20160405/1007863727.html*.

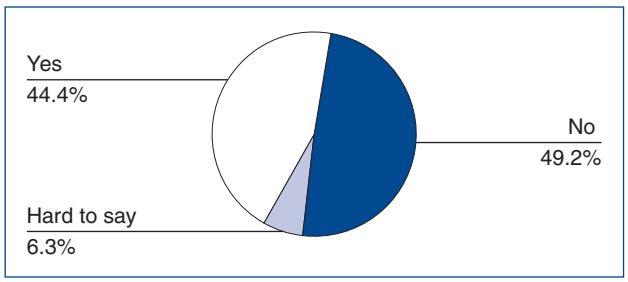
[11] Expert: There are at least 4.5 million illegal firearms in Ukraine, and this number is rising with each passing day. – Vasilyev Grad online publication, 18 January 2015, *http://www.vasilev-grad.in.ua/?p=8910*; Ukrainians hold 2 million legal firearms and close to 3 million illegal firearms. – Tyzhden.ua, 7 November 2011, *http://tyzhden.ua/News/34729*.

EXPERT OPINION ON THE CONSTITUTIONAL PROTECTION OF HUMAN AND CIVIL RIGHTS

An expert survey was conducted by the Razumkov Centre to determine the experts assessment of constitutional amendments directly related to the protection of human rights.[1]

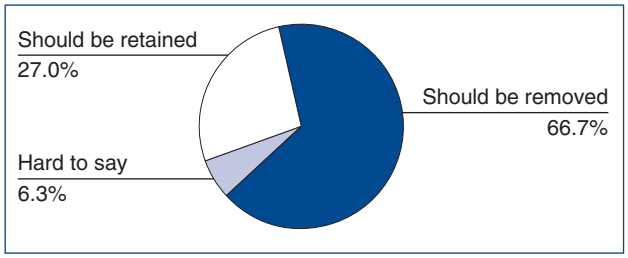
The expert community shows a relatively equal distribution of positive (49%) and negative (44%) assessments regarding the possibility of the removal of the clauses from the Constitution, which refer to certain laws and thus diminish the value of the "constitutional provision of direct effect" formula.

Article 8 of the Constitution of Ukraine states that: "The provisions of the Constitution of Ukraine are provisions of direct effect". Do you think that formulas such as "in conformity with the law", "fixed by the law", "stipulated by the law", "established by the law" should be removed from the Constitution as those diminishing the enunciated rule?
% of experts polled



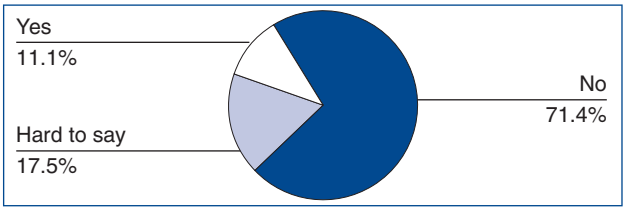
Two thirds (67%) of the experts believe that the reference to the criterion of morality should be removed. Especially since neither the Convention for the Protection of Human Rights and Fundamental Freedoms nor the International Covenant on Civil and Political Rights contain any references to this motive. The suggestion to retain the reference in the text of the Constitution is supported by 27% of the experts.

Is there a need to retain the reference to the criterion of morality, on the grounds of uncertainty, while limiting human rights if the International Covenant on Civil and Political Rights, the European Convention on Human Rights and Fundamental Freedoms as well as many constitutions of other countries do not contain a reference to this motive?
% of experts polled



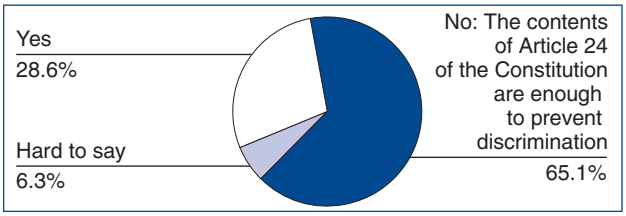
The vast majority of the expert community (71% vs. 11%) believes that the right of the people to bear arms should not be a constitutional provision.

Should the Right to Arms be enshrined to the Constitution?
% of experts polled



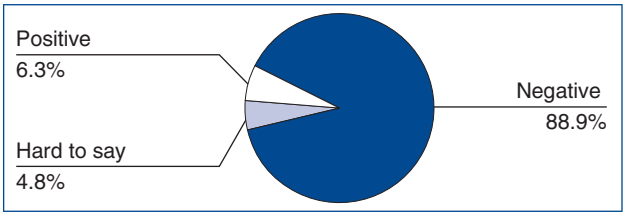
Almost two-thirds (65%) of the experts do not believe there is the need to specially mention "sexual minorities" in the text of the Constitution as one of the criteria of non-discrimination (29% of the experts hold the opposite opinion).

Should the Constitution of Ukraine contain a special mention of "sexual minorities" as a criterion of non-discrimination (this criterion is mentioned in the constitutions of five states)?
% of experts polled



The negative attitude to the initiative to remove the right of people to respect the dignity of the Constitution due to its "uncertainty and haziness" was expressed by the vast majority of experts polled – 89%. The idea was supported only by 6% of experts polled.

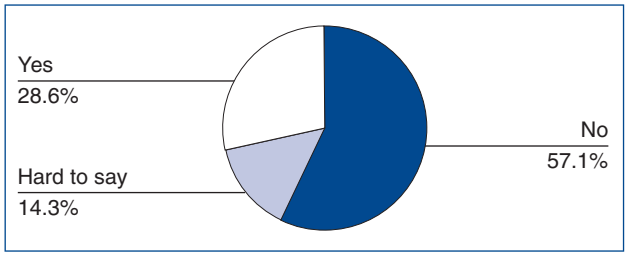
Some experts suggest removing the right of people to respect the dignity of the Constitution due to its "uncertainty and haziness". What is your opinion on this suggestion?
% of experts polled



[1] The expert poll was conducted from April 25 to May 25, 2016. 58 experts, including scholars (higher-education teaching personnel, employees of research institutions), representatives of the judiciary, human rights activists, representatives of NGOs, members of the Constitutional Commission, employees of international organisations, staff members in offices of the Commissioners for Human Rights of the Servicemen, the Rights of Internally Displaced Persons, and employees of the Administration of the President of Ukraine, were polled.

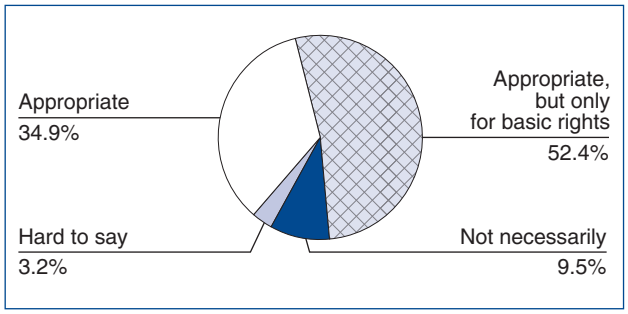
It is worth noting that the expert opinion is dominated by opponents of the possibility of limiting freedom of expression for reasons of morality (57%). At the same time a significant number of supporters – 29% of the polled, are also of great interest.

Do you think that freedom of expression can be limited for reasons of morality?
% of experts polled



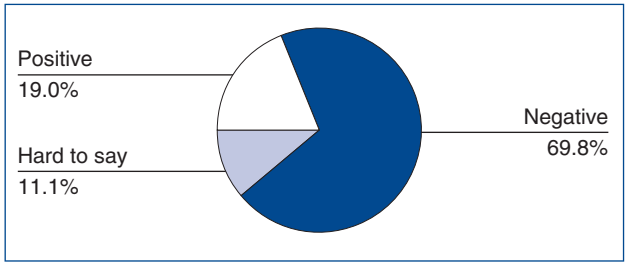
The expert community has no general consensus regarding the expediency of including all the existing human rights and fundamental freedoms into the text of the Constitution. Most experts support the expediency of including only basic rights, but more than a third (35%) support the expediency of including all the existing rights and freedoms.

Is it appropriate to include all the existing human rights and fundamental freedoms into the Constitution of Ukraine?
% of experts polled



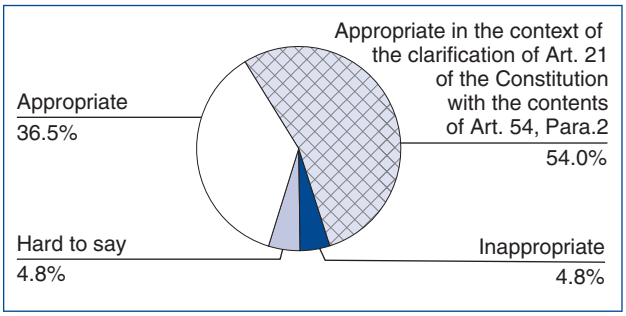
However, the majority (70%) of experts polled believe that the provisions regarding the right to labour, to health protection, to housing, to education should be retained in the text of the Constitution, even if the state is unable to enforce them.

What is your opinion on the suggestion to exclude provisions regarding the "right to labour", "right to health protection", "right to housing", "right to education" and others, given the fact that the state is unable to enforce them today?
% of experts polled



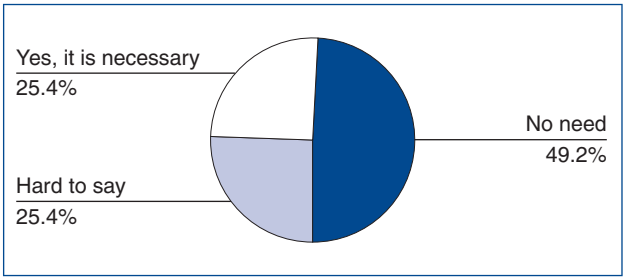
The existing dilemma in the text of the Constitution – the presence of both criteria of "the inviolability of human rights" and provisions that allow these rights and freedoms to be restricted, finds no unambiguous solution as evidenced by the results of the expert poll. The majority (54%) of experts support using the criterion of inviolability of human rights and freedoms, but with a clarification on the provisions that allow for their restrictions. More than a third (37%) of experts believe that no change is required.

Is it appropriate to use the criterion of the "inviolability of human rights" (Art. 21) in the Constitution, if its further provisions allow for the "restriction of human and civil rights" (Art. 54, Para. 2)?
% of experts polled



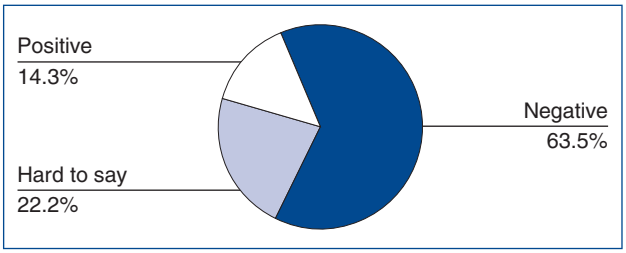
The issue of the constitutional protection of the rights of legal entities has proven to be quite challenging for the experts. Almost half (49%) of them believe that there is no need for it, while a quarter of the experts support this approach and the other quarter could not answer.

Is there the need to provide a designated form of protection of the rights of legal entities in the Constitution of Ukraine?
% of experts polled



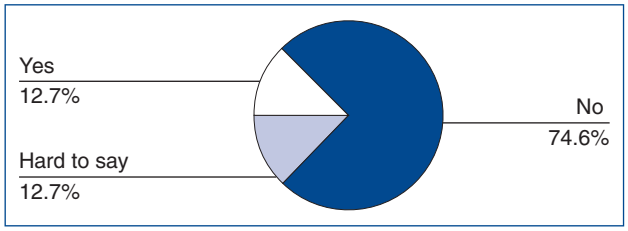
The suggestion to exclude the provisions about the possibility of the expropriation of private property only as an exception for reasons of social necessity was supported by the experts. The majority (64%) of experts polled were against the removal of the provision from the text of the Constitution, and only 14% supported it.

What is your opinion on the suggestion to exclude provisions regarding the "possibility of the expropriation of private property as an exception for reasons of social necessity on the grounds of and by the procedure established by law, and on the condition of prior and complete compensation of its value (Art. 41, Para. 5)" from the Constitution of Ukraine?
% of experts polled



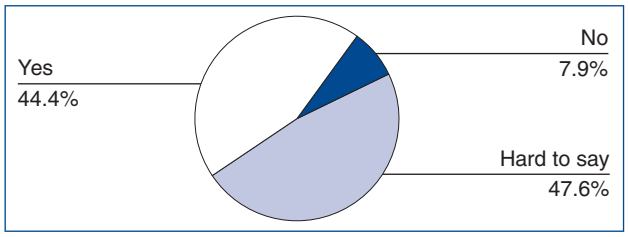
The vast majority (75%) of experts do not support the inclusion of the obligation of citizens to participate in elections and referendums into the Constitution. 13% support this approach.

Do you think that the Constitution should include not the right but the obligation of citizens to participate in elections and referendums?
% of experts polled



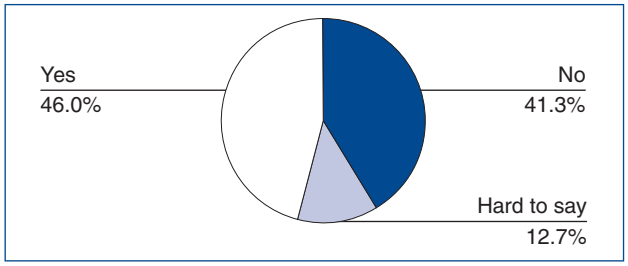
Almost half (48%) of the experts were not able to provide a clear answer to the question whether the wording of the respect for the rule of law, proportionality, etc. will allow a balance between public and private interests to be maintained. Almost as many – 44% are sure that it will help to preserve the necessary balance. 8% of experts regarding this matter are pessimists.

The basis of the wording of the draft amendments to Section II of the Constitution of Ukraine is the respect for the rule of law, proportionality, etc. Will it allow a balance between public and private interests to be maintained?
% of experts polled



The delicate question on the inclusion of specific grounds for the deprivation of Ukrainian citizenship into the Constitution does not have strong support among the expert community. The voices were split almost into two: a relative majority of the experts (46%) support the suggestion, while slightly less (41%) do not.

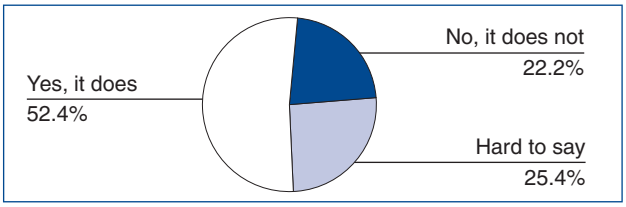
Would you agree with the inclusion of specific grounds for the deprivation of Ukrainian citizenship into the Constitution of Ukraine?
% of experts polled



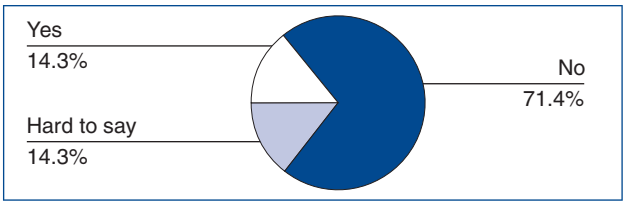
The majority (52%) of experts tend to see a threat in ambiguous wording of the provision on the introduction of the institution of constitutional complaint, when a person is forced to seek remedies that have not been defined in the Constitution. Almost a quarter of the experts do not see such a threat, and 25% of the experts were not able to give a clear answer.

The vast majority (71%) of experts do not consider the provisions on the prohibition of slavery and servitude to be archaic.

The right to a constitutional complaint provided by the draft amendments to the Constitution of Ukraine (on justice) is implemented only when "after the final judgment" a person has exhausted "all other domestic remedies". Does the term "all other domestic remedies" put a specific person into a situation when after the decision of the highest court the person will have to turn to "other" means, which are not defined in the draft?
% of experts polled



Can the provisions of the draft amendments to the Constitution of Ukraine banning "slavery and servitude" be considered as "archaic"?
% of experts polled



The results of the poll regarding the impact of the amendments to the Constitution on human rights provide the basis for the following conclusions.

The experts support the retaining of those provisions of the Constitution which refer to the respect for human dignity, and the right to labour, health protection, housing, and education.

According to most experts, the restriction of freedom of expression for reasons of morality is unacceptable.

Likewise, experts do not support the idea of entrenching the right of the people to bear arms or any special mention of the prohibition of discrimination of sexual minorities into the text of the Constitution.

Expert opinion is inclined towards the inclusion of basic human rights and fundamental freedoms into the text of the Constitution.

The criterion of inviolability of human rights and freedoms, according to the experts, should be used with the clarification on provisions that allow their restrictions.

There is no unambiguous assessment as for the idea of the inclusion of the provision referring to the possibility of the deprivation of Ukrainian citizenship into the Constitution.

The suggestion to exclude the provisions about the possibility of expropriation of private property as an exception for reasons of social necessity was not supported by the experts.

Experts do not support the idea of entrenching the obligation of citizens to participate in elections and referendums into the Constitution.

Experts do not have a clear answer on whether the wording of respect for the rule of law, proportionality, and so on will allow a balance between public and private interests to be maintained.

A significant number of experts noted possible complications for citizens regarding the implementation of their right to constitutional complaint.

THE RIGHT TO ARMED SELF-DEFENCE: COMPLIANCE WITH THE CONSTITUTION AND UKRAINE'S INTERNATIONAL OBLIGATIONS

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Institute of International Relations,
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On 29 August 2015 an e-petition, launched by the NGO The Ukrainian Gun Owners Association and addressed to the President of Ukraine, was registered. The petition, inter alia, requests the President to amend Article 27 of Ukraine's Constitution with Paragraph 4, stating the following: "Every citizen of Ukraine has a right to free possession of firearms as a means to protect his/her life and health, home and property, the lives and health of other people, and the constitutional rights and freedoms in case of usurpation of power, violation of the constitutional order, sovereignty and territorial integrity of Ukraine.

The exercise of the right to free possession of firearms is regulated by a relevant law, and may be limited only by a court decision in each individual case".[1]

The aforementioned petition, and the reaction to it, have given rise to a public debate on whether to provide this right to armed self-defence in the Basic Law, or to enshrine this right at the level of legislation; is it appropriate to provide this right in general, and what is meant by armed self-defence; what kinds of arms can be used in self-defence, etc. However, the most significant problem, in the course of discussions, was the lack of appropriate national legislation in Ukraine, which, in its turn, is the source of numerous gaps, collisions, and violations. The situation is deteriorating, as the illegal turnover of firearms in Ukraine is increasing, due to the war in Eastern Ukraine.

Ukrainian and foreign public figures, politicians, lawyers and experts in other fields, as well as Ukrainian and international non-governmental organisations have responded positively to the on-going debate.[2]

The issue of free possession of firearms for self-defence can be identified by both the procedural aspects (legal techniques) and substantive law.

1. The questions of acquisition, possession and use of arms (including firearms) ***are not subjects to constitutional regulations***. Arms belong to the objects of ownership of private persons and legal entities, in accordance with the legislation (a special procedure for acquiring ownership of arms is established by the current legislation of Ukraine, including ownership of firearms and hunting weapons, gas pistols, revolvers and some types of pneumatic arms). However, while securing property rights (Article 41), the Constitution of Ukraine defines only general principles of ownership, use and disposal of property as well as the prohibition of unlawful deprivation of property, and does not provide a list of objects to which this right is applied (except right of land ownership – Article 14, but the land under this article is a "fundamental national wealth that is under special state protection"). This refers even to potentially dangerous properties, such as vehicles, wild animals, explosives and explosive devices and substances, etc.

Foreign practice is moving in the same direction – the question of regulating categories of armaments, control of arms turnover, acquisition, use, application and storage of arms are subject to legal regulation and are not fixed in the Constitutions (this is also typical for the countries with fairly liberal legislation on arms).

[1] To formalize in legislation the right of the citizens of Ukraine to self-defense. Official website of the President of Ukraine, electronic petitions, *https://petition.president.gov.ua/petition/40*.

[2] See in particular: UKRAINE'S LEGAL DEBATE ON THE RIGHT TO ARMED SELF-DEFENCE. – Democracy Reporting International., Briefing Paper 64, March 2016, *http://democracy-reporting.org/files/briefing_paper_armed_self-defence_clean_en_final.pdf*; *http://democracy-reporting.org/publications/country-reports/ukraine/briefing-paper-64-march-2016.html*.

However, there are rare cases of constitutional entrenchment of the right to own firearms.[3]

Article 10 of the 1971 Constitution of ***Mexico*** stipulates the right of citizens to possess arms in their homes (with the exception of prohibited weapons) for their security and defence, as well as determines the public authorities, responsible for implementation of control and policy in the area of arms.[4]

Another exception is the 1980 ***Chile*** Constitution. However, ownership of arms in Article 103 of the Constitution is being stated with the opposite wording: "Nobody may possess or own arms other than on the grounds, specified by law and with the authorization granted in conformity with it. A law shall determine public organs and mechanism of arms control".

The most illustrative example – and one of the arguments of supporters of the constitutional right to self-defence in Ukraine for enshrining the right to own arms in the Basic Law – is that of the ***USA***. The Second Amendment to the Constitution enshrines the right to free possession of arms (such provisions are contained in most of state constitutions as well). However, the historical context of the adoption of the amendment should be taken into account. Thus, it was adopted in 1791, at a time when the gun culture was common, factor of possession of arms (of various types) indicated the social status of the person, and the legal consciousness of nations, considered arms as one of the essential elements of such status (the right of free man to bear arms was largely justified by ideology of the Enlightenment, which had a direct impact on the U.S. Constitution).[5] Mention should also be made of the fact that this was a period before the sphere of protection of human rights was developed and right to ownership in the legal consciousness was considered as more significant when compared to right to life.[6] In this context, it is appropriate to compare the practices of the USA and the Great Britain – until the middle of the 20th century keeping and bearing arms was part of the common law of Great Britain (and historically was looked upon above all else, as a "duty"[7]). However, today Britain is a country with one of the most strict legislations when it comes to the right of arms ownership.

The example of the United States, in sphere of human rights, is unacceptable for Ukraine, which finds itself in a completely different system of international obligations (primarily within the Council of Europe). In fact, other than historical context of ensuring that the right to free possession of firearms is enshrined in the U.S. Constitution, today the United States finds itself outside the scope of absolute protection of a person's right to life. The U.S. still maintains the death penalty (which continues to be rather widespread), criminal legislation allows imposing such a penalty quite often. Even the International Court of Justice took an unprecedented step – in its judgment on the merits of the LaGrand Case (2001) the Court advocated that the USA needs to change its criminal legislation towards humanization, although the ICJ had no such competence (the competence of the ICJ does not include providing judgements on national legal systems). Researchers of the American Constitution have increasingly recognized the discrepancies between the Constitution and universal and regional trends in the entrenchment and guaranteeing of human rights.[8]

Thus, the value of life in the U.S. legal system is often subordinated to other values and human rights norms.[9] Supporters of the right to free possession of arms claim: "Every year, in self-defence, the American citizens kill at least twice as many criminals as do the police, but the percentage of accidental victims is 3 times less than in the actions of the police".[10] Moreover, killing the offender is considered as an achievement here, while the number of homicides, committed by ordinary citizens, but not the police, as a police oversight. This is quite a questionable "human rights" argument!

As will be discussed further below, Ukraine, having become a member of the Council of Europe, appears to be in a specific system of coordinates, as for the attitudes to human rights values, which is quite different from the modern American system. It is reasonable to recall the judgment of the European Court of Human Rights (ECtHR) on the merits of the Case Soering vs. the United Kingdom of 1989, when it established a priority of the system of human rights protection within the Council

[3] According to researchers, only three countries worldwide have enshrined the right of the citizens to bear firearms. They are Mexico, Guatemala and the USA. See Zachary Elkins, Tom Ginsburg and James Melton, U.S. Gun rights truly are American exceptionalism. – Bloomberg View, 7 March 2013, *http://www.bloombergview.com/articles/2013-03-07/u-s-gun-rights-truly-are-american-exceptionalism*.

[4] It should be noted that throughout the history of the constitutional process in Mexico, the right to arms ownership has been gradually restricted. Thus the Constitution, adopted in 1857, provided citizens with free right to possess and bear arms, while the 1917 Constitution limited this right to the right to own (ownership of arms) and the right to bear arms in cases, determined by law, and the 1971 Constitution, in its turn, limited ownership of arms to the right of citizens to keep arms in their homes, and stated that in exceptional cases, the law may permit bearing arms outside the home; In addition, significant restrictions on the right to own arms are established by legislation, police regulations, etc.

[5] Cantrell Ch. The right to bear arms: a reply. – Wisconsin Bar Bulletin, 2000, pp. 1-14.

[6] Thus, W. Blackstone considered fundamental – the human right to safety, the right to personal liberty and the right to property, which all other rights should meet. See ibid., p. 2. See also: Winkler A. The reasonable right to bear arms. – STANFORD LAW AND POLICY REVIEW, No. 5 (21), 2006, pp. 593-610; GULASEKARAM P. "The people" of the Second Amendment: Citizenship and the Right to Bear Arms. – The New York University Law Review, Vol. 85, 2010, pp.1521-1580; http://nrs.harvard.edu/urn-3:HUL.InstRepos:10880602. Moreover, there is a widely shared interpretation of the Second Amendment as such, that implies the right to own arms for the militia, but not for the self-defense of individuals (this was what the Founders of the American Constitution meant): "The sources prove that Americans consistently employed "bear arms" in a military sense, both in times of peace and in times of war, showing that the overwhelming use of"bear arms" had a military meaning". – Kozuskanich N. Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders. – U. Pa. J. Const. L, 2007, T. 10, p. 416.

[7] See: Ingram J. D., Ray A. A. Right to Keep and Bear Arms. – The NMLRev, 1997, Iss. 27, p. 494.

[8] Law D. S., Versteeg M. The Declining Influence of the United States Constitution. – New York University Law Review, 2012, T.87, №.3, p.762-858.

[9] Such legal practice and historical development of entrenchment of the right to bear arms in the United States has become the basis for ever growing violence, associated with the use of arms, especially among the youth. American researchers have linked the issue of increasing youth violence with the right of carry weapons in both aspects: literally (the ability to use them), and as a factor of **devaluation of human life**. See: R. Page, J. Hammermeister. Weapon-carrying and youth violence. – Adolescence, Vol. 32, No. 127, 1997.

[10] A. Kolosok Weapons legalization as a catalyst for social responsibility development in the society. – Actual Problems of Economics, No. 11 (149), 2013, p. 116. See also: Kates D., Mauser G. Would banning firearms reduce murder and suicide? A review on international and some domestic evidence. – Harvard Journal of Law & Public Policy, Vol. 30, No. 2, pp. 649-694.

of Europe, prohibiting the United Kingdom to extradite the offender to the United States, as it was required by international obligations of the U.K. to the U.S., under other international agreements, due to the existence of a death penalty in the U.S., as the one, prohibited by the European Convention on Human rights (ECHR).

Thus, the cases when the right to own arms is being enshrined in the Constitution, it is mainly the result of inheriting this provision by modern basic laws from their historical predecessors.

Most modern constitutions in the world do not include the issue of possession of arms, as one that does not reach the level of constitutional recognition. The process of rejection of the constitutional recognition of the right of individuals to possess arms has been held most actively since the middle of the 20th century: "The percentage of constitutions that contain a right to bear arms has declined over the last sixty years from an already scant 8% to a mere 2%".[11] Law should regulate this issue.[12]

Moreover, this is typical for both – countries that have quite liberal laws in this area and allow free possession of short-barrelled guns, particularly for self-defence:

Moldova – The Law "On the Regime of Firearms and Ammunition for Civilian Use" of 2012, The Law "On Individual Arms" of 1994, **Estonia** – The Law "On Arms" of 2002, **Lithuania** – The Law "On the Control of Arms and Ammunition" of 2002, **Latvia** – The Law "On Weapons and Special Means Circulation" of 2011, **the Swiss Confederation** – Weapons Law and Weapons Act (amended in 2008),[13] **Czech Republic** – The Law "On Firearms and Ammunition" of 2014, **Norway** – The Law "On Weapons" of 1961, **Serbia** – "Weapons and Ammunition Law" (amended in 2015), **South Africa** – The Firearm Control Act of 2000,[14] as well as those countries, where the possession was prohibited or severely restricted:

Australia – gun laws of the states are based on the National Firearms Agreement of 1996, **France** – The Internal Security Code of 2012, The Defence Code, etc., the **FRG** – The 1972 Federal Weapons Act, The 2002 Law "On Weapons", **the United Kingdom** – The Firearms (Amendment) Acts of 1997, **Poland** – The Law on "Weapons and Munitions", **South Korea** – criminal legislation of the country prohibits the ownership of firearms,[15] **the Philippines** – Republic Act 10591 of 2013, **Israel** – The 1996 Law "On Firearms Control", as well as Indonesia, People's , of China, etc.[16]

2. The proposal to enshrine the right to free possession of firearms in the very ***same Article 27*** of the Constitution of Ukraine seems rather questionable. Total inconsistency of this proposal lies in the fact that: the Article of the Constitution, which enshrines the right to life, regulates methods for restricting this right (use of firearms, even for purposes of self-defence, entails severe threats to life or deprivation of life), by its subsequent provisions.

The wording of the draft law, according to which the free possession of firearms is possible, not only for protection of life and health, but also for protection of "home and property", "rights and freedoms... in case of attacks on the constitutional order, sovereignty and territorial integrity of Ukraine" also contains contradictions.

Firstly, under this wording, the right to life is being put under subordination to the right to home and property (the threat to home and property is the basis for the use of arms, hence a direct threat to life). Under Article 15 of European Convention on Human Rights, even in case of emergency (in time of war or other public emergency threatening the life of the nation) allows derogation of human rights (including the right to property), *except for the right to life*. Thus, **the right to life in the human rights system** of the Council of Europe and the EU (and therefore Ukraine as well) **is absolute and does not contain any restrictions** (especially since they cannot be set at the national legislative level). The right to life cannot be subordinated to the right to property. The right to property should be protected by means that do not involve deprivation of life of the offender, who infringes this very same right.

Secondly, the provision which introduces the right to free possession of firearms, in order to protect the "rights and freedoms in case of...attacks on the constitutional order, sovereignty and territorial integrity of Ukraine", may become a reason for abuse (involving the use of weapons, and therefore posing a direct threat to human life). Thus, there is a possibility of cases of incitement to overthrow the constitutional order in Ukraine, to limit or destroy the sovereignty or independence of Ukraine (which is a criminal offense) during rallies, political party or other meetings, political gatherings, etc. However, such cases are the basis for criminal liability of persons who express such illegal calls, but not for using weapons against them. Obviously, the current provisions of Constitution on protecting the sovereignty and territorial integrity of Ukraine do not have such contradictions: "To protect the sovereignty and territorial

[11] Law D. S., Versteeg M. The Declining Influence of the United States Constitution. – New York University Law Review, 2012, T. 87, No. 3, p. 775. However, during this process, the right to own arms was ranked last (rank 60) by popularity, among all other constitutional provisions.

[12] Firearms-control legislation and policy. Compiled by Constance A. Johnson. – The Law Library of Congress, 2013, 243 p.

[13] Ukrainian proponents of ownership of short-barreled firearms refer to the fairly liberal practice of control over turnover of arms in Moldova, the Baltic countries and Switzerland.

[14] The example of South Africa, where the practice of gun ownership is widespread, can hardly be comparable to the situation, for example, in Ukraine. Current liberal legislation on gun ownership was adopted as a result of the insistence of the black majority (one of the main proponents of free possession of firearms today is also the Association of Black Gun Owners). However, this right is being considered not in the context of the right to self-defense from general criminal assaults, but as the need for protection against racism. Hence, the quite liberal South African legislation on possession of arms was caused and should be considered in the context of apartheid, which denied the rights of black citizens to own arms (thus, obtaining ownership of arms was one of the manifestations of acquiring a full-fledged status by these citizens).

[15] South Korea has the most restrictive policy on gun ownership, gun culture is notably absent there, and gun ownership rank of the country is the lowest. Firearm-related death rate in the country is also the lowest. See: https://en.wikipedia.org/wiki/List_of_countries_by_firearm-related_death_rate.

[16] Free possession of firearms is mostly restricted in Asian countries. The exceptions are the Philippines (which have generally strict gun laws, but the most liberal ones compared to the rest of the Asia-Pacific Region) and Israel. As for Israel, the historical and political conditions of formation of the state and its legislation, as well as military threats that influenced the corresponding culture to bear arms, should be taken into account.

integrity of Ukraine... is the most important function of the State and a matter of concern for all the Ukrainian people" (Art. 17), "Defense of the Motherland, of the independence and territorial indivisibility of Ukraine, and respect for its state symbols, are the duties of citizens of Ukraine" (Art. 65).

Therefore, entrenching the right of citizens to free possession of firearms aiming at self-defense, protecting property and protecting the sovereignty of Ukraine, does not meet the rules of constitutional technique, and is not the subject-matter for constitutional regulation.

3. A more difficult task is ***developing the relevant legislation on civilian arms*** in Ukraine. Normative regulation requirements can be divided into the following thematic clusters:

- The concept of civilian arms (definition of civilian arms; civilian arms ownership; specifications of arms, permitted for ownership by individuals and legal entities; taxation of permission on the acquisition of civilian arms; taxation of ownership of civilian arms; storage conditions; terms of carrying arms outside the place of permanent residence, etc.);
- Regime of arms (functions of the central executive authorities, responsible for control over possession and turnover of civilian arms in Ukraine; formation of a single state register of firearms; terms of use of arms; determining their types for the protection of life and health; defining places where carrying of civilian arms is prohibited, etc.);
- Eliminating collisions in the legislation (honorary weapons; age restrictions for possession and use of arms; trainings on the use of arms; the concept of self-defence and self-protection, etc.);
- Turnover of arms (conditions and procedure for obtaining permission for acquisition, storage, use of civilian arms; regime of acquisition, disposal, use of civilian arms; criminal liability for illegal acquisition, disposal, storage, or use of arms; rules of transportation of arms and ammunition, including transportation between administrative-territorial units; illegal turnover of firearms caused by the armed conflict in the East of Ukraine), etc.

Civilian arm legislation should be based on constitutional norms, and on the international obligations of Ukraine.

The right to life, as the decisive one regarding the content and implementation of other human rights.

As has been already mentioned, regarding the proposed changes to the Constitution of Ukraine, the right to life in the system of the EU and CoE can be described as the decisive one regarding all other rights and freedoms (including the social, political and economic, which include the right to housing and property, etc.) in a kind of hierarchy of rights. This should be taken into account while developing legislation on arms.

Recognition and incorporating the right to life in international legal framework, as an absolute and unconditional one, was manifested in the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights, regarding the abolition of the death penalty in 1989, and embodied in the European system of human rights protection, particularly, in the provisions of the Additional Protocol No. 6 (1983.) and No. 13 (2002)[17] to the ECHR. These agreements are applicable for Ukraine – thus guaranteeing an absolute right to life, which is not a subject to any exceptions – and are Ukraine's international obligations, and, given the imperative of this norm, are the most fundamental obligations. In the process of European integration, Ukraine should take into account the fact that the right to life is absolute in the EU as well (Article 2 of the Charter of Fundamental Rights of the European Union).

Quite clear characteristic of ratio of the right to life and self-defence, and necessary self-protection was provided by the European Court of Human Rights. Moreover, it holds the view of protecting absolute value of life even in situations, threatening public peace or (especially) the free exercise of the right to ownership or rights to the inviolability of the home.

Thus, in the decision on the admissibility of the case Putintseva vs. Russia (2012), the ECtHR stated: "Article 2, which safeguards the right to life and sets out the circumstances in which deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. ... The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing, but also situations where it is permitted to "use force", which may result, as an unintended outcome, in the deprivation of life. Any use of force must be no more than "absolutely necessary"... Consequently, the force used must be strictly proportionate to the achievement of the permitted aims.[18] ...Furthermore, national law must ensure a system of adequate, and effective safeguards against arbitrariness and abuse of force, and even against avoidable accidents. ...In particular, officials must be trained to assess whether or not there is an absolute necessity to use firearms, not only on the basis of the letter of the relevant regulations, but also with due regard to the pre-eminence of respect for human life as a fundamental value".

Thus, **the value of human life is proclaimed to be the fundamental basis of the entire European**

[17] In particular, Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms establishes the absoluteness of the right to life and the impossibility of exceptions to this right: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed... No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.... No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol" (Articles 1-3).

[18] See: Kelly and Others vs. United Kingdom, Judgment of 4 May 2001, application No. 30054/96, Para. 93.

legal order. And even in cases of legitimate use of firearms by individuals for self-defence or law enforcement agencies, ECtHR stands for the preservation of life, even under the threat (probable or predictable) to public security, implementation of political, social or economic rights.

In this context, the provisions of the Draft Law "On Civilian Arms and Ammunition", the adoption of which is the second requirement of the petition to the President of Ukraine, regarding "the right to defence", contradict Ukraine's obligations under instruments of the Council of Europe.[19]

As is stated in the preamble of the Draft "Law ... aimed at protecting the life and health of citizens, property, public order and public safety". Obviously, the property is not of such value that a person may defend it with weapons in hand. Moreover, property right to low cost everyday things – is also a property right. Article 36 of the Draft law provides that it is legitimate to use arms "to prevent illegal forced entry into a home or other property (including transport vehicles)". Hence, the right to life is superior to the right to home and property. Illegal entry is not an adequate basis for the use of arms.

Furthermore, adding the risk of deprivation of life (caused by free possession of firearms) after Ukraine agreed to be bound by the standards of European values of human life, may become a negative incentive for national legislation and enforcement (law enforcement) practice, as well as a bad signal to the European side (from the perspective of European integration of Ukraine).

Principle of proportionality between a punishment and the gravity of the crime (offense)

One of the general principles of law is the principle of proportionality of the punishment to the gravity of the crime committed (principle, known since the Roman times). In Ukrainian criminal law, it is enshrined under the principle of fair punishment.[20]

The proponents of the introduction of free possession of firearms indicate the need for people to protect themselves and others from illegal attacks on their lives, health and property. They claim that if a person owns a gun, it will be more difficult even to commit an act of hooliganism against this person. In fact, according to the proponents, possession of arms will allow confronting such criminal offenses as hooliganism, battery, intended bodily injury of various levels of severity, rape, theft, burglary, brigandism (including brigandism accompanied with braking into a residence), etc. The Criminal Code of Ukraine contains a list of punishments for committing such crimes.

Penalties for crimes under the Criminal Code of Ukraine

- Thus, under the current criminal legislation of Ukraine, **hooliganism** shall be punishable by a fine of 500 to 1000 tax-free minimum incomes, or arrest for a term of up to six months, or restraint of liberty for a term of up to five years, depending on the on the circumstances of the crime (Art. 296);
- **Rape** shall be punishable by either imprisonment for a term of three to five years, or by imprisonment for a term of ten to fifteen years under aggravated circumstances (Art. 152);
- **Intended grievous bodily injury** shall be punishable by imprisonment for a term of five to eight years or, under aggravated circumstances shall be punishable by imprisonment for a term of seven to ten years (Art. 262);
- Intended **blows, battery** or other violent acts, which caused physical pain, but no bodily injury, shall be punishable by a fine up to 50 tax-free minimum incomes, or community service for a term of up to 200 hours, or correctional labour for a term of up to one year, while the same acts characterized as torture, committed by a group of persons or for the purpose of intimidating the victim or his relatives, or based on racial, national or religious intolerance, shall be punishable by restraint of liberty for a term of up to five years, or imprisonment for the same term (Art. 126);
- **Theft** shall be punishable by a fine of 50 to 100 tax-free minimum incomes, or community service for a term of 80 to 240 hours, or correctional labour for a term of up to two years, or arrest for a term of up to six months, or imprisonment for a term of up to three years; under aggravated circumstances, theft shall be punishable by imprisonment for a term of seven to twelve years, with or without the forfeiture of property (Art. 185);
- For a **burglary**, the Criminal Code of Ukraine provides for a punishment of a fine of 50 to 100 tax-free minimum incomes of citizens to community service, or correctional labour for a term of up to two years, or arrest for a term of up to six months, or imprisonment for a term of up to thirteen years, with or without forfeiture of property (Art. 186);
- An assault for the purpose of taking possession of somebody else's property, accompanied with violence dangerous to life and health of the assaulted person, or with threats of such violence (**brigandism**), shall be punishable by imprisonment for a term of three to seven years, while brigandism accompanied with braking into a residence, shall be punishable by imprisonment for a term of seven to twelve years with the forfeiture of property (Art. 187);
- **Gangsterism** (organizing an armed criminal gang for the purpose of attacking ... private individuals, and also participation in such gang or its attacks), shall be punishable by imprisonment for a term of five to fifteen years with the forfeiture of property (Art.257), etc.

[19] State registration No. 1135-1 from 05 February 2015., *http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=52809*.

[20] This, however, causes criticism among the researchers, according to which firstly, there is a necessity to distinguish the principle of proportionality between a sentence and the gravity of the offense committed; secondly, in the current criminal law, the principle of proportionality is restrained by rather stretched lower and higher limits of the sentence within one sanction. – See: O. O. Knyzhenko Problematic aspects of the principle of proportionality of the crime and the subsequent punishment // The Journal of V.N. Karazin of Kharkiv National University / V.N. Karazin V.N. University. – Kharkiv: V.N. Karazin Kharkiv National University Press, 1964. - N757: Series Law. Vol. 1(2). – 2007. – pp. 108-111.

Of course, neither of these sanctions relate to deprivation of life, inflicting grievous body injuries or harm to a person's health. Moreover, Para. 3 of Art. 50 of the Criminal Code of Ukraine stipulates that "The punishment is not meant to cause physical sufferings". If to return to the question of free use arms for self-defence from these and other crimes, it needs to be frankly stated – the right to free possession of firearms provides its application, which has the effect of depriving life or inflicting grievous harm to a person's health and causing physical suffering.

Therefore, **the permit for free possession of arms for self-defence can lead to establishment of two parallel criminal jurisdictions in Ukraine**: the one, authorized by the state and its laws, and the other one – which will be actually formed in the course of implementation of the practice of armed self-defence. Free right to bear arms can lead to disproportionately more severe consequences than it is provided for by the current criminal legislation, and result in violation of the principle of proportionality of the punishment to the offense committed.

In addition, the Constitution stipulates that "The duty of the State is to protect human life" (Art. 27). While, according to the ECHR, the state not only has to protect the person from criminal's actions, but is also responsible for the failure to take practical preventive measures to protect human life (judgment in case Gongadze vs. Ukraine).

Thus, an obligation of protecting people from unlawful assaults belongs to the State and its law enforcement agencies. The argumentation for free possession of firearms for self-defence, in fact, "legalizes" the distrust to law enforcement agencies, and a belief in their inability to perform their duties. This can significantly affect the process of reforming the law enforcement system, which is being provided under the implementation of the Association Agreement with the EU (and is itself a requirement for cancelling visa regime with the EU as well as for obtaining EU membership). In this context, not a demand to "transfer" self-defence function to individuals, but an effective functioning (reform) of law enforcement agencies, to which funds of the individuals – taxpayers are allocated appears to be more constructive.

While analysing the practice of the ECHR, we can conclude that the use of arms for self-defence may take place only in case of direct threat to life, as an "absolute (exclusive) need".

In the practice of the ECtHR, the question of proportionality of the crime and the punishment is often considered in the context of self-defence (McCann and Others vs. the UK, Ogur vs. Turkey, Nachova and Others vs. Bulgaria, Kakoulli vs. Turkey, Ramsahai and Others vs. the Netherlands, etc.). The need for use of arms has a fairly wide range – from overcoming resistance, neutralization of the object, to preventing his escape, etc. In all cases, according to the decisions of the ECtHR, the choice should be made based on extreme circumstances for the relevant actions. The question is whether ***a person can estimate that it is indeed an extreme circumstance***?

And if the person cannot do so, but used arms, would it cause new charges against the State for violating the ECHR?

In most of their decisions on this issue, the ECtHR encourages States to consider the principle of proportionality, and even allow their law enforcement agencies to open fire in case of exceptional (absolute) urgency. The Court also calls upon sacrificing the need for detention of a criminal through the threat to deprivation of his life (cases Nachova and Others vs. Bulgaria, Ramsahai and Others vs. the Netherlands, Bubbins vs. the United Kingdom, Yasa vs. Turkey, Ergi vs. Turkey, Ilhan vs. Turkey, Makaratzis vs. Greece, Isayeva and Others vs. Russia, Putintseva vs. Russia, etc.). It should be noted that in this context, are meant the actions of law enforcement agencies who have the relevant instructions, skills, etc. There is no reason to believe that a civilian without relevant skills will work just as carefully, aiming at preserving life of the attacker.

Analogy with the "Miscarriage of Justice"

One of the most substantive and irrefutable arguments in favour of abolishing the death penalty is a factor of the miscarriage of justice. A certain percentage of miscarriage of justice is always probable and varies depending on the sense of justice in a society, the level of development of the judicial system, the effectiveness of law enforcement agencies, professional training of law enforcement personnel, judges, etc. However, in case of miscarriage of justice, there is also a possibility to correct it. It can be done by means of abolition of unlawful sentence, person's release from detention or from serving other penalties, providing compensations for moral and material damages caused by an unlawful verdict, etc. Death penalty – is the only form of punishment where restoration of illegally divested (violated) rights is impossible. Neither rehabilitation nor the acknowledgment of the falsity of the decision, made in the result of miscarriage of justice, will not return a person's life. The main factor here is the ***irrevocability/ incorrigibility*** of this type of punishment.

It was the presence of miscarriage of justice, which became an ultimate argument for most countries that have abolished the death penalty.

A legitimate use of force for self-defence can be considered by analogy with the miscarriage of justice. Not always a person, who has no appropriate skills of bearing

and using arms (who is neither a law enforcement officer, a serviceman, an athlete of corresponding sports, etc.) can adequately assess the degree of a threat. In addition, the person against whom the acts, that can be interpreted as aggressive ones,[21] are being committed, may be in a state of fear, excitement, in the heat of passion, etc. Such human conditions may be explained by the circumstances, in which the situation takes place (e.g., isolated dark place), by the stress experienced before, by the fact that the person has already become a victim of criminal activities, by reasonable or baseless fear for his/her life and health (e.g., if a person receives threats from enemies), etc.

However, the key feature here is still ***irrevocability/incorrigibility*** of such actions. Indeed, in the case of using arms for the imaginary defence, after establishing that the threat had not actually existed, it will be impossible to turn back the situation and bring the person who has committed hooligan actions or simply behaved rudely, back to life or restore the person's health. Therefore, ***in case of the free possession of firearms for self-defence, as in case of a miscarriage of justice during the delivery of a death sentence, the incorrigibility of such actions eliminates the possible benefits of protection of law-abiding citizens against illegal encroachments***.

Inadequate assessment of possible threats by law enforcement representatives

Speaking about the possibility of inadequate assessment or exaggerating the degree of threat and incorrigibility of using arms for the imaginary defence, it is reasonable to refer to similar practice in law enforcement structures. Thus, there are a number of ECtHR judgments in which it found the state guilty of violating the right to life, due to the use of arms by law enforcement personnel, when they had exaggerated the degree of threat. However, in almost all cases, law enforcement officials had objective and reasonable grounds to suspect the persons, against whom they have used arms, in the commission of a serious crime and an attempt to escape (using arms to prevent the escape), in the threat of committing a murder of one or a group of people (using arms to prevent killing of others) or in the threat of opening fire on law enforcement officials.

Thus, in the case McCann and Others vs. the UK (1995) the ECtHR concluded that the State had breached Article 2 of the European Convention on Human Rights stipulating "the right to life" (In 1998, a team of the Special Air Service soldiers of Gibraltar shot and killed 3 Irish citizens, suspected in the intention of carrying out a terrorist attack by placing blasting explosives in a car in Gibraltar. After the incident, it turned out that none of three suspects had neither arms, nor a detonator). Their [the soldiers'] reflex action in this vital respect lacks the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects, and stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police, which had been drawn to their attention and which emphasized the legal responsibilities of the individual officer in the light of conditions prevailing at the moment of engagement" (Para. 212). Similar situations were decided by the ECtHR in the cases Andronicou and Constantinou vs. Cyprus (1997), Ergi vs. Turkey (1998), Gulec vs. Turkey (1998), McKerr vs. the UK (2001), Pretty vs. the UK (2002), Ogur vs. Turkey (1999), etc.

It is revealing that regarding these cases, the Court declared good practice by public officials (police) during their implementation of respective tasks. However, they had overestimated the degree of the threat, which led to the death of suspects.

In these decisions, we can observe the "oversight" of experts (law enforcement and military personnel), i.e., the persons who undergo appropriate training, education, have appropriate psychological and physical preparation, skills of arms handling (which are necessary and fundamental in their service), knowledge on when and how the arms can be used, and who have taken the appropriate oath before the people of their state. However, even in cases when the arms are used by people, directly authorized to do so, the situations of exceeding the limits of urgent (absolute) necessity still take place. Thus, in case of free possession of short-barrelled firearms, there is a risk of disproportionately more cases of its more-than-necessary use (by persons without relevant skills that cannot always assess the threat adequately), compared to the current situation, when it happens to the professional law enforcement officials. This, in its turn, will become a cause for filing the relevant applications against Ukraine in international judicial institutions, in particular the ECtHR.

The use of arms for self-defence must meet certain criteria. Thus, self-defence cannot be recognized as legitimate, if the actual injury is more significant than the prevented one (gunshot wounding of a person in response to his hooliganism actions or rude behaviour). According to John Lott (Chicago, the USA), who defends the right of U.S. citizens to free possession of arms, "Firing weapons is the last resort".

Thus, Article 36 of the Draft Law "On Civilian Arms and Ammunition" stipulates that "gun owners have the right to use arms for ... detention of persons, ... if there is reasonable suspicion that these persons have committed a crime". This raises the question: who should determine

[21] Here the usage of the word "assault" is being deliberately omitted, as such actions can be an act of hooliganism, or just brazen behaviour of an arrogant person.

the validity of suspicion? In fact, this provision empowers citizens with functions of the public prosecution office. The same Article contains a provision according to which "A person has the right to obtain and bring arms in readiness to fire, if **he/she considers** that there may be grounds for its use in the situation that has developed". A subjective assessment of the situation is insufficient basis for the use of arms. Empowering people with this function, creates a direct threat to public safety and the safety of others. There is also ***a danger to third parties***.

The right to possession of firearms is not total, so it cannot provide the right to self-defence. While insisting that free possession of firearms is a human right, which derives from the right to self-defence, guaranteed by the Constitution of Ukraine (the preamble to the Draft Law "On Civilian Arms and Ammunition" states that it is being based on provisions to the Constitution of Ukraine about "equality of constitutional rights and responsibilities of citizens"), the proponents of its introduction do not consider that the right to self-defence should be total (the right to protect one's own life and health, the lives and health of other persons, stipulated in Article 27 of the Constitution).

The right of legally capable persons – persons with no criminal record or suspected of having connections with criminals – to self-defence

Thus, people with visual problems, the disabled, people with diseases not related to disabilities, etc., will be objectively deprived of this right. The right to protection of people's life and health cannot be subjected to physical abilities. Thus, a large number of people will be deprived of the right to armed self-defence. In fact, free possession of arms singles out a certain group of people who have a "privileged" right to self-defence. After all, Article 17 of the Draft Law "On Civilian Arms and Ammunition" proposes to provide a criterion for physical health condition, as a prerequisite for granting authorization to own arms.[22]

It ***contradicts the principle of equality of all people, enshrined in Article 21 and Article 24 of the Constitution of Ukraine.***

Possibility of obtaining firearms by socially dangerous persons

According to the survey, conducted by "Equal Opportunities and Women's Rights in Ukraine Programme" (a joint project of the European Union and UN Development Programme in Ukraine), 35% of Ukrainians suffered from psychological violence (most often – continuous humiliation and controlling behaviour), 21% – from physical violence (beatings, locking up, tying up, standing without movement), 17% – from economic violence (need to report even very

small expenses, fraudulent appropriation or destruction of property), 1% – from sexual violence (rape).[23] Only 10% of victims of physical violence sought assistance from bodies of interior affairs. ***47% of all the respondents believe that physical violence must be reported to the police, 45% trust the police***.[24]

52% of respondents trust psychological services, 46% – NGOs that combat violence and help victims, 40% – state social services, but only ***1-2% of victims of domestic violence sought assistance from these organisations***.[25]

Suppression of domestic (family) violence evidence and failure to make a police statement about it, does not allow to detect individuals who resort to such practices. Therefore, according to human rights organisations, this practice may be much more widespread than the reported cases. For a person who commits domestic violence, free possession of arms may become an additional incentive in this. And a victim of such violence will be less likely to seek help from relevant civil society organisations or law enforcement agencies. The issue here is not that the attacker will directly use arms against his family members – it simply becomes an effective tool not for physical, but mostly for psychological violence and avoiding public disclosure through intimidation of a victim.

The Draft Law "On Civilian Arms and Ammunition" offers the most liberal attitude to such persons. Article 18 reads "stay on the watch list in connection with the commission of domestic violence in the family" (Para. 7) is considered as the basis for refusal to grant authorization for arms; and in case of "placing on the watch list in connection with the commission of the domestic violence by the owner of the arms" an issued arms permit is suspended (Art. 20, Part 1, Para. 3).

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[22] Today, to get a license for hunting arms, one must submit a medical certificate. However, rifle hunting and shooting sports are not equivalent to the human right to self-defense.

[23] For more details see: Ten unknown facts about domestic violence in Ukraine: a joint EU/UNDP Project releases new poll results. – Legal Portal Pravotoday, 19 January 2010., *http://pravotoday.in.ua/ua/press-centre/publications/pub-63*.

[24] Ibid.

[25] Ibid..

It is furthermore proposed by the draft law to re-grant authorization for arms "provided that... the owner of arms is removed from the watch list in connection with domestic violence" (Art. 20, Part 2, Para. 3). This provision is incorrect for several reasons. *Firstly*, removal from the watch list can be made as a result of corruption (including bribery) or cunning from the side of the attacker (persuasion of victims to testify in his favour, long-term positive behaviour, etc.). *Secondly*, the removal from such list is a formal act and cannot be an evidence of the fact that the person got rid of the habits of domestic violence.

The right to free possession of arms and legal consciousness

According to the founders of Ukrainian Rifle Association, the purpose of its creation was, in particular, to popularize the idea of free carrying of arms, which is not common in Ukrainian society, "one of the main problems in this area today is not even the opposition of the public authorities (as they are always against initiatives that reduce control over the citizens), but the inactivity of the society and the lack of demand for the liberalization of legislation on arms. Society lives by stereotypes and does not accept the right to armed self-defence as a normal right of a free man".[26]

Perhaps, Ukrainian Gun Owners Association pursues the very same "educational" aim. The chairman of the Association Georgiy Uchaikin (the author of the e-petition to the President of Ukraine) declared: "First, we should tell people about defence, enable them to understand that they are completely defenceless".[27] According to the data provided in press-interview of Ukraine's President Petro Poroshenko on 20 September 2015, only 11% of Ukrainian citizens actually support legislative entrenchment of the right to possess firearms.

Enshrining this provision will contradict the prevailing humanistic legal consciousness of the people. More valuable task for national legislation and legal system would be deepening in the legal consciousness of the people the value of human life, priority of non-violent methods, reducing the need for armed force and means of solving social problems.

In addition, anyone who wants to possess arms already has them, as the current legislation does not prevent this. "According to rough data of the Gun Owners Association, about 2 million citizens possess firearms, registered in accordance with the established procedure. They include smoothbore weapons, rifles, and the so-called "non-lethal" weapons.[28]

At the same time, legislative regulation is required for the kinds of arms, permitted for ownership by civilians. Thus, pump-action shotgun, the starting velocity of bullet of which is 400 meters per second, is legalized: "Pump-action shotguns, which are pumped with air and have lethal effect on people, are freely purchasable in Ukraine. This weapon is prohibited in almost all European countries as a terrible weapon. Pump-action shotgun shoots without sound, leaves no traces of shells or bullets, and cannot be identified. It is a perfect weapon for a killer".[29] In this case, arms legislation should be based on the national interests of public safety and security of individuals.

In addition, if it is the case of self-defence, it is enough to use a traumatic weapon (which can also have lethal effect), as it shoots at a distance of 2-5 meters, ***but reduces the risk to third parties***.

Therefore, the main aspect of the legislation on arms is to determine the types of weapons permitted for hunting, sports and self-defence, and those types, which are completely prohibited for civilian possession.

Honorary Weapons

The issue of honorary weapons is regulated by: The Law of Ukraine "On State Awards of Ukraine" (Art. 9), "On Disciplinary Statute of Internal Affairs of Ukraine" (Art. 9. Para. 10), "On the Disciplinary Statute of the Armed Forces of Ukraine" (Para. 44 of the Disciplinary Statute), Presidential Decree "On Establishing the Award of the President of Ukraine "Nominal firearms" No. 341 of 27 April 1995, Order of the Ministry of Interior "On Departmental Award of the Ministry of Interior "Firearms" No. 15211 of 30 November 2015 and other interdepartmental regulatory legal acts.

Obviously, the issue of honorary weapons, the ownership of them, and their turnover are not a subject of interdepartmental regulatory legal acts. Today the institute of award weapons in Ukraine is more like a relic of the Soviet past. During the development of the relevant arm legislation, the issue of honorary weapons should become solely a subject of legislative regulation, according to the requirements of public safety and common sense.

Public debate on the right to free possession of arms for self-defence has exposed numerous concerns associated with lack of arms legislation in Ukraine, and has identified the urgent need for its development. The basic principles on which it should be developed are obvious, they include provisions of the Constitution and international obligations of Ukraine in the sphere of human rights. Given the inevitability of the use of weapons, the principle of "not to harm" should become the basis of the legislation in this area. ■

[26] For more details see: Society lives according to the stereotypes and does not accept the right to own arms and self-defense as a normal right of a free man. – Ukrainian Gun Owners Association, http://www.strilets.org/analitika/statti/ukrajinska-striletska-asotsiatsiya-suspilstvo-zhive-stereotipami-i-ne-sprijmae-pravo-na-zbroyu-ta-samozakhist-yak-normalne-pravo-vilnoji-lyudini.

[27] For more details see: Millions of Ukrainians have proven that they can be responsible gun owners – Uchaikin. – Bigmir.net, http://news.bigmir.net/ukraine/938079-Milliony-ukraincev-uzhe-dokazali--chto-mogut-otvetstvenno-vladet--oruzhiem--Uchajkin.

[28] Mykola Kudryavtsev: Why I Am Also Against "Arms Legalization" – Official website of "The Ukrainian Gun Owners Association", http://zbroya.info/ru/blog/6428_mikola-kudriavtsev-chomu-ia-tezh-proti-legalizatsiyi-zbroyi/.

[29] Legalization of arms in Ukraine: to be or not to be? – Volyn Post, 13 May13 2015, http://www.volynpost.com/articles/524-buty-chy-ne-buty-legalizacii-zbroi-v-ukraini.

POSITIVE OBLIGATIONS UNDER THE ECHR AND "POSITIVE COMPLEMENTARITY" UNDER THE ROME STATUTE: INTEROPERABILITY

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Processes of humanisation in international law, which intensified in the early 1990s, led to a rapid development of international humanitarian law, international human rights law and international criminal law. These "humanistic" branches of international law have many points of contact, one of the most significant being the obligations of states in situations of mass violence and serious human rights violations that usually accompany them. Each of the abovementioned branches of international law approaches these situations in its own way, which at times may appear not very closely related to each other.

International humanitarian law defines the rights and responsibilities of parties to the armed conflict in order to humanise it, and the provisions of human rights conventions are formulated as rights of individuals in their relations with states. In turn, international criminal law is viewed primarily as a "secondary" branch of international law that augments the traditional provisions on international legal responsibility of states with provisions on criminal responsibility of separate individuals for violation of the "primary" standards of international humanitarian law, international human rights law and international law standards governing the use of force in international relations (and traditionally included in the field of "international security law" in national science).

Over the past three decades, thousands of volumes of scientific monographs and periodicals have covered the problems of these areas of international law. Along with this, there is clearly a lack of studies with a functional analysis of the institutions in these three sectors in terms of state, which is the bearer of obligations under the relevant treaty and customary rules. And it is on the conduct of the state and its adherence to the requirements of humanistic international law that the embodiment of the latter depends. This angle on interoperability of standards of international humanitarian law, international human rights law and international criminal law also has the benefit of being practical, as it can be directly applied by the state, on the territory of which there is an ongoing crisis and massive and serious violations of fundamental human rights occur.

Taking into account the ongoing since 2014 military conflict on the territory of Ukraine, the relevance of the outlined set of issues does not require further substantiation. How Ukraine responds (or does not respond) to the numerous challenges in front of it, is immediately important for other states, especially those that together with Ukraine are part of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Finally, Ukraine's acceptance of the International Criminal Court's (ICC) jurisdiction in all events on its territory from 21 November 2013 as per Art.12 (3) of the Rome Statute (even without ratification of this international treaty) poses new questions regarding the scope of international legal obligations of the state in the area of protection of armed conflict victims and other victims of mass violence.

This article analyses **only one practically important for Ukraine aspect** of interoperability of the states' obligations under international humanitarian law, European human rights law and international criminal law, and namely – **the duty of the state to prosecute for the gravest crimes against international law**.

The importance of this duty is clearly visible in all of these branches of international law, even though it takes different forms and emphasises its different aspects. Thus, in international humanitarian law, common article 49/50/129/146 of the Geneva Conventions dated 12 August 1949, p.2 says: "Each High Contracting party shall be under the obligation to search for persons alleged to

have committed, or have ordered to be committed, such grave breaches [of the corresponding convention] and shall bring such persons, regardless of their nationality before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case". In prepared under the supervision of the International Committee of the Red Cross study of customary international humanitarian law, a similar provision is analysed as such that is valid in both types of an armed conflict – international and non-international, and covers all serious violations of standards in this area (i.e. all war crimes), and not only the relevant breaches of the Geneva Conventions, which states: "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects".[1]

Unlike international humanitarian law, where relevant obligations of the state are defined in the text of conventions, in European human rights law, the duty to prosecute parties guilty of committing the gravest violations of human rights was formulated in practices of the European Court of Human Rights (ECtHR) as the so-called "procedural obligation" under Articles 2 and 3 of the ECHR. It includes the duty to "carry out an effective investigation into the violations of material aspects of these norms".[2] The criminal component of this procedural obligation is also directly referred to by the Court: "The Court has repeatedly stated that an efficient judicial system required by Article 2, in certain circumstances, has to involve the use of the criminal law".[3]

As noted by W. Schabas,[4] requirements for investigating violations of Articles 2 and 3 in the context of an armed conflict were first defined by the Grand Chamber of the ECtHR in the case of *Varnava and Others v. Turkey*, that concerned disappearance of people in 1974 during Turkish invasion of Cyprus. The Grand Chamber emphasised that the investigation not only has to be independent, accessible to the families of the victim, carried out with reasonable speed and efficiency, and include elements of public control of the investigation and its results, but also be effective in the sense that it must have the ability to lead to determining, whether the death was caused unlawfully, and if so, to establish the responsible parties and punish them.[5]

The ECtHR does not distinguish between crimes committed in the context of mass violence (e.g. enforced disappearance as a crime against humanity), and other grave crimes against an individual. For instance, in the case of *MC v. Bulgaria* were established violations by the state of its obligations in respect to effective investigation of the case of rape due to outdated norms of national legislation.[6]

In international criminal law, the duty to carry out investigation of certain crimes and prosecute the guilty parties is formulated differently and includes crimes against general international law. Such crimes are associated with violation of peremptory norms of international law, i.e. prohibition of genocide, crimes against humanity, and war crimes. The fact that this obligation applies to all states without exception is clear from the wording of paragraph 6 of the Preamble to ICC's Rome Statute: "Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". This logic is continued in paragraph 10 of the Preamble that mentions the complementary nature of the ICC to national criminal jurisdictions, and Art.1 and 17 of the Statute, which specifically define the principle of complementarity. In other words, it is manifested that the **ICC acts in cases, when the state does not execute its international legal obligation to prosecute individuals guilty of the gravest crimes against international law**.

It appears fundamentally wrong to interpret the principle of complementarity as such that violates a state's sovereignty. This mistake was made by the Constitutional Court of Ukraine in 2001, when it concluded this international treaty to be such that "is inconsistent with the Constitution of Ukraine as regards the provisions of paragraph ten of the Preamble and Article 1 of the Statute, according to which 'International Criminal Court ... shall be complementary to national criminal jurisdictions'".[7] To the contrary, the main purpose of the ICC is to ensure full respect for a state's sovereignty, and, in particular, its judicial power. However, a state's sovereignty under international law is not absolute, and its scope in each specific case depends on this state's compliance with its international obligations in the relevant area. In case of the Rome Statute, we refer to the obligation of all states without exception to fight the gravest crimes against international law that violate its fundamental peremptory norms and infringe on values shared by the entire international community. Based on utmost respect for the sovereignty of states, as well as on the fact that it is the states that bear the main responsibility for ensuring international legal order, paragraph 10 of the Preamble of the Rome Statute emphasises that the International Criminal Court does not replace national judicial systems, but only complements them.

The goal of the principle of complementarity (subsidiarity), as defined in the Rome Statute, is to establish a delicate balance between the state sovereignty and independence of the international judicial body that

1 Customary International Humanitarian Law. Volume I. Rules – Jean-Marie Henckaerts and Louise Doswald-Beck, Oxford University Press, 2009, p.607.

2 Silih v. Slovenia [GC], European Court of Human Rights, App. No.71463/01, 9 April 2009, para.153.

3 Ibid., para.194; Mastromatteo v. Italy, European Court of Human Rights, App. No.37703/97, 24 October 2002, para.90.

4 Schabas William A. Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights. – Journal of International Criminal Justice 9 (2011), p.609-632.

5 Varnava and Others v. Turkey [GC], European Court of Human Rigths, App. Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, Para.191.

6 MC v. Bulgaria, App. No.39272/98, 4 December 2003.

7 Conclusion of the Constitutional Court of Ukraine in the case of the constitutional appeal of the President of Ukraine regarding making a conclusion on the compliance with the Constitution of Ukraine of the Rome Statute on the International Criminal Court (Rome Statute case) No.3 dated 11 July 2001.

is the International Criminal Court. The initial goal of the complementarity formula defined in Art.17 of the Rome Statute was to establish a model of concurrent jurisdiction, in which states bear the primary responsibility for investigating and prosecuting international crimes. The Statute acknowledges the obvious truth that there are states with well-functioning judicial systems, and there are others, where for various reasons the state is unable to carry out its proceedings. However, even those states, where the judicial system is unable to ensure prosecution of those who committed the gravest crimes against international law, are not exempt from international legal obligations to carry out such prosecution. In view of this, the principle of complementarity in the Rome Statute defines the situations, when for objective or subjective reasons a state is not carrying out its international legal obligations to prosecute those responsible for the gravest crimes against international law, and, as a result, when the ICC may conduct the proceedings in a particular case.

Article 17 of the Rome Statute establishes a mechanism, which ensures application of the principle of complementarity through determining inadmissibility of cases, in which state that has jurisdiction over one of the four gravest international crimes, properly carries out its international legal obligations to investigate such crimes and prosecute persons responsible for them. Paragraph 1 of this article covers four main situations:

1) the case is being investigated or prosecuted;

2) based on results of investigation or criminal proceedings, the state has decided that there are no grounds for prosecution;

3) the person concerned has already been tried for conduct which is the subject of the case, over which the ICC has jurisdiction;

4) the case is not of sufficient gravity to justify further action by the ICC. The principle of complementarity is related to the first three of these four situations. An approach to their practical resolution was first formulated by the ICC's Pre-Trial Chamber in the case of Thomas Lubanga Dyilo in 2006.[8] This decision emphasises the importance of thorough separate analysis of each criterion related to complementarity, as well as the issue of sufficient gravity of the relevant offense.

The most comprehensive presentation of the general idea of complementarity principle can be found in the 2006 report on prosecutorial strategy issued by the ICC's Office of the Prosecutor – the key organ in selecting situations for investigation – which has built an approach to the complementarity principle by having formulated the concept of "active complementarity":

"With regard to complementarity, the Office emphasises that according to the Statute national states have the primary responsibility for preventing and punishing atrocities in their own territories. In this design, intervention by the Office must be exceptional – it will only step in when States fail to conduct investigations and prosecutions, or where they purport to do so but in reality are unwilling or unable to genuinely carry out proceedings. A Court based on the principle of complementarity ensures the international rule of law. This means that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation".[9]

Coming back to the procedural obligations mentioned by the ECtHR, they are the right of each specific victim of human rights violations. Reviewing these obligations, the Court can take into account other considerations, including the refusal of the person who holds this right to use it. Instead, in international criminal law, states are obliged to prosecute persons guilty of crimes against international law, based on requirements of peremptory norms of general international law, regardless of the will of these crimes' victims.

The issue of possible limits of amnesty for crimes committed in situations of mass violence is connected with this. With all complex aspects of different conflict situations, the overall conclusion that international law prohibits genocide, crimes against humanity and war crimes to be the object of an amnesty law, does not cause any serious doubt.[10] A strong stand on this issue was repeatedly taken by the Inter-American Court of Human Rights, which rejected amnesty for grave violations of human rights, such as torture, extrajudicial, summary or arbitrary executions, as well as enforced disappearances, as all of these constitute violations of inalienable rights recognised in the international human rights law. The Inter-American Court first took this stand in the famous ruling in the case of *Velasquez-Rodriguez v. Honduras*[11] and developed it in the case of *Barrios Altos*.[12]

In order to answer the question of interoperability of European human rights law and international criminal law in cases of amnesty for crimes committed at the time of an armed conflict, one cannot ignore the decision of the Grand Chamber of the ECtHR in 2014 in the case of *Marguš v. Croatia*,[13] in which the Court ruled that bringing new military crimes charges against a person that has been granted amnesty for them not only does not violate Croatia's obligations according to ECHR, but also "complies with Articles 2 and 3 of the Convention and requirements and recommendations /…/ of international mechanisms and documents." Key provisions of the decision used to substantiate this conclusion are worth quoting word for word:

"127. The obligation of States to prosecute acts such as torture and intentional killings is thus well established in the Court's case-law. The Court's case-law affirms that granting amnesty in respect of the killing and ill-treatment of civilians would run contrary to the State's obligations under Articles 2 and 3 of the Convention

[8] Prosecutor v. Thomas Lubanga Dyilo, International Criminal Court, Decision on the prosecutor's application for a warrant of arrest, Art. 58, No. ICC-01/04-01/06-8-US-Corr, 10/02/2006, para. 29.

[9] ICC-Office of the Prosecutor, Report on prosecutorial strategy, September 2006, *http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf*.

[10] For example: O'Shea A. Amnesty for crime in international law and practice / Andreas O'Shea. – The Hague : Kluwer Law International, 2002, p.322; Ntoubandi F.Z. Amnesty for crimes against humanity under international law. – Faustin Z. Ntoubandi, Leiden: Brill, 2007, p.226.

[11] Velasquez Rodriguez v. Honduras, Inter-American Court of Human Rigths, Series C, No.4

[12] Barrios Altos Case, Inter-American Court of Human Rigths, Series C, No.75, para. 41.

[13] Marguš v. Croatia [GC], European Court of Human Rigths, App. No. 4455/10, 27 May 2014.

since it would hamper the investigation of such acts and necessarily lead to impunity for those responsible. Such a result would diminish the purpose of the protection guaranteed by under Articles 2 and 3 of the Convention and render illusory the guarantees in respect of an individual's right to life and the right not to be ill-treated. The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective /…/.

139. In the present case the applicant was granted amnesty for acts which amounted to grave breaches of fundamental human rights such as the intentional killing of civilians and inflicting grave bodily injury on a child /…/. A growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights. Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances".

These arguments create the impression of ECtHR's unwillingness to be potentially flexible in considering similar cases in the future, concerning amnesty along with mechanisms of national reconciliation and compensation to the victims. In this sense, ECtHR remains rather consistent, as back in 2009, in the case of *Ould Dah v. France*, it noted that a conflict is possible between the interests of social reconciliation and prosecution under Articles 2 and 3 of the ECHR. Along with this, there is no reason to believe that ECtHR allows for the possibility of amnesty for the gravest crimes against international law.

As we see, there are no compelling reasons to talk about differences between European human rights law and international criminal law regarding the obligation of each state to investigate the gravest crimes against international law (in the least, genocide, crimes against humanity, war crimes), and carry out prosecution of persons guilty of such crimes. It is important to note that in connection with the Russia-Georgia armed conflict of 2008 and Russia-Ukraine armed conflict that started in 2014, and recognition of ICC jurisdiction by Georgia (through ratification of the Rome Statute) and Ukraine (through the *ad hoc* arrangement foreseen in Art.12(3) of the Rome Statute), the issues of interoperability of ICC and ECtHR procedures gain not only theoretical, but also specific practical meaning for the first time.

It would not be an overstatement to say that in the first 13 years of its work the ICC failed to impress the international community with its effectiveness. In its first years of operation, when the situations that ICC considered were limited to Africa, this international judicial body was quickly nicknamed the colonial court of the white. Yet, even on the African continent the ICC's influence remains quite limited.

Given the crimes against international law committed on the territory of Georgia and Ukraine, the ICC has no other choice but to start working in the European continent. In January 2016, ICC's Pre-Trial Chamber approved the Prosecutor's initiative to start an investigation into crimes committed during the armed conflict in 2008,[14] and the situation in Ukraine, connected with possible crimes against international law, committed during the events of the Revolution of Dignity (November 2013 – February 2014) and the armed conflict with Russia (after 20 February 2014), remains at the stage of preliminary examination at the ICC's Office of the Prosecutor.[15]

So we can establish that in 2016 the ICC has entered ECtHR's territory, its l'espace juridique. Taking into account the abovementioned, there is no doubt that a state that is simultaneously a party to ECHR and the Rome Statute (ICC) (or at least recognises jurisdiction of the latter in the frame of the ad hoc arrangement), can be considered such that carries out its international obligations, only if it conducts effective investigations of international crimes and prosecutes persons guilty of them both in line with positive procedural obligations formulated by the ECtHR under Articles 2 and 3 of the ECHR, and with the principle of "active complementarity" formulated by ICC's Prosecutor. Similarly, there are double requirements for any amnesty laws that have to comply with principles of both, ECtHR and international criminal law. The equation here will also include any attempts of organising post-conflict (transitional) justice institutions, as well as efforts of other countries (primarily, members of the Council of Europe) to exercise universal criminal jurisdiction over persons who have committed crimes against international law in Georgia and Ukraine.

This situation is not only complicated, but it also opens up new opportunities for constructive dialogue between the ECtHR and the ICC, and possibly, assistance to the latter from the first one in determining the admissibility of cases in the light of complementarity principle of ICC's jurisdiction. It seems that ICC should examine complementarity criteria in Article 17 of the Rome Statute (i.e. issues of a state's willingness and possibility to prosecute a criminal) in the light of effective investigation criteria, developed by ECtHR. The possibility and feasibility of this approach have already been the subject matter in literature, although only theoretically.[16] In its turn, ECtHR, which has already received (and will keep receiving) hundreds of petitions regarding the abovementioned situations, has to acknowledge the presence of International Criminal Court as an important actor in the European continent, and, as much as possible, facilitate its work through establishing a tighter connection between positive obligations of states under Articles 2 and 3 of ECHR and the duty to investigate crimes against general international law and prosecute those guilty of such crimes. In the end, besides the general goal of ensuring respect for human rights, both international judicial institutions are united by the common battle against impunity in cases of gravest violations. ■

[14] Decision on the Prosecutor's request for authorisation of an investigation. International Criminal Court, ICC-01/15-12, 27 January 2016 / Pre-Trial Chamber I.

[15] For more information, see: *https://www.icc-cpi.int/ukraine*.

[16] Van der Wilt H., Lyngdorf S. Procedural obligations under the European Convention on Human Rights: Useful guidelines for the assessment of "unwillingness" and "inability" in the context of the complementarity principle / Harmen van der Wilt, Sandra Lyngdorf // International Criminal Law Review. Volume 9 (2009). P. 39-75.

JUDICIAL SYSTEM OF UKRAINE: HISTORY, CURRENT STATE AND PROSPECTS IN THE CONTEXT OF THE CONSTITUTIONAL REFORM

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Judicial systems in various countries are quite different. Their models depend on many factors: belonging of the national judicial system to a certain legal family, influence of national traditions, form of government, international judicial institutions, experience of foreign countries, etc. Most popular in modern world, in particular, in Europe, are three-/four-level judicial systems.

According to the first one, the system of courts has a basic, main level (named differently in different countries), where cases of first instance are tried. Second level courts (oblast, district, etc.) are the courts of appeal, although they mostly hear certain categories of first instance cases. Third level courts – are high instance courts mainly with cassation instance functions, although in certain cases defined by the law they can function as courts of appeal or event first instance courts. Three-level court systems are found in most European, namely, post-socialist and post-soviet states.

In the four-level model of the court system, the three-level system is supplemented with one more – primary level – magistrate, precinct or other courts, establishing a special "revision" level in the court system, etc. Almost in every country this model has its special features. The most typical representatives of this model are France and Italy. Some post-soviet states also accepted this model, for instance, Lithuania.

In the past half-century in continental Europe appeared a number of states, the court system of which includes practically autonomous systems – specialised courts with jurisdiction extending throughout the country. As a result, the court system grows more complicated, which expresses itself, in particular, in the increased number of "vertical" levels. A typical representative of such polysystem judiciary is the Federal Republic of Germany. Attitude to them even in the countries where these systems operate (including Germany) is ambivalent. Along with positive features they have significant shortcomings. This requires a cautious approach to borrowing such court systems.

Ukrainian judicial traditions were historically formed on the basis of the three-level court system. It was laid by most constitutional projects developed by different political and public associations and individual authors back at the beginning of the 20th century, as well as the UNR (Ukrainian National Republic) Constitution of 1918, draft ZUNR (Western Ukrainian National Republic) Constitution of 1920 and other constitutional documents of that time.[1] This tradition, although with certain special aspects, was preserved in Soviet constitutions – Ukrainian Soviet Socialist Republic Constitution (Basic Law) of 1937 and Ukrainian SSR Constitution (Basic Law) of 1978.

Three-level court system was also documented in the Concept of the new Constitution of Ukraine approved by the Verkhovna Rada of Ukrainian SSR on 19 June 1991.[2] This system with certain adjustments

[1] History of Ukrainian Constitution. – "Law", 1997, p.47-85, 105-113, 165.

[2] Constitution of the independent Ukraine. Book one. Documents, commentary, articles. – K., Ukrainian Legal Foundation, 1995, p.63-78. M. Koziubra took part in developing this article.

was documented in the developed on the basis of the Concept draft Constitutions of Ukraine of 1 July 1992, 27 May 1993, 28 October 1993, 15 November 1995, which for the first time introduced into the text of the constitution the principle of court specialisation; the draft did not mention high specialised courts.[3] However, this provided grounds to distinguish in the court system based on the previous soviet tradition specialised courts of arbitration, renamed during the so-called "minor judicial reform" in the early 2000s as commercial courts.

And only draft Constitution of Ukraine of 24 February 1996 documented the provision that "the highest judicial bodies of specialised courts are high courts".[4] This provision, approved in the final version of the 1996 Constitution of Ukraine opened the way for the transition of Ukraine's court system to a polysystem one with corresponding autonomous "verticals" and high specialised courts at the top. Since the 1996 draft Constitution was finalised with participation of senior representatives of the judiciary, in particular, the Chairman of the High Arbitration Court, we can assume that the corporate interest principle was involved.

Nevertheless, despite these constitutional innovations, the system of general jurisdiction courts, even after the adoption of the Constitution, kept on operating according to established legislative rules defined by the 1981 Law "On Judicial System". According to them, the Supreme Court of Ukraine exercised its powers mainly as the court of cassation, primarily in civil and criminal cases. Courts of arbitration (later commercial courts) operated independently, as a subsystem of general jurisdiction courts, with the High arbitration (commercial) court of Ukraine at the top, which also executed cassation functions in commercial cases (with a possibility of second cassation at the Supreme Court of Ukraine). This situation remained virtually unchanged even after the five-year term defined by the Transitional provisions (p.12) of the new Constitution of Ukraine to form the system of general jurisdiction courts according to Art.125 of the Constitution.

Essentially, the first, although not quite consistent step towards reforming the judicial system in Ukraine was the Law "On Judicial System of Ukraine" dated 7 February 2002, which in particular introduced into the system such level as Ukraine's Court of Cassation. This innovation, according to representatives of highest levels of judiciary, as well as a number of academic specialists, had to promote operation of the four-level court system, similar to commercial courts, and ensure the focus of the Supreme Court's powers on hearing cases in the order of second cassation.

However, the Constitutional Court of Ukraine, which was reviewing this innovation as regards its constitutionality in response to the constitutional appeal by people's deputies of Ukraine, in its decision on 11 December 2003 quite reasonably declared it unconstitutional, although the issue of constitutionality of the second cassation institution which at that time was practically legalised in Ukraine, was left out of its review.[5]

After the Law "On Judicial System of Ukraine" and this judgment of the CCU, we observed rapid establishing of autonomous subsystems of specialised courts in the judicial system of Ukraine – first administrative with the High Administrative Court of Ukraine at the top, and later – civil and criminal courts with High Specialised Court with similar name at the top. Autonomous full-cycle "verticals" of specialised courts, where high courts review cassation appeals in relevant category cases, have fully formed after the CCU judgment in the case of the constitutional appeal of people's deputies of Ukraine regarding the official interpretation of terms "the highest judicial body", "high judicial body", "cassation appeal", contained in Art.125, 129 of the Constitution before the amendments made in June 2016.

The CCU has decided, *first*, that powers of the court of cassation regarding decisions of corresponding specialised courts are to be executed by high specialised courts, and *second*, that the constitutional status of the Supreme Court as the "highest judicial body in the system of general jurisdiction courts" does not mean that it is given powers of the court of cassation regarding decisions of high specialised courts that exercise the powers of cassation.[6]

Agreeing that the so-called "second" or "double" cassation is inconsistent with the European standards of justice, as it contradicts the principle of legal certainty, along with this, we must also stress that this decision of the CCU was the last drop in undermining the constitutional status of the Supreme Court as "the highest judicial body in the system of general jurisdiction courts". As in the European tradition "the highest judicial body" is the court that tries cases according to the procedure of cassation, which is sometimes reflected in its name – Supreme Court of Cassation (for example, Art.124 of the Constitution of Bulgaria).

The following laws "On Judicial System and Status of Judges" of 7 July 2010 and "On Ensuring the Right to a Fair Trial" of 12 February 2015, not only did not clarify the situation, but made it more complicated instead. The powers kept by the Supreme Court of Ukraine according to these laws are related to issues of mainly specific and exceptional nature, among which there are only two powers that actually correspond to its status as the highest judicial body, besides, even these do not include respective means and methods of their execution.

An illustrative example in this situation is the power of the Supreme Court to "ensure consistency of judicial practices in the order and with methods defined by procedural law" (p.1 of Art.38 of the Law "On Ensuring the Right to a Fair Trial"). As according to European standards, the Supreme Court ensures consistency of judicial practices mostly through its own

[3] Constitution of the independent Ukraine. Book two. Part one. Documents. Articles. – K., "Law", 1997, p. 87-98.
[4] Ibid., p. 131-132.
[5] Constitutional Court of Ukraine. Decisions. Conclusions 2002-2003. Book 4. – K., Yurincom Inter, 2004, p. 529-534.
[6] Constitutional Court of Ukraine. Decisions. Conclusions 2002-2003. Book 10. – K., Yurincom Inter, 2011, p. 171-172.

decisions in specific cases heard by it in the order of cassation. In the situation, when the Supreme Court is largely deprived of powers of the court of cassation, vesting in it the responsibilities to ensure consistency of judicial practices looks like declaration without substantiation. No extraprocedural powers given to the Supreme Court can compensate for the lack of powers of cassation.

In connection with this, the opinion of the Venice Commission documented in one of its opinions is quite logical and reasonable, stating that "as long as the Supreme Court does not regain its general competence as a cassation court, it still has not fully recovered its role" as the highest judicial body in the system of general courts.[7]

The easiest and most effective way of such recovery is Ukraine's return to the three-level judicial system, which, as noted, has existed here before and is currently successfully operating in many European countries, including Ukraine's neighbours. Many experts tend to favour this approach. It deserves attention even more, taking into account that changing Ukraine's judicial system to "blanket specialisation" and polysystemic approach was done to increase accessibility of courts, judges' professionalism, and hence – improve the protection of human rights and freedoms, decentralise the judicial system and thus increase the independence of courts and judges, which essentially did not work out. This change did not make justice more accessible, on the contrary, it further inhibited access to it. Court decisions did not become more professional, judicial system became even more monopolistic through staffing policy and the use of administrative leverage, and the independence of courts and judges that has never been close to European standards, in the last decade, has moved away from them even more. "Selective justice", which has become proverbial both inside the country and outside of it, massive corruption and a heavy drop (by European standards) of courts' credibility (according to numerous opinion polls, the level of their credibility is one of the lowest among government institutions, which is generally not typical for the judiciary in Europe) – are the convincing proof.

It has been becoming more and more obvious that minor repairs of the national judicial system in the form of amending the Law "On Judicial System and Status of Judges" or even adopting a new version of a similar law with a good name "On Ensuring the Right to a Fair Trial" will not solve the problems that have accumulated in the past decade. In order to solve them, a full-scale judicial reform is necessary, which is impossible without making changes to the Constitution of Ukraine. As it turned out, some of its provisions inhibit (at least in the current Ukrainian circumstances) the formation of impartial, free from political influence, professional and righteous judiciary, as well as simplification of the court system, disencumbering it (according to the Venice Commission) from "excessive bureaucracy and administrative burden".[8]

Frankly, now is not the best time for amending the Constitution. Not only because Ukraine is de facto in the state of war, even though officially undeclared, during which according to p.2 of Art.157 of the Constitution, it cannot be changed, which is stressed by many politicians, political scientists and legal specialists. As is commonly known, Constitution is a type of social contract, a result of reaching if not the full social consensus, then at least a compromise between major political players, civil society and the government on critical issues of constitutional regulation. Currently, there are no grounds for such compromise in Ukraine. Hard political opposition both in the Verkhovna Rada, which ultimately has to approve changes to the Constitution, and in the society in general, is caused by economic instability and social impoverishment of the majority of population, external political influence (not only Russian) on the constitutional process and some other circumstances are not contributing to the said compromise. Wringing the Parliament into submission is not the best way of "pushing through" even with the most progressive constitutional changes. The rule of law and the constitutional state cannot be established with anti-legal methods.

Regrettably, the adoption of the developed by the Constitutional Commission under the President draft Law "On Amendments to the Constitution of Ukraine – on justice" and the Law of Ukraine "On Judicial System and Status of Judges" (which according to the procedure had to be adopted after the amendments to the Constitution, and not before them, as it was done) on 2 June 2016, once again demonstrated the main reason for our legal troubles – preference of political expediency over requirements of the Constitution and the rule of law. Blunt disregard for the procedure established by the Constitution and the Law "On the Rules of Procedure of the Verkhovna Rada of Ukraine" became one of the most prominent features of our modern parliamentary system, which will have inevitable consequences on the legitimacy of the introduced changes in the future. However, combining constitutional idealism (i.e. unreasonably high expectations for the constitutional changes) and constitutional scepticism – are the two sides of the same coin – the lack of political and legal culture, especially in the upper echelons of power.

So, assessing constitutional changes in general, we notice that they contain a number of provisions, which on condition of consistent implementation of the Law "On Judicial System and Status of Judges" and procedure codes, and their strict execution can help establish independent, fair and righteous judiciary in accordance with European values and standards.

These provisions include, first of all:

- improving the procedure for appointing judges, in particular: cancelling probation period – first appointment as a judge by the President for the term of five years; introducing a competition for judicial positions; excluding the political institution

[7] Joint opinion on the draft law amending the law "On Judiciary and Status of Judges and Other Legislative Acts of Ukraine", by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe. Strasbourg, 18 October 2011 Opinion No. 639/ 2011 CDL-AD (2011) 033 Or. Engl.

[8] Joint opinion on the draft law "On the judicial system and the status of judges of Ukraine". Strasbourg. 16 March 2010 CDL-AD (2010) 003 Or. Engl.

(Verkhovna Rada of Ukraine) from the procedure of appointing (electing) judges; shifting the centre of selecting and appointing judges from political institutions to a judicial community body – the High Council of Justice, etc.;

- bringing the procedure of forming, composition and powers of the High Council of Justice in compliance with European standards, specifically: predominance in its composition of representatives of the judiciary, which will increase the professionalism of this institution, as repeatedly stressed by the Venice Commission; enhancing the powers of the High Council of Justice, particularly those related to appointing judges, their transfer from one court to another (including, due to career growth), dismissal of judges, etc.;
- introducing a number of anti-corruption safeguards up to dismissal of judges, who cannot prove the legitimacy of the source of their income.

These and other innovations of the Law of Ukraine "On Amendments to the Constitution of Ukraine – on justice"[9] should certainly be considered (only on condition of their strict execution) a major step on the path to depoliticising the judiciary, increasing its professionalism and righteousness, and ensuring the independence of courts and judges.

The situation with provisions of the abovementioned constitutional law on the judicial system (Art.125) is more complicated.

Contrary to European practices and Venice Commission recommendations, judiciary system, according to Art.125 of the Law "On Amendments to the Constitution ..." is not determined by the Constitution, but by law.

Back at the stage of developing the draft law on amendments to the Constitution of Ukraine, some other members of the Constitutional Commission and I expressed our opinion that leaving the regulation of court system issues to the law threatens to preserve the existing complicated and at times incomprehensible to ordinary citizens as well as legal professionals judicial system. Unfortunately, as proven by the analysis of the updated Law of Ukraine "On Judicial System and Status of Judges", these unheard at the time forecasts are being confirmed.

According to p.3, Art.17, Chapter 1 "Organisational framework of the judicial system" in Section II "Judicial system" of the law, the judicial system is comprised of:

- local courts;
- courts of appeal;
- Supreme Court.

At first glance it would seem that this system means the return to the three-level model of judiciary with the Supreme Court at the top as "the highest court in the judicial system" (p.3 of Art.125 of the Law "On Amendments to the Constitution…", p.2 of Art.17 of the Law "On Judicial system…"), which, given the considerations set out earlier, would be welcome. However, the following text of the "Judicial system" section of the mentioned law proves that this conclusion is clearly premature. The law contains a number of contradictions, uncertainties and sometimes outright weird legal structures, which negate the advantages of the declared assurances of the authors regarding the alleged documentation of the three-level judicial system.

So, according to p.3 of Art.17 of the Law, "within the judicial system operate high specialised courts", the legal nature and status of which, even considering the content of dedicated to them Chapter 4 of the "Judicial system" Section, remain unclear, apart from determining categories of cases to be heard by them – High Intellectual Property Court and High Anti-Corruption Court. According to p.1 of Art.31 of the Law "On Judicial System…" in cases of these categories the named courts act as courts of first instance. Such wording of the Law raises numerous logical questions: what is the need for creating these specialised courts, especially, the so-called patent court, considering that the number of cases in this category is not that significant and they could easily be heard within the defined three-level court system (with possible specialisation of courts); if these courts are first instance courts, then why are they "high"; what are their relations (taking into account the documented in p.1 of Art.17 of the Law instance principle) with courts of appeal and the Supreme Court, etc. The uncertainty of the law on these issues will inevitably cause, as correctly noted in the Opinion of the Supreme Court of Ukraine on the draft Law of Ukraine "On Judicial System and Status of Judges" (reg. No.4734 of 30 May 2016), internal contradictions in the judicial system, will complicate the ensuring of consistency of judicial practices and organisational unity of the judiciary as a whole. Analysis of the structure and powers of the Supreme Court in this law is increasingly demonstrating an attempt to preserve the existing judicial system.

According to its Art.37, the Supreme Court is comprised of:

- the Grand Chamber of the Supreme Court;
- Administrative Court of Cassation;
- Commercial Court of Cassation;
- Criminal Court of Cassation;
- Civil Court of Cassation.

In modern European (and other) practices there are no known cases, when the Supreme Court, which, as noted, according to established tradition, is itself a court of cassation (and this is what manifests its status as the highest court in the judicial system), would include virtually autonomous subsystems in the form of specialised courts of cassation. This is a Ukrainian know-how.

Autonomy of specialised courts, and not only the high ones (cassation courts), but also lower level courts, is confirmed with numerous provisions of the law: preserved existing "vertical" of specialised courts – local (p.1, 2, 3 of Art.21), courts of appeal (p.1, 2, 3 of Art.26), cassation (Art.37, 44); possession of representative authority by the heads of specialised courts of all levels in relations

[9] More information can be found in the Analytical Report "Constitutional Process in Ukraine: Current Results, Risks and Prospects" in this journal.

with government institutions, local self-government, individuals and legal entities (subparagraph 1, p.1, Art.24, subparagraph 1, p.1, Art.29, subparagraph 1, p.6, Art.42); their organisational support responsibilities regarding respective court's operation (subparagraphs 3-9, p.1, Art.24, subparagraphs 3-9, p.1, Art.29, subparagraphs 3-9, p.6, Art.42), etc.

The powers of the Supreme Court according to the Law are limited to the powers of the Grand Chamber of the Supreme Court, outlined in general terms. These powers, as in the previous laws "On Judicial System and Status of Judges" and "On Ensuring the Right to a Fair Trial" mainly include powers of extraprocedural nature (up to issuing opinions on draft laws related to court system operation), which are not directly related to the "highest court" status of the Supreme Court.

Meanwhile, changes to the Constitution regarding administration of justice, even in the imperfect form, approved by the Verkhovna Rada on 2 June of this year, open up possibilities for a true court system reform, instead of an imitation.

The most rational way to form it would be, as previously suggested by the group of experts, to distinguish in this system two relatively autonomous three-level subsystems – general courts, which would address civil cases (including commercial) and criminal cases, high instance of cassation, which would include a Supreme Court with relevant chambers in its structure, and administrative courts, with the High Administrative Court as the instance of cassation. It is for this, and not to define the abovementioned patent and anti-corruption court, that the provision on creating high specialised courts had to be used as documented in the Law "On Amendments to the Constitution…", p.4, Art.125.

Although the issue of administrative courts' place in the judicial system of different countries is still addressed in different ways (the option of their belonging to the single court system with Supreme Court being the highest court, is still relatively common), but the trend towards separation of administrative justice from general courts is becoming increasingly apparent in the countries of continental Europe, particularly in the post-socialist ones. At least, a logical consequence of building the judiciary in all countries the constitutions of which mention administrative courts and their features, was singling out these courts into a relatively autonomous "vertical" of the judicial system. After the Law "On Amendments to the Constitution…" is approved, there will also be a similar provision in the Ukrainian Constitution, which is definitely a positive feature of this law.

Given these trends, the Venice Commission has "strongly recommended" while amending the Constitution of Ukraine to single out administrative courts into an autonomous subsystem within the judicial system, abolishing all other high specialised courts.[10] However, the Constitutional Commission and the authors of the Law "On Judicial System and Status of Judges" have unfortunately chosen to ignore this recommendation of the reputable European institution. So, without any illusions as to fast changes in the defined direction, I shall still try to present additional arguments in favour of autonomy of administrative justice within the judicial system of Ukraine.

First, administrative justice is a special type of justice. It is not just an important tool for ensuring human rights and freedoms (as is commonly known, this feature is inherent to all courts), but is an institution that protects human rights and freedoms from government infringement, and often from outright abuse of power on the part of the government. Hence, administrative justice is a key tool to strengthen the rule of law and constitutional state principles in a country. Without its effective operation, as history proves, these principles, even though captured in the constitution, remain just a declaration. Thus **creating a relatively autonomous administrative justice subsystem within the court system** is not a tribute to a questionable Soviet tradition (which suggests singling out a practically independent system of courts of arbitration first, and then – commercial courts), and even less so – satisfying someone's personal ambitions, but **an objective necessity for any state that is trying to abide by European values**.

Second, the tasks and functions of administrative justice, in their turn, determine the characteristics of administrative justice – the institution of proof in administrative court (in particular, the burden of proof), administrative justice principles (combining the adversarial principle with the inquisitorial, research principle, meaningful characteristics of the disposition principle, etc.), court's reasoning for its judgment (prevalence of rational points and logical science-based structures in it, minimal influence of psychological factors and public speaking techniques, etc.). As foreign experience shows, these characteristics may entail certain differences in qualification requirements for administrative court judges, selection procedure for judge candidates and others, which is determined by Art.127 of the Law "On Amendments to the Constitution…".

Third, consistency of judicial practices in general and administrative courts (respective types of justice) could be ensured through joint sessions of the Supreme Court and High Administrative Court or with the help of other institutions jointly established by them in the order defined by law. There are similar foreign practices in this area.

And finally, *fourth*, transition to the three-level judicial system model with relatively autonomous subsystems of general and administrative courts does not mean rejection of the constitutional principle of specialisation, which can be realised in different forms. The most common one being specialisation of judges, not courts, within the framework of corresponding subsystems. The use of specialised courts is also possible, but they are to be created only on the level of first instance courts (such practices exist in Europe), and not for the purpose of satisfying corporate or personal interests, as it unfortunately has happened in our country on numerous occasions.

This is the direction to move in while working on improving the Law of Ukraine "On Judicial System and Status of Judges". ■

[10] Opinion on the proposed amendments to the Constitution of Ukraine regarding the judiciary as approved by the Constitutional Commission on 4 September 2015. Adopted by the Venice Commission at its 104th Plenary Session. Venice, 23-24 October 2015.

CONSTITUTIONAL AND LEGAL FRAMEWORK OF THE RIGHT TO HEALTH

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Analysis of natural human rights brings us to the understanding of these rights as such that arise from human nature, inherently belonging to the person due to the fact that they possess purely human qualities and attributes of the human race. Natural rights are characterised as innate, inalienable, inherent, universal, stemming from the concept of a connection between human nature and people's rights, which are necessary for a human to ensure best possible operation and realisation of derivative rights.

At the present stage of development of mankind, natural human rights have become an integral component of states' legal systems through constitutional regulation and recognition of the rights and their derivatives in international law, including them in integration, supranational law (EU law). Human rights are the common achievement of mankind, even though they constantly become the subject of controversy regarding their specification and means of realisations, forms of protection and preservation through national and international mechanisms.

The right to health has dual nature and attitude to it has undergone certain evolution. The right to health belongs to the category of most important universally recognised human rights and is most often viewed as a part of economic and social rights, however, on the doctrine level, the right to health has been studied and developed as a part of natural human rights[1] (first generation human rights).[2] For any society, health of citizens is one of the characteristics of its development and democracy in the country, its real capacity to recognise, preserve and protect this universal value.

As rightly noted by O. Aleksandrova and others, human life and health are the most important values for the society, which should determine all other values and benefits.[3] S. Neumann, establish the right to health through the right to possession, stressed that health is the most important value for a person of any social status.[4] Representative of Ukrainian law school I. Seniuta stresses that the importance of health as the highest and natural value justifies the need for its preservation and protection, including in the international legal framework.[5]

However, we should acknowledge the overall inefficient realisation of the right to health on the domestic level, which in confirmed with statistical data of annual WHO reports.[6] Naturally, the health of people living in different countries will differ, which depends on

1 Hladun Z. Right to health (political and legal aspects). – Ukrainian Journal of Human Rights, 1996, No.1, p.7; Stefanchuk R. Right to health as a personal non-property right of individuals. – Bulletin of Khmelnytskyi Institute of Regional Management and Law, 2003, No.2 (6), p.40-45.

2 Brigit Toebes. The right to health: policy and practice. – *http://krotov.info/lib_sec/19_t/tob/es_01.htm.*

3 Herasymenko N., Aleksandrova O., Hrihoriev I. Legislation in the field of public health protection (under the general editorship of V.I. Starodubov), Moscow: MCFR (International Centre for Financial and Economic Development), 2005, p.91.

4 Neumann S. Die offentliche Gesundheitspflege und das Eigentum. – Berlin: Adolf Riek, 1847, p.68.

5 Seniuta I. Medical law: a person's right to healthcare: Monograph. – Lviv: Astroliabia, 2007, p.20.

6 WHO reports: World health report, 2002, reducing risks, promoting healthy life. – *http://www.un.org/ru/development/surveys/docs/whr2002.pdf*; World health report, 2003, shaping the future. – *http://www.un.org/ru/development/surveys/docs/whr2003.pdf*; World health report, 2004, changing history. – *http://www.un.org/russian/aids/who04/who_report04.htm*; World health report, 2005, make every mother and child count. – *http://www.un.org/ru/development/surveys/docs/whr2005.pdf*; World health report, 2006, working together for health. – *http://www.un.org/ru/development/surveys/docs/whr2006.pdf*; World health report, 2007, a safer future. Global public health security in the 21st century. – *http://www.who.int/whr/2007/whr07_ru.pdf*; World health report, 2008, primary health care – now more than ever. – *http://www.un.org/ru/development/surveys/docs/whr2008.pdf*; HIV/AIDS programme: Main achievements in 2008-2009. – *http://www.who.int/hiv/pub/9789241599450/ru/index.html*; On the global tobacco epidemic, 2009. Implementing smoke-free environments. – *http://whqlibdoc.who.int/publications/2010/9789244563915_rus.pdf*; World health report, 2010, health systems financing: the path to universal coverage. – *http://www.un.org/ru/development/surveys/docs/whr2010.pdf*; GLOBAL HIV/AIDS RESPONSE. Epidemic update and health sector progress towards Universal Access (Report on global response measures to HIV/AIDS), 2011 – *http://www.who.int/hiv/pub/progress_report2011/hiv_full_report_2011.pdf*; On the global fight against tuberculosis, 2012 – *http://www.who.int/tb/publications/global_report/gtbr12_execsummary_ru.pdf*; On healthcare in Europe, 2009, health and healthcare systems. – *http://www.euro.who.int/__data/assets/pdf_file/0006/117186/E93103R.pdf*.

many factors, – the state of national healthcare systems, economic, social, environmental well-being, etc., but such difference is also often observed within one state, which leads to a different scope of realisation of the right to health by different people.

It is important to define the universal content of the right to health, for which purpose we turn to provisions of international law, which is the expression of the common will of states.

To define the right to health, it is necessary to define health according to WHO Constitution: "Health is a comprehensive value; elements of health include absence of disease or infirmity in physical, mental and social spheres".

The right to health as an integral human right was captured in legislation as a result of public movement for health in the 19th century. For example, in Germany, from 1820 to 1850, there was a movement for health, representatives of which substantiated responsibility of state for the health of the population in general, as well as for the improvement of the quality of healthcare for poor people. As a result, in the 19th century, state's responsibility for the health of the population was determined and first domestic healthcare laws were adopted. Later, in the 20th century, we see recognition of health as a human right in international law, which is ensured through effective national healthcare systems. Healthcare, according to A. Bieliakov, is one of the ways available to a state to carry out its obligation to ensure one of the main human rights – the right to health. Its origin is largely connected with formation of healthcare systems in European countries.

The next step was securing this right on a universal level through adoption of international treaties that established substantive law for healthcare. Recognition of the right to health as one of the socio-economic human rights at the universal level was first documented at the UN Conference held in San Francisco in 1945. At this conference, the delegation from Brazil submitted a Memorandum, which cited Archbishop of New York Spellman regarding medicine being one of the world's backbones, which brought about the adoption of the Declaration on establishment of the World Health Organisation. The Memorandum resulted in capturing in Art.55 of the UN Charter of the provision stating that in order to create conditions for stability and well-being, necessary for peaceful and friendly relations between states, it is also necessary to solve international issues in healthcare.

Later, the right to the highest attainable standard of health ("*the right to health*",[9] "*droit a la santé*") was captured in the 1946 WHO Constitution, which states that "health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". Also, the Preamble says that "enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition".

In 1958-1968, the attitude to healthcare as a human right took shape in the WHO activities. Thus, the WHO Director-General at the time M.G. Candau noted: "People are starting to make demands regarding healthcare and consider it their legitimate right".[10]

The next step in refining **the right to health** was the adoption of the Alma-Ata Declaration of 1978 and the World Health Declaration approved by the World Health Assembly in 1998. The right to health was also enshrined in a number of international and regional human rights documents.

Having ratified the WHO Constitution, all Member States of the WHO have committed to ensure and guarantee the right to health, thereby recognising its universal character. Positive international law, for the first time, reflected the concept of the human right to health. It should be noted that national healthcare standards may differ significantly from the economic, social and democratic level of a state, this is why WHO adopted a number of recommendations that establish minimum requirements for the health care sectors.

Thus, the main significance of defining the right to health in the WHO Constitution is that it **became the subject of protection and regulation by international law**, having thus become the starting point for further development and specification of this right in other international and national documents.

The Universal Declaration of Human Rights of 1948 talks about health as part of the right to an adequate standard of living: everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services. So in the Universal Declaration of Human Rights, the right to health is placed alongside other social human rights as an element of a broad right to an adequate standard of life, necessary to sustain health and well-being of a person and his family. However, during the development of the Declaration, another version was considered, which captured the right to health in a separate Art.33: "Availability of highest attainable standards

7 Brigit Toebes. The right to health: policy and practice.

8 For example, in the Russian Empire, medical police was established, which was the prototype of the modern sanitary and epidemiological service, first health legislation was passed: "On preserving the cleanliness of streets to prevent contagious diseases" (1737), "When importing silk and wool from Constantinople to Russia subject to quarantine" (1762); similar medical police authorities were established in many European countries. Worth mentioning is also the first legal regulation of pharmaceutics, specifically, "On customs clearance of supplies brought according to the Pharmaceutical Order" (1689); Marine Charter (1720), which contains a section "On conditions for the sick", with special emphasis on organisation of sanitary and epidemiological measures for emergency evacuation of contagious patients from ships.

9 This is the term contained in the WHO Constitution and other international legal documents, the one that is being used on the international level. It helps us realise that it is not just about healthcare, but also about the right to a number of conditions, without which enjoyment of health is impossible, namely: access to clean drinking water, healthy ecological environment, etc.

10 Bieliakov A. World Health Organisation as the central authority for ensuring the human right to health. – Russian Justice, 2009, No.8, p.19.

of health is an inalienable right of every person regardless of their financial or social status in society. Responsibility of the state and society for public health should be ensured through appropriate measures in the medical and social fields", which would allow to define the place of the right to health in the catalogue of human rights as belonging to the category of natural human rights. Certainly interesting is the fact that the USSR representative spoke against the adoption of an overly unspecified "abstract" right to health, insisting on capturing a more specific wording – "right to healthcare", while the representative of France proposed to add to this list satisfactory living conditions, nourishment and medical assistance.

The Universal Declaration of Human Rights is not legally binding, but its provisions have long been used as rules of customary international law, compulsory in nature, which has repeatedly found confirmation in the decisions of the International Court of Justice.[11]

The most precise interpretation of the right to health is contained in the International Covenant on Economic, Social and Cultural Rights of 1966 (the Covenant). It was the provisions in Art.12 that stopped the debate on the causes and consequences of absence in the text of the Universal Declaration of Human Rights of the directly captured right to health. Article 12 says that states parties to the Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This article also contains a list of steps to be taken by the states to achieve the full realisation of this right:

- the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- the improvement of all aspects of environmental and industrial hygiene;
- the prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- the creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Provisions of the article on the right to health are to be understood as the right to use, if necessary, different services, goods and conditions in order to achieve the highest attainable level of health.

Also Art.12 of the Covenant demonstrates understanding of the right to health, along with other socio-economic rights, first of all, as a comprehensive right, and correlates well with the definition in the WHO Constitution. The contents of the article show an attempt to define the indicators of health in a society (stillbirth-rate, infant mortality), determine high-risk groups (infants, children). The scope of the Covenant includes traditional approaches to the concept of public healthcare (subparagraphs *b* and *c*), as well as specially highlights the necessity of medical care and assistance. So the list of measures mentioned in p.2 of Art.12 of the Covenant reflects an attempt to interpret the term "health" in the broadest sense, encompassing protection of environment, healthcare, occupational diseases and other issues. Also, articles of the Covenant define the right of specialised UN agencies to participate in the monitoring of the process of implementation of its provisions (Articles 16, 17, 18, 20, 21, 22).

As of today, not all states have become parties to the Covenant,[12] but they recognise the content and the compulsory nature of the right to health, which results in appropriate provisions being written into the constitutions and legislation, as well as participation in the activities and programmes of international organisations, which ensure the right to health on the international level. So we can say that the right to health, which has become universally recognised, is developing as customary law.

The right to health also encompasses the notion of "health promotion" according to Ottawa Charter for Health Promotion of 1986, where this term is explained as justice and equality in the health sector. From the standpoint of the state, according to the Ottawa Charter for Health Promotion, health promotion is based on the well-being of citizens and a healthy lifestyle.

During the time that has passed since the declaration of the human right to health in the WHO Constitution, the Universal Declaration of Human Rights, the Covenant of 1966, the set of regulations that characterise the right to health has evolved and acquired certain internal structure and hierarchy. Provisions of the international acts regulate various aspects in the health sector – from preventive care and preventing epidemics and pandemics, combating the tobacco epidemic to ethical issues related to intervention of medicine in human life (biomedical human rights).

There are also different approaches to the right to health, in particular, "the right to healthcare",[13] "human rights in the healthcare sector", "social rights in the healthcare sector",[14] "individual rights in the healthcare sector".[15]

[11] The International Court stated that the Declaration is the act of authoritative interpretation and application of the UN Charter and should be regarded as an integral extension of the Charter. Western Sahara. Advisory Opinion. – ICJ Reports, 1975, *www.icj-cij.org/docket/index.php?sum=323&code=sa&p1=3&p2=4&case=61&k=69&p3=5*.

[12] China, Indonesia, Saudi Arabia are not parties to the Covenant; signed without ratification: USA, Cuba, South Africa, Sao Tome and Principe, Republic of Palau, the Union of the Comoros, Belize.

[13] See: par. e of part 4, Art.5 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965; Art.11 of the European Social Charter (revised) of 1996.

[14] Declaration on the promotion of patients' rights in Europe, 1994 – *http://www.privatmed.in.ua/viewtopic.php?t=93&sid=91b775c1aa086af8e45e8f94660f3052*.

[15] Ibid.

"The right to healthcare" means the right to access different institutions, goods and services, as well as conditions necessary to achieve the highest attainable level of health.[16] I. Seniuta notes that a person's right to healthcare is one of the most important natural, inherent, inalienable and inviolable human rights, guaranteed to every person as a member of civil society by the non-interference of state in his personal and family life, protection of his life and health, personal security and safety.[17] Such definition points out the comprehensive nature of the right to health. In our opinion, such approach is an unjustified expansion of the content of the right to health, which combines it with other natural, inherent, inalienable human rights, including the right to life and respect for private and family life. These categories of rights are independent, although interrelated, which is confirmed by the practices of the European Court of Human Rights (ECtHR).

There is also another approach to "human rights in the healthcare sector", according to which, human rights in the healthcare sector include the entire scope of rights related to healthcare, recognised by international law and amended by bioethics principles.[18] This approach aims at a comprehensive coverage of the different components of the right to health associated with different areas of healthcare: from the requirements to national healthcare systems to provide medical assistance to capturing biomedical human rights, patient rights, the right to palliative care.

Declaration on the promotion of patients' rights in Europe of 1994 says that "social rights in the healthcare sector" belong to the category of rights, which are the achievement of the entire society, and are a part of social obligations undertaken by state, government or private institutions to provide adequate medical care; they entail equal access to healthcare services for the entire population of a state or other geopolitical area, and the elimination of unjustified discriminatory barriers – financial, geographical, cultural, social or psychological.[19] Thus, the main emphasis is placed on the social nature of the right to health. Separately specified and set against the "social rights in the healthcare sector" are the "individual rights in the healthcare sector" as the right to integrity, to privacy, to confidentiality and religious beliefs.[20] Such contrasting approaches reflect **the two regimes of the right to health, namely, collective and individual**.

The right to health and human rights related to health have been included in different universal and regional treaties. During international UN conferences and conferences of specialised international institutions, states have undertaken some far-reaching international legal obligations to ensure the right to health, both in general and targeting specific groups of population, who are often discriminated against, including women, children, migrants, people living with HIV/AIDS. This tendency was also supported on the regional level.

The right to health is also guaranteed by international documents dedicated to protecting the rights of certain categories of persons: racial and ethnic groups,[21] women,[22] children,[23] migrant workers,[24] persons with various disabilities,[25] refugees.[26]

Article 24 of the Convention on the rights of the child (1989) talks about access to healthcare services, which are described as "facilities for the treatment of illness and rehabilitation of health". The Convention is of particular interest because it contains a detailed list of measures necessary to realise children's right to health, specifying the obligations of a state in this field (Art.24).

It is also necessary to pay attention to a regional agreement in the field of child protection – the African charter on the rights and welfare of the child of 1990. The Charter captures the right of the child to the best attainable state of physical, mental and spiritual health (Art.14). Further, the text of the Charter contains a detailed list of states' obligations, generally repeating the text of the Convention.

[16] Compilation of general comments and general recommendations adopted by human rights treaty bodies. – International human rights instruments, Vol. I, 4 July 2000, *http://www2.ohchr.org/english/bodies/icm-mc/docs/8th/HRI.GEN.1.Rev9_ru.pdf*.

[17] Seniuta I. Medical law: a person's right to healthcare: Monograph. – Lviv: Astroliabia, 2007, p.19.

[18] International glossary. – http://healthrights.org.ua/praktichnii-posibnik/glosariji/mizhnarodnii-glosarii.

[19] Declaration on the promotion of patients' rights in Europe.

[20] Ibid.

[21] International Convention "On the elimination of all forms of racial discrimination" of 1965; ILO Convention No.169 "On indigenous and tribal peoples in independent countries"; Declaration "On the rights of persons belonging to national or ethnic, religious and linguistic minorities" of 1992.

[22] Convention "On the elimination of all forms of discrimination against women" of 1979; Declaration "On the elimination of violence against women" of 1993; ILO Convention No.183 "Concerning the revision of the maternity protection convention (revised), 1952" of 2000.

[23] Convention "On the rights of the child" of 1989; ILO Convention No.138 "On the minimum age for admission to employment" of 1973; ILO Convention No.182 "On the worst forms of child labour" of 1999; United Nations standard minimum rules for the administration of juvenile justice of 1985.

[24] International Convention "On protection of the rights of all migrant workers and members of their families" of 1990.

[25] Declaration "On the rights of mentally retarded persons" of 1971; Declaration "On the rights of disabled persons" of 1975; Standard rules on the equalisation of opportunities for persons with disabilities of 1993; Principles for the protection of persons with mental illness and the improvement of mental health care of 1991.

[26] Convention relating to the status of refugees of 1951.

The foundation of international legal regulation of non-discrimination in the context of the right to health are the provisions of the Convention on the elimination of all forms of discrimination against women (1979), Convention on human rights and biomedicine (1997), International convention on the elimination of all forms of racial discrimination (1965), European convention on social and medical assistance (1972), Declaration on the human rights of individuals who are not nationals of the country in which they live (1985).

Article 12 of the Convention on the elimination of all forms of discrimination against women stresses elimination of discrimination against women at the time of accessing medical services, as well as the need to ensure prenatal and postpartum care. With regard to prohibition of discrimination concerning the right to health, we should also mention the International convention on the elimination of all forms of racial discrimination, according to par. e, p. iv, Art.5 of which, states undertake the obligation to "to prohibit and to eliminate racial discrimination ... especially in regard to realisation ... of the right to public health, medical care".

The right to health is reflected in the documents adopted by the UN at the turn of the millennium.[27] Out of the eight goals formulated in the United Nations Millennium Declaration in the field of development, half are directly related to the right to health: "reduce maternal and child mortality; halt the spread of HIV/AIDS, malaria and other major diseases that afflict humanity, and begin to reverse them; encourage the pharmaceutical industry to make essential drugs more widely available and affordable by all", etc.

This tendency also did not bypass UN institutions, which expressed their concern regarding the realisation of this right through adopting resolutions of the UN General Assembly,[28] UN Human Rights Council,[29] decisions of the UN Economic and Social Council,[30] reports of Secretary-General[31] and other bodies.

The universal level of capturing the human right to health is an important guarantee of recognition of this right by the global community, it defines the development of international cooperation in this area and the

[27] We the peoples: the role of the United Nations in the twenty-first century. – Report of the Secretary-General dated 27 March 2000, *http://www.un.org/russian/conferen/millennium/sgrep.htm*.

[28] UN General Assembly resolutions: Health as an integral part of development, A/RES/34/58 dated 29 November 1979 – *http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/381/53/IMG/NR038153.pdf*; Protection against products harmful to health and the environment, A/RES/37/137 dated 17 December 1982 – *http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/431/23/IMG/NR043123.pdf*; Need to ensure a healthy environment for the well-being of individuals, A/RES/45/94 dated 14 December 1990 – *http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/569/99/IMG/NR056999.pdf*; Traditional or customary practices affecting the health of women and girls, A/RES/52/99 dated 12 December 1997 – *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/766/41/PDF/N9876641.pdf*; Enhancing capacity-building in global public health, A/RES/58/3 dated 17 November 2003 – *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/453/11/PDF/N0345311.pdf*; The right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/RES/58/173 dated 10 March 2004 – *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/504/98/PDF/N0350498.pdf*; Enhancing capacity-building in global public health, A/RES/59/27 dated 23 November 2004 – *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/477/84/PDF/N0447784.pdf*; Enhancing capacity-building in global public health, A/RES/60/35 dated 8 February 2006 – *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/489/72/PDF/N0548972.pdf*; Smoke-free United Nations premises, A/RES/63/8 dated 11 December 2008 – *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/471/29/PDF/N0847129.pdf*; Recognition of sickle-cell anaemia as a public health problem, A/RES/63/237 dated 17 March 2009 – *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/485/03/PDF/N0848503.pdf*; years 2001-2010: Decade to roll back malaria in developing countries, particularly in Africa, A/RES/64/79 dated 16 February 2010 – *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/466/59/PDF/N0946659.pdf*; Global health and foreign policy, A/RES/64/108 dated 19 February 2010 – *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/468/33/PDF/N0946833.pdf*; Globalisation and its impact on the full enjoyment of all human rights, A/RES/64/160 dated 12 March 2010 – *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/471/45/PDF/N0947145.pdf*; Prevention and control of non-communicable diseases, A/RES/64/265 dated 20 May 2010 – *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/477/75/PDF/N0947775.pdf*; The human right to water and sanitation, A/RES/64/292 dated 3 August 2010 – *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/479/37/PDF/N0947937.pdf*; Global health and foreign policy, A/RES/65/95 dated 10 February 2011 – *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/518/26/PDF/N1051826.pdf*; Organisation of the 2011 comprehensive review of the progress achieved in realising the Declaration of commitment on HIV/AIDS and the Political declaration on HIV/AIDS, A/RES/65/180 dated 30 March 2011 – *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/523/36/PDF/N1052336.pdf*; Scope, modalities, format and organisation of the High-level meeting of the General Assembly on the prevention and control of non-communicable diseases, A/RES/65/238 dated 7 April 2011 – *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/526/84/PDF/N1052684.pdf*; Consolidating gains and accelerating efforts to control and eliminate malaria in developing countries, particularly in Africa, by 2015, A/RES/65/273 dated 19 July 2011 – *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/528/94/PDF/N1052894.pdf*; Political declaration of the High-level meeting of the General Assembly on the prevention and control of non-communicable diseases, A/RES/66/2 dated 24 January 2012 – *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/458/96/PDF/N1145896.pdf*; Globalisation and its impact on the full enjoyment of all human rights, A/RES/66/161 dated 22 March 2012 – *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/468/50/PDF/N1146850.pdf*.

[29] Resolutions: 2002/32 and 2001/33 on access to medication in the context of pandemics such as HIV/AIDS; 2002/31 on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; 2001/35 on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights.

[30] The right of everyone to the enjoyment of the highest attainable standard of physical and mental health. – ECOSOC Decision 2002/259, UN Doc. E/2002/INF/2/Add.2.

[31] "On the theme of the 2009 high-level segment of the Economic and Social Council: Current global and national trends and their impact on social development, including public health." – Report of the Secretary-General, E/2009/53 dated 23 April 2009, http://daccess-ods.un.org/TMP/4406281.70967102.html; "Theme of the coordination segment: implementing the internationally agreed development goals and commitments in regard to global public health." – Report of the Secretary-General, E/2010/85 dated 24 May 2010, *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/373/84/PDF/N1037384.pdf*.

presence of international legal cooperation, imposes an obligation on the states to create mechanisms of support for this right, including legislative, administrative, judicial measures.

Having analysed the provisions of international legal documents in the field of healthcare, we can conclude that **the right to health belongs to natural, inherent, inalienable and inviolable human rights, and is accompanied by the following types of subjective rights: guaranteed right to access to national healthcare systems; the right to information about factors that affect health; the right to medical and social care, including primary medical assistance**.

The guaranteed right to access to national healthcare systems is enshrined in the European Social Charter (revised), which has defined one of the aims of its policy as attainment of conditions in which the right of every person to benefit from any measures enabling him to enjoy the highest possible standard of health attainable, may be effectively realised (Part I, p.11). The European Committee of Social Rights has specified this commitment, stating that in order to execute it, a state must have an adequate healthcare system financed primarily from the state budget. Comment No.14 prepared by the UN Committee on Economic, Social and Cultural Rights said that access to healthcare system services and to information about factors that affect health are the necessary components of the right to health.[32]

The right to information about factors that affect health is captured in p.2 of Art.11 of the European Social Charter (revised) that talks about the obligation of Charter Parties to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health. In the context of this right, interesting is provision in p.2 of Art.10 of the Convention on human rights and biomedicine: everyone is entitled to know any information collected about his or her health. However, the wishes of individuals not to be so informed shall be observed.

The right to social and medical assistance, including primary medical assistance, is guaranteed by p.13 of Part I of the European Social Charter (revised), specifically, the right of each person without adequate resources to medical assistance. In the context of this right, important is the content of p.1 in Part II of Art.13 of the Charter: States undertake the obligation to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition. Part V of the Alma-Ata Declaration on primary health care of 1978 states that Governments have a responsibility for the health of their people which can be fulfilled only by the provision of adequate health and social measures. Similar provisions are contained in par. d of Art.12 of the International Covenant on Economic, Social and Cultural Rights; p.1 of Art.24 of the Convention on the rights of the child.

Thus, **implementation of international legal provisions on the right to health is directly dependent on the current level of development of medical science and technology, and above all of the healthcare system itself**.

The right to health has a tight genetic and functional connection with other rights. Committee on Economic, Social and Cultural Rights stated that the right to health is closely linked with the enjoyment of other human rights and depends on their enjoyment, including the right to nourishment, housing, work, education, participation, the use of benefits of scientific progress and application of its results, life, non-discrimination, equality, prohibition of torture, privacy, access to information and freedom of association, assembly and movement.[33]

Thus, we can conclude that **the existing international agreements that enshrine human rights in the area of health use different forms of wording, which cover medical assistance, as well as other health conditions**. The right to health is a basic universally recognised inherent human right enshrined in many international universal and regional treaties and confirmed in numerous declarations and resolutions of international organisations and conferences. Its place in the catalogue of human rights is determined by the fact that it is inseparably linked with other natural, inherent, inalienable human rights, including the right to life and respect for private and family life, while at the same time being an independent comprehensive right.

National healthcare legislation should be based on provisions of international treaties and customary international law. However, the content of international legal documents does not provide a clear understanding in regard to the scope of rights of an individual and the corresponding scope of a state's obligations as to realisation of the right to health, i.e. does not give a full answer to the question of the legal meaning of this right.

On the national level, the highest legal power is in capturing the right to health in the constitution. The right to health or the right to healthcare is recognised in 115 constitutions, and six constitutions talk about the obligation of the state to develop healthcare services or allocate a certain budget for healthcare.[34]

[32] See ref. 16.

[33] Ibid.

[34] The Right to Health, Fact Sheet No. 31 – Human Rights, United Nations, Geneva, 2008, *http://www.ohchr.org/Documents/Publications/Factsheet31ru.pdf*.

THE RIGHT TO HEALTH IN THE CONSTITUTIONS OF INDIVIDUAL COUNTRIES

On the constitutional level, the right to health is guaranteed in the constitutions of: UAE, Cuba, the Philippines, Romania, Lithuania, Seychelles, Belgium, Belarus, Azerbaijan, Armenia, Kazakhstan, Ukraine, Finland, Serbia, Thailand, Kyrgyz Republic, Latvia, Morocco, Egypt.

Thus, in the Constitution of the **Arab Republic of Egypt** of 2014, healthcare questions are determined in great detail in Art.18, which guarantees the right to health, defines state policy in the healthcare sector, establishes the rights of healthcare workers. Article 18 defines that each citizen has the right to health and to general high-quality medical assistance, and refusing a person in an emergency or a life threatening situation any type of medical assistance is a crime.[35] Also, the state guarantees preservation and support of the public healthcare system and will enhance its effectiveness and equitable geographical distribution. According to the Constitution, Egypt commits to allocating a percentage of government spending that is no less than 3% of the GDP for healthcare. It will gradually increase this percentage until it reaches the maximum rate. The next commitment is establishing a comprehensive health care system for all Egyptians covering all types of assistance.

The Constitution of **Egypt** separately specifies the rights of doctors, and the government commits to improve the working conditions of physicians, nursing staff, as well as health sector workers, and to ensure achievement of justice for them. All health facilities as well as health-related ones are subject to State control, also the State encourages participation of private and nongovernmental sectors in providing healthcare services according to the Law.[36]

Article 29 (the right to healthcare) of the Constitution **of the Republic of Seychelles** of 1993 defines that the State recognises the right of every citizen to protection of health and to the enjoyment of attainable standard of physical and mental health[37] and with a view to ensuring the effective exercise of this right the State undertakes: (*a*) to take steps to provide for free primary health care in State institutions for all its citizens; (*b*) take appropriate measures to prevent, treat and control epidemic and other diseases; (*c*) to take steps to reduce infant mortality and promote the healthy development of the child; (*d*) to promote individual responsibility in health matters; (*e*) to allow, subject to such supervision and conditions as are necessary in a democratic society, for the establishment of private medical services.[38] Paragraph (c) of Art.29 differs from all similar constitutional provisions that capture the obligation of the state in the health protection sector, namely, by mentioning control of infant mortality; it should be noted that this problem is a major issue in the healthcare sector, as reflected in the reports, programmes, action plans of the WHO. The Constitution reflects the WHO approach to the right to health through providing the attainable level of physical and mental health, as enshrined in the WHO Constitution.

Constitution **of the Kingdom of Thailand** of 2007 has a whole part (9), dedicated to the right to services in the healthcare and social security sectors. Article 51 guarantees that a person shall enjoy an equal right to receive standard public health service, and the indigent shall have the right to receive free medical treatment from State's infirmary. Also, the public health service shall be provided thoroughly and efficiently by the State, and the State shall promptly and without charge prevent and eradicate contagious diseases harmful for the public. This commitment of the state reflects the epidemiological problems of the region. Paragraph 1 of Art.52 says that children and youth shall enjoy the right to a decent life and to receive physical, mental and intellectual development in the environment suitable for such purposes. So, here we see the obvious interconnection of the right to health and environmental human rights. Paragraph 2 of Art.52 defines that children, youth, women and their family members have the right to medical treatment or rehabilitation. Article 54 guarantees persons of unsound mind the right to access and to utilise appropriate aids from the State.[39]

Article 15 of the Constitution **of the Philippines** of 1987 indicates that the State shall protect and promote the right to health of the people and instill health consciousness among them. Also, the right to health is captures in Article 14 regarding healthy working conditions; Art.19 on the State promotion of development of healthy and active citizens; Art.16 on the obligation of the State to protect and advance the right of the people to a balanced and healthy environment.[40] So in the Constitution of the Philippines the approach to the right to health is evidently ecological.

A detailed right to healthcare is seen in the Constitution of **Cuba** of 1976, specifically, in Art.42, where the State establishes the right, won by the Revolution, of its citizens, without distinction based on race, colour and national origin to be given medical care in all medical institutions, and in Art.49, according to which everyone has the right to health protection and care, and the State guarantees this right by providing free medical and hospital care by means of institutions of the rural medical service network, polyclinics, hospitals and preventive and specialist treatment centres; also, provision of free dental care is guaranteed.[41] State undertakes, according to Art.49, to promote networks of institutions that conduct health publicity campaigns and health education, regular medical examinations, general vaccinations and other measures to prevent the outbreak of disease.[42]

Article 23 of the 1994 Constitution of **Belgium** says that everyone has the right to lead a life in conformity with human dignity, realising the right to social security,

35 Egypt's Constitution of 2014 – *https://www.constituteproject.org/constitution/Egypt_2014.pdf*.
36 Ibid.
37 This is the definition contained in the WHO Constitution.
38 Constitution of the Republic of Seychelles of 1993 – *http://www.electionpassport.com/files/SC-Constitution-2011.pdf*.
39 Constitution of the Kingdom of Thailand (2007) – *http://legalportal.am/download/constitutions/220_ru.pdf*.
40 Constitution of the Republic of the Philippines (1987) – *http://legalportal.am/download/constitutions/175_ru.pdf*.
41 Constitution of the Republic of Cuba (1976) – *http://legalportal.am/download/constitutions/57_ru.pdf*.
42 Ibid.

to health care and to social, medical and legal aid, as well as the right to enjoy the protection of a healthy environment.[43]

Constitution of **Finland** of 1999 in Section 19 states that public authorities shall guarantee for everyone, as provided in more detail by an Act, adequate social, health and medical services and promote the health of the population.[44]

Article 68 (healthcare) of the 2006 Constitution of **Serbia** guarantees that everyone shall have the right to protection of their mental and physical health, also, healthcare for children, pregnant women, mothers on maternity leave, single parents with children under seven years of age and elderly persons shall be provided from public revenues unless it is provided in some other manner in accordance with the law.[45] The Republic of Serbia shall assist the development of health and physical culture.[46]

Constitution of the **United Arab Emirates** indicates in Article 19 that the community undertakes the responsibility to take care of its citizens, protect them and provide with medical care, and shall promote the establishment of public and private hospitals, clinics, and treatment houses.[47]

Article 33 (Right to protection of health) of the 1991 Constitution of **Romania** establishes that the right to the protection of health is guaranteed and the State is bound to take measures to ensure public hygiene and health, while organisation of the medical care and social security system in case of sickness, accidents, maternity and recovery, the control over the exercise of medical professions and paramedical activities, as well as other measures to protect physical and mental health of a person shall be established according to the law.[48]

Article 31 of the 2011 Constitution of the **Kingdom of Morocco** indicates that the State, the public establishments and the territorial collectivities work for the mobilisation of all the means available to facilitate the equal access of the citizens to conditions that permit their enjoyment of the right to healthcare and social protection, medical coverage and to the mutual or State insurance.

The right to health is enshrined in all constitutions of post-Soviet states. Thus, the 1992 Constitution of the **Republic of Lithuania** in p.1 of Art.53 captures the commitment of the State to take care of people's health and guarantee medical aid and services for the human being in the event of sickness; also the Law establishes the procedure for providing medical aid to citizens free of charge at State medical establishments.[49] Article 41 (Right to protection of health) of the 1995 Constitution of the **Republic of Azerbaijan** says that everyone has the right to protection of his/her health and for medical care, also the state takes all necessary measures for development of all forms of health services based on various forms of property, guarantees sanitary-epidemiological safety, creates possibilities for various forms of medical insurance, while officials concealing facts and cases dangerous for life and health of people will bear legal responsibility.[50] Article 38 of the 1995 Constitution of the **Republic of Armenia** defines that everyone has the right to benefit from medical aid and healthcare services under conditions defined by law, and specifies that everyone has the right to benefit from basic medical aid and services free of charge, with the list and the procedure of providing services being established by law.[51] State guarantees everyone the right to health and basic medical assistance according to p.111 of the 2010 Constitution of **Latvia**.[52]

The 1994 Constitution of **Belarus** contains provisions, according to which citizens of the Republic of Belarus are guaranteed the right to healthcare, including treatment in public healthcare facilities free of charge. Also, the State creates conditions for accessible medical services for all citizens (Art.45). The Constitution of Belarus also captures the rights that arise from the right to health. Thus, the right to healthcare is also ensured through the development of physical culture and sports, environment enhancement means, ability to use recreational facilities, improvement of occupational safety.[53]

Article 29 of the 1995 Constitution of **Kazakhstan** indicates that citizens of the Republic have the right to protection of health and are entitled to free, guaranteed, extensive medical assistance established by law, while paid medical treatment is provided by state and private medical institutions as well as by persons engaged in private medical practice on the terms and according to the procedures stipulated by law.[54]

Constitution of the **Kyrgyz Republic** of 2010, Art.47, guarantees that everyone shall have the right to health protection; the State shall create conditions for medical servicing of everyone and shall take measures to develop public, municipal and private healthcare sectors; free medical services as well as medical services at reduced rates are provided within the volume of state guarantees defined by the law. Constitution of the Kyrgyz Republic contains provisions on establishing legal responsibility for officials concealing facts and circumstances dangerous for life and health of people (p.4 of Art.47).[55]

[43] Constitution of Belgium (1994) – *http://www.urzona.com/index.php?option=com_content&view=article&id=454:---17--1997-&catid=65:2010-07-22-19-48-30&Itemid=77*.
[44] Constitution of Finland (1999) – *http://www.finlex.fi/fi/laki/kaannokset/1999/ru19990731.pdf*.
[45] Constitution of Serbia (2006) – *http://www.wipo.int/wipolex/ru/text.jsp?file_id=191259*.
[46] Article 68 (healthcare) of the Constitution of Serbia.
[47] Constitution of the United Arab Emirates (1971, with amendments of 2004). – *kdpd.uabs.edu.ua/images/department/kdpd/../OAE.doc*.
[48] Constitution of Romania (1991) – *www.parliament.am/library/../ROMANIA.doc*.
[49] Constitution of the Republic of Lithuania (1992) – *http://www3.lrs.lt/home/Konstitucija/Konstitucija_RU.htm*.
[50] Constitution of the Republic of Azerbaijan. – *http://ru.president.az/azerbaijan/constitution*.
[51] Constitution of the Republic of Armenia (1995) – *http://www.parliament.am/parliament.php?id=constitution&lang=rus*.
[52] Constitution of the Republic of Latvia (2010) – *https://www.cvk.lv/pub/public/29171.html*.
[53] Constitution of the Republic of Belarus (1994) – *http://pravo.by/main.aspx?guid=14551*.
[54] Constitution of the Republic of Kazakhstan (1995) – *http://www.akorda.kz/ru/official_documents/constitution*.
[55] Constitution of the Kyrgyz Republic (2010) – *http://www.gov.kg/?page_id=263&lang=ru*.

Below are the main components of the right to health as captured in the basic laws of states:

- the right to high-quality medical assistance;
- the right to primary/urgent/emergency healthcare;
- the right to attainable standard of physical and mental health;
- the right to appropriate assistance to persons with mental illness;
- the right to healthy working conditions;
- the right to healthy environment.

Constitutions contain states' commitment to:

- determine state policy in the healthcare sector;
- establish a comprehensive healthcare system;
- control epidemics and other diseases;
- reduce infant mortality and promote the healthy development of the child, maternity;
- ensure sanitary-epidemiological safety of the state.

The fundamental laws of countries do not contain the right to access to high-quality affordable medicines and reproductive rights.

The right to health protection, medical assistance and health insurance are also guaranteed to everyone by the Constitution of **Ukraine** of 1996, specifically, p.1 of Art.49. There is an inconsistency in between p.1 and p.3 of Art.49. Paragraph 3 of Article 49 states that the State creates conditions for effective and accessible to all citizens medical care. State and communal health protection institutions render medical care free of charge; the existing network of such institutions shall not be reduced.

In order to interpret the content of the right to protection of health, it is necessary to define the term "medical care" in national legislation. Term "medical care" is used in the preamble, Articles 4, 16, 25, 33, 37, 52, 58, 60, 78 of the Basic Law of Ukraine "On Health Care" (1992). As noted by I. Seniuta, the right to medical care should be interpreted as the captured in the legislation and guaranteed by the state ability of every person to obtain from a healthcare institution or a private practice doctor, who carry out professional activity according to the applicable law, a complex of measures aimed at prevention, diagnosing, treatment and rehabilitation, in order to preserve, strengthen, develop and, in case of deterioration, restore the highest attainable level of physical and mental state of the human body.[56] Articles 33, 35, 58, 67, 68, 77 of the 1992 Basic Law of Ukraine "On Health Care" define components of medical care (emergency, urgent, primary, specialised, highly specialised, etc).

According to p.3 of Art.49 of the Constitution of Ukraine, "state and communal health protection institutions render medical care free of charge", which the Constitutional Court interprets in such a way that state and communal healthcare institutions provide medical care to all citizens of Ukraine regardless of the scope and without previous, current or following payment for such assistance.[57]

Thus, analysis of provisions of the Constitution of Ukraine and the Constitutional Court judgment shows that only the citizens of Ukraine have the right to free medical care, including emergency, urgent, primary, specialised, highly specialised care. The right to medical care, including emergency, urgent, primary, specialised, highly specialised care for foreign nationals, stateless persons, including refugees, is not guaranteed by the Basic Law of Ukraine.

So this raises the issue of guaranteeing the right to emergency (urgent) care to the abovementioned categories of persons. Unlike other categories of foreigners, refugees and related categories are unable to realise their natural right to health within their state of nationality, which raises the issue of ensuring their right to health in the receiving state along with citizens of this state.

Paragraph 1 of Art.3 of the Law of Ukraine "On Emergency Medical Care" of 2012 notes that foreign nationals and stateless persons, temporarily staying in

[56] Seniuta I. Human right to medical care: some theoretical and practical aspects. – Medical law of Ukraine: legal status of patients in Ukraine and its legislative support (genesis, development, problems and prospects of improvement). Materials of the 2nd All-Ukrainian scientific and practical conference, 17-18 April 2008, Lviv, p.282.

[57] Judgement of the Constitutional Court of Ukraine in the case of constitutional appeal by 53 people's deputies of Ukraine on the official interpretation of provision in paragraph 3 of Article 49 of the Constitution of Ukraine: "State and communal health protection institutions render medical care free of charge" (case on provision of medical services free of charge) No.10 dated 29 May 2002. – Website of the Verkhovna Rada of Ukraine, *http://zakon4.rada.gov.ua/laws/show/v010p710-02/paran54#n54*.

Ukraine are provided with emergency medical care in the manner determined by the Cabinet of Ministers of Ukraine. Provisions of the Law "On Emergency Medical Care" are further specified in the Resolution of the Cabinet of Ministers of Ukraine "On the order of providing medical care to foreign nationals and stateless persons permanently residing or temporarily staying in Ukraine, who filed an application for recognition as a refugee or a person in need of additional protection, and in respect of whom a decision has been made to process documents in order to solve the issue of recognising them as a refugee or a person in need of additional protection, or who are recognised as refugees or persons in need of additional protection". The document establishes that all categories of foreign nationals and stateless persons temporarily staying in Ukraine are provided medical care, including emergency care, on a paid basis.[58] Positive is the provision of the Resolution on provision of medical care paid for by the state to foreign nationals and stateless persons permanently residing in Ukraine, foreign nationals and stateless persons recognised as refugees or persons in need of additional protection. Also, a person recognised as a refugee or a person in need of additional protection has equal rights with Ukrainian citizens to healthcare, medical assistance and medical insurance according to p.1 of Art.15 of the Law "On Refugees and Persons in Need of Additional or Temporary Protection". Persons, who have been granted temporary protection also have the right to free urgent medical care in public healthcare institutions.[59]

Progressive changes in the national legislation are connected with the documentation of the provision of the mentioned Resolution of the Cabinet of Ministers of Ukraine on providing emergency medical care free of charge to foreign nationals and stateless persons, who filed an application for recognition as a refugee or a person in need of additional protection, foreign nationals and stateless persons in respect of whom a decision has been made to process documents in order to solve the issue of recognising them as a refugee or a person in need of additional protection. This provision corresponds to practices and principles of operation of the United Nations High Commissioner for Refugees.

Resolution No.121 of the Cabinet of Ministers of Ukraine superseded Resolution No.667 "On the order of providing medical care to foreign nationals and stateless persons temporarily staying in Ukraine, and recognising as void certain resolutions of the Cabinet of Ministers of Ukraine" dated 22 June 2011.[60]

Besides constitutional and legislative guarantees and documentation of the right to health, Ukraine also suffers from system-wide weaknesses in the healthcare system, which creates obstacles for the enjoyment of the right in question. These weaknesses are:

- Ukrainian healthcare system is not focused on the person as the holder of the right to health;
- Ukrainian healthcare system is not focused on disease prevention;
- lack of effective access to healthcare in rural areas;
- lack of necessary medication.

Chapter 22 "Public health" of the Association Agreement between Ukraine and the EU defines main priorities for Ukraine in the healthcare sector, and namely:

- strengthening of the public health system and its capacity in Ukraine;
- prevention and control of communicable diseases (implementation of International Health Regulations of 2005);
- control of non-communicable diseases;
- quality and safety of substances of human origin;
- health information and knowledge (Art.427).

To implement its foreign policy aimed at integration with the EU, Ukraine must gradually bring its legislation and practices in line with the EU law, in particular, in the sector of communicable diseases control, regulation of blood supply and tissues and cells transplantation services, tobacco control, according to EU guidelines and recommendations.

58 Resolution of the Cabinet of Ministers of Ukraine No.121 of 19 March 2014.

59 Part 1 of Art.20 of the Law of Ukraine "On refugees and persons in need of additional or temporary protection".

60 According to the CMU Resolution No.667 dated 22 June 2011, medical care, including emergency care, is provided to foreign nationals and stateless persons temporarily staying in Ukraine at a fee. Provisions of this Resolution were subject of regular criticism by the United Nations High Commissioner for Refugees. See: Ukraine as a country of asylum. Observations on the situation of asylum-seekers and refugees in Ukraine. – UN High Commissioner for Refugees, Geneva, Switzerland, 2013, 45 p.

For example, harmonisation of Ukrainian legislation with the EU law

- in **tobacco control** according to Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, Council Recommendation of 2 December 2002 on the prevention of smoking and on initiatives to improve tobacco control, etc.;
- in **control of communicable diseases** – Decision 2119/98/EC of the European Parliament and of the Council of 24 September 1998 on setting up a network for the epidemiological surveillance and control of communicable diseases in the community, Commission Decision 2002/253/EC of 19 March 2002 laying down case definitions for reporting communicable diseases to the Community network under Decision No.2119/98/EC of the European Parliament and of the Council, etc.;
- **regulation of blood and tissues and cells transplantation services** – Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending Directive 2001/83/EC, Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components, Commission Directive 2005/62/EC of 30 September 2005 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards Community standards and specifications relating to a quality system for blood establishments, Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells, Commission Directive 2006/17/EC of 8 February 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards certain technical requirements for the donation, procurement and testing of human tissues and cells, Commission Directive 2006/86/EC of 24 October 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards traceability requirements, notification of serious adverse reactions and events and certain technical requirements for the coding, processing, preservation, storage and distribution of human tissues and cells, etc.;
- **in other sectors of healthcare** – Council Recommendation 2003/488/EC of 18 June 2003 on the prevention and reduction of health-related harm associated with drug dependence, Council Recommendation 2001/458/EC of 5 June 2001 on the drinking of alcohol by young people, in particular children and adolescents, Council Recommendation 2003/878/EC of 2 December 2003 on cancer screening, Council Recommendation of 31 May 2007 on the prevention of injury and the promotion of safety, Regulation (EC) No.1394/2007 of the European Parliament and of the Council "On advanced therapy medicinal products and amending Directive 2001/83/EC and Regulation (EC) No.726/2004" of 13 November 2007, etc.

CONCLUSIONS

1. The right to health is a universally recognised human right enshrined in international customary and treaty law and closely related to such rights as the right to life, to information, to a healthy environment, to healthy working conditions and others. Ukraine's undisputed international obligation is to ensure the right to health.

2. In most countries of the world the right to health is directly or indirectly enshrined in constitutional acts. Its content ranges from acknowledgment provisions to expanded definition of the concept, components, forms, methods of ensuring of the right to health and its derivative rights.

3. Capturing the right to health in constitutional acts, its level and degree of specification do not directly correlate with its actual execution. In states with a high level of execution of the right to health (USA, Germany, France, Iceland, Denmark) it is not enshrined on the constitutional level.

4. Ukraine's constitutional tradition captures the right to health on the constitutional level. However, its wording is very general, with no specification and definition of conditions for its execution, and is not connected with the actual situation in the provision of the right to health.

5. The right to health has double nature, as it is associated with the quality of life and economic development of the state, which defines its close connection with other socio-economic rights. Therefore, documenting the right to health, a state must take into account its real capabilities to ensure it in connection with other rights.

6. Components of the right to health as enshrined in constitutional acts of states include: the right to high-quality and accessible medical assistance; the right to primary/urgent/emergency healthcare; the right to receive standard public health service; the right to attainable standard of physical and mental health; the right to appropriate assistance to persons with mental illness; the right to receive treatment free of charge; the right to free medical assistance; the right to free medical assistance; the right to medical examination; the right to general vaccination; the right to medical insurance; the right to sanitary-epidemiological safety; the right to healthy working conditions; the right to healthy environment.

7. In our opinion, the right to health must be guaranteed by the Constitution, but its content must correspond to the current situation and possibilities. *First*, provide everyone with a minimum scope of free medical assistance, especially emergency medical assistance and free medical assistance for certain categories of persons; *second*, a state must create conditions for the development of healthcare services system and preconditions for the introduction of the insurance medicine; a state must provide conditions and ensure control of the quality of medical services and the protection of rights of patients and medical staff. The content of the right to health must be specified in separate laws. ■

THE NEED FOR ENSURING NATIONAL SECURITY AS GROUNDS FOR REASONABLE RESTRICTION OF HUMAN RIGHTS IN EUROPEAN CASE-LAW (ACCORDING TO THE EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW)[1]

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The concept of "national security" can be broadly defined as a focus of the state activity, aimed at creating internal and external conditions favourable for preserving or strengthening vital values in the state. In particular, Article 3 of the Constitution of Ukraine provides that "human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State", including activity in the sphere of national security.

In general, "national security" – is a condition that should perfectly ensure and balance the protection of interests of the people, the state, community, society and every individual that belongs to it. In some cases, it is quite difficult to determine the concept of the national security measures system, as such a concept is closely related to subjective and sometimes emotional perception of the threats to national security by members of state administration agencies and military institutions. National security, as noted above, is primarily aimed at protecting the nation from external and internal factors that affect the existence of the essential foundations of contemporary society.

Thus, based on the concept of national security, a modern democratic state, acting on the basis of constitutional norms, has the right to defend itself and the society, which this state serves, from interference by other states or from interference with the legally existing system of the state. At the same time, actions of the state regarding protection of national security should be subordinated to, or properly balanced with, the need to protect human rights and fundamental freedoms.[2] **Based on a broad interpretation of the concept of "national security", the protection of rights and freedoms should be also included in it**.[3]

The concept of "national security" in the Ukrainian legislation is well-defined. In particular, under the Law of Ukraine "On National Security", "national security" is defined as "safeguarding of vital interests pertaining to the person, citizen, society and State of Ukraine that insure the sustainable development of society, through the timely detection, prevention and neutralisation of implicit and explicit threats to national interests". This Law also contains the concept of "threats to national security", defined as "clear and present factors that represent a danger to vital national interests of Ukraine". The concept of "ensuring national security" generally refers to a set of measures and means aimed at preventing and eliminating threats to life of a person, society and state.

[1] The views expressed in the article are those of the author and do not imply the expression of official position on the part of any organisation or institution.

[2] William W. Burke-White. Human Rights and National Security: The Strategic Correlation. – Harvard Human Rights Journal, *http://www.law.harvard.edu/students/orgs/hrj/iss17/burke-white.shtml*.

[3] M. Antonovych The right to security of person under national legislation and international human rights instruments. – National Security of Ukraine (Materials of the conference of Ukrainian graduates of scientific training programmes in the USA, 16-19 September 2004), pp. 69-80.

This concept is similarly defined in national legislations of other countries. In particular, the legislation of the Russian Federation has no concept of "national security"; instead, there is a concept of "state security in general". While at the doctrinal level, the Russian Federation national security is meant the security of its multinational people as the bearers of sovereignty and as the only source of power in the Russian Federation.[4] Quite similar definition of national security is provided in the legislations of the Western countries.

Unlike legislation, doctrinally "national security" of the U.S. is defined by many authors as the development of valid nationally (state)-oriented objectives that define U.S. goals or purposes. On that basis, "national security interests" include protecting political purposes of the United States, U.S. national governance system, in a broad sense – public institutions; fostering economic development of the State and well-being of the nation; supporting the vital interests of the United States and its allies.[5] Overall, at the doctrinal level, "national security" is often defined as a set of measures related to national defence capabilities and foreign relations of the United States.[6]

In the European Court of Human Rights (ECtHR) case-law, the concept of "national security" and a need for ensuring national security often occurs in cases related to alleged violation of Articles 8-12 of the European Convention on Human Rights (i.e., the right to privacy, the right to expression of religious beliefs, the right to freedom of expression and right to information, freedom of association and the right to marry), reported by the applicants. The term is often used to justify restrictions of the aforementioned rights or interference by the state with the exercise of these rights by a person. Thus, **the concept of national security is used as one of the criteria for the limits of acceptable interference with the rights**.

It should be noted that in the case-law of the ECtHR, which is also an interesting and accessible source of research in comparative law, the application of the limits of acceptable interference with human rights, on the basis of need for protection or ensuring national security, should be based on the following elements:

- Interference with the rights of the individual in the interests of national security must be reasonable.
- Interference must be exercised in the interests of national security or for its protection;
- It must be based on legal or regulatory acts, which must be accessible to the person concerned and have foreseeable consequences for the ordinary people and legal professionals;
- Interference with the individual's right, or restriction of this right, exercised in the interests of national security, and implemented in the interests of society as a whole, must be balanced with the interests of the person; the balance is being disclosed in the existing criterion;
- Interfering or restricting the rights of an individual must be proportionate to the legitimate aim (in this instance, the protection of national security interests);
- Interfering or restricting the rights of an individual, aiming at protection of the national security interests is considered as permitted, and one that does not violate individual rights if there are adequate and effective, including due process guarantees, of combating or protection against arbitrary interference or restriction of individual rights by the state.

Let us review these postulates, according to judicial practice in hearing of cases by the ECtHR, particularly in terms of the provisions on national security in the ECtHR case-law.

In particular, in the case of *Stoll v. Switzerland*,[7] regarding disclosure by the applicant of confidential information, contained in diplomatic correspondence of Switzerland and related to the strategy to be adopted by the FDFA of Switzerland on the subject of compensation due to Holocaust victims for unclaimed deposited assets in Swiss bank accounts. As a result of the proceedings heard before national courts, the applicant-journalist was sanctioned with a fine for disclosure of state secrets and for violation of national security interests. In this case, the ECtHR concluded that there had been no violation of Article 10 of the Convention and, consequently, no violation of applicant's right, as the journalist expressed his views on information of high-profile public importance. Nevertheless, the Court decided that publication of the information prepared by the applicant, could not cause "serious damage" to the interests of the state, and harm "national security interests".

It is interesting, that in assessing the interference with the applicant's rights itself, and the proportionality

[4] Varlamov v.Yu. What should a law on national security be like? – Journal "Right and Security", No. 1 (10). March 2004, *http://www.dpr.ru/pravo/pravo_7_12.htm*.

[5] Dictionary of Military Terms – *http://www.dtic.mil/doctrine/dod_dictionary*.

[6] Dictionary of Military and Associated Terms. US Department of Defence, 2005.

[7] See: Judgment by the Grand Chamber of the European Court of Human Rights, case of Stoll v. Switzerland [GC], No. 69698/01, ECHR 2007XIV.

of the interference, in terms of protecting the interests of "national security", the Court considered such elements of national security, relied on by the Government of Switzerland, as protecting the public image of public servants of the diplomatic corps of the FDFA, protecting privacy of personal information, spread by them, protecting foundations of public relations, which actually were equated by the ECtHR with protecting the "national security interests" in the sense of the limits of acceptable interference and restrictions of individual rights under Article 10 of the Convention.

In case of *Pasko v. Russia*,[8] recently heard by the Court, it was concluded that the interference with the applicant's rights, which was made in connection with the distribution of information which constituted state secret by the applicant, was proportionate to the objective of protecting state interests, involving non-disclosure of state secrets to third parties. In this case, the Court has concluded that the concepts of "state interests" and "national security interests" are equal.

In another case which was heard by the Court and dealt with the issue of documents required for the lawsuit of the former public servant of the UK, who worked for the enterprise of strategic importance in Northern Ireland, the definition of the concept of "national security" was equated with such concepts, and interference with individual rights, due to the need to protect the interests of "national security" were equated with protection of the need to take measures to maintain "public order and public security".[9] In a similar case, concerning the employment of persons in military units, the concept of protecting "national security interests" was equated with the need to maintain high morale, combat readiness and operational effectiveness of the Armed Forces of the United Kingdom.[10]

In general, it should be noted that the case-law of the Court regarding national security can be divided into two periods: before 1990 and after 1990, corresponding to the end of the "Cold War". During the first period, the Court has made a number of fundamental decisions, particularly, Klass and *Others v. Germany*[11] and *Leander v. Sweden*,[12] which provide underlying, though quite basic and hardly overly burdensome, principles of state responsibility in the sphere of national security. In other words, the Court has developed a basic approach to the principles of accountability of the national security agencies to the principles of protection of human rights and fundamental freedoms. The court has also defined the requirements for procedural and due process safeguards of protection. The safeguards have primarily touched upon interference with the privacy of correspondence, as in cases of *Kruslin v. France*,[13] *Hewitt and Harman v. United Kingdom*,[14] and *R.V. and Others v. the Netherlands*.[15] However, to some extent, the Court case-law is largely characterized by relatively tolerant approach to determination of how effective the national mechanisms of control over the national security are; such mechanisms were subsequently deemed to have significant defects (e.g., *M.S. and P.S. v. Switzerland*,[16] *L. v. Norway*[17] and *Leander v. Sweden*[18]).

During the "second period" the approach of the Court has changed, although the examples of controversial decisions on the merits of the case can still be found, as in the case of *Christie v. the United Kingdom*[19] or *Kalaç v. Turkey*.[20] This period can be characterized as a period of "enhanced scepticism" of the Court as for the objections from the states, concerning the necessity of interference, which became apparent in a number of cases, including the *Observer and Guardian v. the United Kingdom*,[21] *BLUF v. the Netherlands*,[22] *Vogt v. Germany*.[23] In particular, in these cases, the state generally claims that its representatives are not responsible for limiting the rights of a person, having broad discretionary powers on the basis of protection of national security interests (for example, the case of *Tsavachidis v. Greece*[24]).

Thus, the margin of appreciation in matters of national security shall be considered according to other criteria. In some cases, the Court declares that the state cannot refer to the existence of "limits of legitimate interference", especially with regard to situations of absolute prohibitions (case of *Chagall v. the United Kingdom*[25] regarding

8 See: Judgment by the ECtHR, case of Pasko v. Russia, No. 69519/01 of 22 October 2009.

9 Judgment by ECtHR, case of Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom of 10 July 1998.

10 Judgment by the ECtHR, case of Lustig-Prean and Beckett v. the United Kingdom, Nos. 31417/96 and 32377/96 of 27 September 1999.

11 Judgment by the ECtHR, case of Klass and Others v. Germany, No. 5029/71 of 6 September 1978.

12 Judgment by the ECtHR, case of Leander v. Sweden of 26 March 1987.

13 Judgment by the ECtHR, case of Kruslin v. France of 24 April 1990.

14 Judgment of the Commission, case of Hewitt and Harman v. the United Kingdom, No. 12175/86 of 9 May 1989.

15 Judgment by the ECtHR, case of R.V. and Others v. The Netherlands, Nos. 14084/88, 14195/88, 14109/88, etc., Resolution of the Committee of Ministers of the CoE of 20 June 2007.

16 See: M.S. and P.S. v. Switzerland, Nos. 10628/8310628/83, Comission (Plenary Session), Judgment of 14 October 1985.

17 See: L v. Norway, No. 13564/88, Judgment of Commission of 8 June 1990.

18 See reference 13.

19 See: Christie v. The United Kingdom, No. 21482/93, Judgment by Commission (Plenary Session) of 27 June 1994.

20 See: Judgment by the ECtHR, case of Kalaç v. Turkey Turkey, No. 20704/92 of 1 July 1997.

21 See: Judgment by the ECtHR, case of Observer and Guardian v. the United Kingdom, No. 13585/88 of 26 November 1991.

22 See: Judgment by the ECtHR, case of Vereniging Weekblad Bluf v. The Netherlands, No. 16616/90 of 9 February 1995.

23 See: Judgment by the ECtHR, case of Vogt v. Germany, No. 17851/91 of 26 September 1995.

24 See: Judgment by the ECtHR, case of Tsavachidis v. Greece (strikingout) [Grand Chamber], No. 28802/95 of 21 January 1999.

25 See: Judgment by the ECtHR, case of Chahal v. The United Kingdom, No. 22414/93 of 15 November 1996.

Article 3 of the Convention and the "absolute prohibition of torture"). In other cases, especially regarding Article 6 ("right to a fair trial"), the Court has significantly restricted the limits of reasonable retreat, explicitly or implicitly using the "least intrusive means" (e.g., *Tinnelly and McElduff v. the United Kingdom*[26]). On the other hand, considering the cases in the sphere of national security, the Court has retained and strengthened its standards, exclusively related to the quality of the law (*Kopp v. Switzerland*,[27] *Lambert v. France*,[28] *Amann v. Switzerland*,[29] *Rotaru v. Romania*,[30] etc.). Even regarding the question of effective remedies, the Court finds more scepticism when it comes to state requirements, at least from time to time (*Chahal v. the United Kingdom*[31]).

The European Convention on Human Rights is among the few common standards applicable to almost all countries of the European geographical space, with the exception of Belarus and the Vatican. International legal instruments of the Convention are invaluable in the capacity of "jumping-off point" for the development of common principles of accountability of law enforcement agencies and other state bodies engaged in the protection of national security interests. Major achievements and successes of the Convention and the Court case-law in this area are related to setting requirements in national legislation on the minimum level of predictability of discretionary powers of national security, including the implementation of measures of secret surveillance, covert surveillance, removal of personal information from communication channels, private correspondence, telephone communications, i.e., the so-called "interference with privacy in general", and implementation of other security measures and supervision in the community.

However, the minimum level of protection required by the Convention and the Court case-law, margin of appreciation, subsidiarity of the Court and, to some extent, limited competence and jurisdiction of the ECHR, mean that the Convention has limited capacity to be used as a general basis within which it is possible to assert the existence of common European principles of accountability of national security agencies.

In general, the Court case-law finds that the states may have certain – even quite broad – margin of appreciation and degree of discretion while assessing threats to national security, as well as while making decisions about how to deal with the existing threats, such as terrorism. However, the Court case-law requires from the states a certain level of justification, as to the fact that safeguards of national security interests are well grounded, and the threat referred to by the state has sufficient reasons (*Janowiec and Others v. Russia*,[32] *Konstantin Markin v. Russia*[33]). In cases, where the issue relates exclusively to the quality of the law, the Court case-law has been developing towards evaluating applicable restrictive standards in terms of their compliance with the standards of the "quality of the law", as an initial matter. Such Court case-law is quite restrictive for the states.[34]

Furthermore, **the Court carefully examines the need for interference with certain rights, as well as proportionality of the interference to its legitimate aims, including national security interests**. However, according to the Court case-law, the limits of state interference with individual rights, on the basis of national security interests, are not uniformly wide. In some cases, certain actions of the state against the person, such as torture, inhuman treatment or punishment are considered unacceptable and thus leave the state with no "margin for manoeuvre" because of the very nature of the rule of absolute prohibition in Article 3 of the Convention.[35] In other areas, the Court managed to significantly limit margin of appreciation of the state, in respect to the limits it has, for example, regarding Article 6 of the Convention ("the right to a fair trial"), as the Court found that such measures restricted the individual freedom less, and therefore were not as burdensome, nor did they conflict with the norms of absolute prohibition (*Van Mechelen v. Netherlands*).[36] At the same time, such restrictions could also constitute serious violations of the right to a fair trial, as the non-absolute right (*Incal v. Turkey*[37]).

[26] See: Judgment by the ECtHR, case of Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom, No. 20390/92 of 10 July 1998.

[27] See: Judgment by the ECtHR, case of Kopp v. Switzerland, No. 23224/94 of 25 March 1998p.

[28] See: Judgment by the ECtHR, case of Lambert v. France, No. 23618/94 of 24 August 1998.

[29] See: Judgment by the ECtHR, case of Amann v. Switzerland [Grand Chamber], No. 27798/95 of 16 February 2000.

[30] See: Judgment by the ECtHR, case of Rotaru v. Romania [Grand Chamber], No. 28341/95 of 4 May 2000p.

[31] See reference 26.

[32] See: Judgment by the ECtHR, case of Janowiec and Others v. Russia[GC], Nos. 55508/07 and 29520/09 of 21 October 2013.

[33] See: Judgment by the ECtHR, case of Konstantin Markin v. Russia [GC], No. 30078/06 of 22 March 2012.

[34] National Security and European Case-Law. – Report prepared by the Research Division of the Registry of the European Court of Human Rights, covering the Court's case-law (settled and pending cases) up to November 2013. Council of Europe / European Court of Human Rights, 2013.

[35] See: Judgment by the ECtHR, case of Chahal v. The United Kingdom, reference 26.

[36] See: Judgment by the ECtHR, case of Van Mechelenand and Others v. the Netherlands, Nos. 21363/93, 21364/93, 21427/93 of 23 April 1997 (the case regarding violation of Article 6 of the Convention in the context of impossibility to question anonymous police witnesses).

[37] See: Judgment by the ECtHR, case of Incal v. Turkey, No. 22678/93 of 9 June 1998 (in the context of independence and impartiality of Turkish National Security Courts).

The Court in its case-law has chosen an approach of narrowing the margin of discretion under the Convention in areas such as freedom of expression in the Armed Forces of the state (*Grigoriades v. Greece*;[38] *VDSO and Gubi v. Austria*[39]) and soldiers' private lives *(Lustig-Prean and Beckett v. the United Kingdom*,[40] *Smith and Grady v. the United Kingdom*,[41] *Konstantin Markin v. Russia*[42]), compared to its rather clear previous position regarding such complaints (*Hadjianastassiou v. Greece*[43]).[44]

As for the Court case-law concerning secret surveillance, the ECtHR is relatively flexible in the matter of victim status determination under Article 34 of the Convention, since in these cases the Court holds the view that the law – valid one and future one, should regulate in detail the issues connected with secret surveillance of the person.[45]

The Court focuses on procedural and due process safeguards that must accompany surveillance and record-keeping, as well as the possibility of challenging the measures, which can be applied to a person.

Regarding the requirement that the interference must be necessary in a democratic society, the Court takes into account of the interest of the defendant state, in the sphere of protecting national security as for the weight of individual allegations concerning violations of the right to respect of a person's private life. **Thus, the Court case-law requires the establishment of adequate and effective safeguards against abuses of power by law enforcement agencies and bodies, engaged in protecting national security interests**. Supervision should be related and implemented by the State judiciary, or at least by independent supervisory authorities (*Klass and Others v. Germany*[46]). In addition, according to the Court case-law, the evaluation of the information and status of persons who are the subjects to surveillance, is essential (regarding cases of protection of the rights of "informants" – *Bucur and Toma v. Romania*[47]).

Talking about the ECtHR case-law and national security interests, it may be noted that the Court's attitude towards this issue is neutral. Court's judgments reflect the minimum criteria of "quality of the law" to be

incorporated in national legislation, including the question of procedure and procedural protection in cases of interference with the right to privacy or the right to freedom of expression. The Court's attention was also focused on an approach to determine how wide the discretionary powers of the state, dealing with issues of national security should be, and set some restrictions on these powers, which primarily referred to proper justification of the limits of the law in the first place. The Court case-law has also introduced restrictions regarding proportionality of interference in respect of certain qualified rights and underlined the absolute prohibition of arbitrary state actions against any person, even the one, suspected of terrorist activities. These issues have already been partially heard in Court case-law in respect of Ukraine, concerning the secrecy of correspondence and the implementation of certain secret investigations.[48] The Court's decisions on these matters can also be a source of law-making and positive changes in judicial and administrative practice in the context of their approximation to EU standards of protection of national security and adapting national law to the relevant case-law of the European Court of Human Rights. ■

[38] See: Judgment by the ECtHR, case of Grigoriades v. Greece, No. 24348/94 of 25 November 1997.

[39] See: Judgment by the ECtHR, case of Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria, No. 15153/89 of 19 December 1994.

[40] See: Judgment by the ECtHR, case of Lustig-Preanand Beckett v. The United Kingdom, Nos. 31417/96 and 32377/96 of 27 September 1999.

[41] See: Judgment by the ECtHR, case of Smithand Grady v. The United Kingdom, Nos. 33985/96 and 33986/96 of 27 September 1999.

[42] See reference 34.

[43] See: Judgment by the ECtHR, case of Hadjianastassiou v. Greece, No. 12945/87 of 16 December 1992.

[44] National Security and European Case-Law, p.2.

[45] Ibid.

[46] See reference 12.

[47] See: Judgment by the ECtHR, case of Bucurand Toma v. Romania, No. 40238/02 of 8 January 2013.

[48] See: Judgment by the ECtHR, case of Vladimir Polishchuk and Svetlana Polishchuk v. Ukraine, No. 12451/04 of 30 September 2010 (regarding the search of a residence); Dovzhenko v. Ukraine, No. 36650/03 of 12 January 2012 (regarding interference with the right to privacy); Belyaev and Digtyar v. Ukraine, Nos. 16984/04, 9947/05 of 16 February 2012 (regarding violation of the right to privacy); Shvydka v. Ukraine, No. 17888/12 of 30 October 2014 (regarding violation of the right to freedom of expression); Bagiyeva v. Ukraine, No. 41085/05 of 28 April 2016 (regarding the search).

CONSTITUTIONAL COURT OF UKRAINE: BETWEEN POST-SOVIET PAST AND EUROPEAN FUTURE

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The justice-related constitutional amendments[1] have a major impact on the Constitutional Court of Ukraine (CCU) – one of the youngest national state institutions that had once been "proudly titled" by the fathers of the Constitution as "the sole body with constitutional jurisdiction in Ukraine" (Part 1, Article 147 of the Constitution). Notably, constitutional amendments pertaining to the CCU have been made not just to the so-called basic section of the Constitution ("Section XII – Constitutional Court of Ukraine") but also to almost one half of the Constitution sections, particularly to "Section II – Human and Citizen Rights, Freedoms and Obligations", "Section IV – Verkhovna Rada of Ukraine", "Section V – President of Ukraine", "Section VIII – Justice" and "Section XV – Transitional Provisions". Note that all articles without exception (Articles 147 to 153) have been amended in Section XII "Constitutional Court of Ukraine", and the section itself has been supplemented with four new articles – 148[1], 149[1], 151[1] and 151[2]. On the face of it, all of this could be seen as an indication of serious intentions of the head of state jointly with the Parliament[2] to amend the relevant provisions of the CCU primarily as regards the operation of the Constitutional Court. On the other hand, however, it is obvious that the decisive role in this process is reserved not so much for mechanical (external) changes to the underpinnings of the relevant constitutional provisions, but rather for filling them with substance. An analysis of the latter appears to hold answers to the question as to the real motives behind the constitutional amendments and the potential prospects for future evolution in Ukraine of the institution of constitutional control as such.

It stands to mention that, in and of itself, the initiative to amend the constitutional provisions that define the underlying principles of the way the Constitutional Court operates has not caused any particular concern in Ukrainian society (unlike the way it happened with constitutional initiatives of the head of state pertaining to decentralisation of government). The actions of the Constitutional Court itself, which have been called into question by both the scholarly and expert community and rank-and-file citizens, are reasonably believed to be one of the reasons for this kind of public attitude. In this context, the CCU issued a nearly "textbook" ruling in the case involving the term of office of the President of Ukraine.[3]

The situation surrounding the Constitutional Court deteriorated drastically in 2010-2013 when some of the Court's rulings not only surprised the Ukrainian public but also caused many to question whether Ukraine should really have this kind of "sole body with constitutional jurisdiction". The rulings in question include the ruling in the case involving the ability of individual Parliament members of Ukraine to directly form a coalition of fractions of deputies in the

[1] The Law of Ukraine On Justice-Related Amendments to the Constitution of Ukraine was passed on 2 June 2016, and the amendments will take effect in September 2016.

[2] Opinion No. 1 of 20 January 2016 of the Constitutional Court of Ukraine in a case initiated by the Ukrainian Parliament seeking an opinion on whether or not the draft law on justice-related amendments to the Constitution of Ukraine conforms to Articles 157 and 158 of the Constitution of Ukraine. – Website of the Constitutional Court of Ukraine, *http://ccu.gov.ua/doccatalog/ document?id=301294*.

[3] Ruling No. 22 of 25 December 2003 of the Constitutional Court of Ukraine in a case initiated by a constitutional filing of 53 and 47 Parliament members of Ukraine seeking the official interpretation of Part 3 of Article 103 of the Constitution of Ukraine (the case involving the term of office of the President of Ukraine). – Website of the Constitutional Court of Ukraine, *http://zakon3.rada.gov.ua/laws/show/v022p710-03*.

Ukrainian Parliament;[4] the ruling in the case concerning observance of the procedure for amending the Constitution of Ukraine;[5] the ruling in the case seeking an official interpretation of the provisions of Article 1, Parts 1, 2 and 3 of Article 95, Part 2 of Article 96, Clauses 2, 3, 6 of Article 116, Part 2 of Article 124, Part 1 of Article 129 of the Constitution of Ukraine, Clause 5 of Part 1 of Article 4 of the Budget Code of Ukraine, Clause 2 of Part 1 of Article 9 of the Code of Administrative Justice in Ukraine in a systemic interconnection with specific provisions of the Constitution of Ukraine,[6] to name just a few.

It became obvious that these **actions of the sole body with constitutional jurisdiction, at a minimum, did not contribute to the establishment of Ukraine as a democratic, social and law-governed state** (Article 1 of the Constitution). Moreover, the situation surrounding the Constitutional Court was not made any better by the practice of selecting candidates for the **position of Constitutional Court** judges and appointing them, which was in place at the time. The latter rapidly resulted in an excessive dependence of this sole body with constitutional jurisdiction on the head of state and his inner circle. The vestiges of the previous political system typical of constitutional courts in almost all post-Soviet republics could also be felt. That is why a reform of the Constitutional Court, especially after the Revolution of Dignity, **was** only **a matter of time**.

It should be noted that the constitutional law principles established by the fathers of the constitution in 1996 for the organisation and proceedings of the Constitutional Court vested the Court with powers that generally consistent with the scope of powers exercised by similar foreign courts. They were based on so-called "traditional" or "classical" powers of constitutional courts in countries of continental Europe. In our case, they include the powers to decide whether or not laws and other legislative acts of the Parliament, acts of the head of state and the government are constitutional. Ukrainian scholars believe that exercise of those powers constitutes the substance of constitutional control in Ukraine in the so-called narrow sense of this concept, namely evaluation of the relevant legislative acts for conformity to the constitution. It has been proposed to consider it the principal (titular) function of constitutional courts as such.[7] The group of "traditional" powers also includes the ability of the Constitutional Court to official interpret the provisions of the Constitution.

However, the Constitutional Court also has other powers that could be provisionally called the "national specifics" of the exercise of constitutional control as such. In particular, such powers include issuing opinions on whether or not standing international treaties of Ukraine or international treaties submitted to the Ukrainian Parliament for ratification conform to the Constitution of Ukraine; opinions on the observance of the constitutional procedure for investigating and examining the case involving impeachment of the President; opinions on whether the draft law amending the Constitution conforms to Articles 157 and 158 of the Constitution; and opinions on whether or not laws of Ukraine are open to interpretation.[8]

Practical experience shows that the latter aspect – "interpretation of laws" – was the most vulnerable of the powers vested in the Constitutional Court. In interpreting laws, the Constitutional Court sometimes crossed the dividing line between interpretation of laws and creation of new legislative provisions. Such situations could often throw off balance the established system of legal regulations of the relevant social relations. There are plenty examples of the latter. Recall, for example, the CCU rulings in cases initiated based on a constitutional filing from Avante Insurance Company JSC,[9] the constitutional filing of the private enterprise IKIO,[10] the constitutional filing of 48 Parliament members seeking an official interpretation of the provisions of Part 2 of Article 136, Part 3 of Article 141 of the Constitution of Ukraine, and Paragraph 1 of Part 2 of Article 14 of the Law of Ukraine "On Elections of Deputies",[11] to name just a few. Justices of the Constitutional Court repeatedly pointed out in their dissenting opinions the negative consequences of enforcement of such CCU rulings.[12]

[4] Ruling No. 11 of 6 April 2010 of the Constitutional Court of Ukraine in a case initiated by a constitutional filing of 68 Parliament members of Ukraine seeking an official interpretation of the provisions of Part 6 of Article 83 of the Constitution of Ukraine, Part 4 of Article 59 of the Rules of Procedure of the Ukrainian Parliament concerning the ability of individual Parliament members of Ukraine to directly form a coalition of fractions of deputies in the Ukrainian Parliament. – Bulletin of the Constitutional Court of Ukraine, 2010, No. 3, pp. 44-50.

[5] Ruling No. 20 of 30 September 2010 of the Constitutional Court of Ukraine in a case initiated by a constitutional filing of 252 Parliament members of Ukraine as to whether or not the Law of Ukraine of 8 December 2004 No. 2222 On Amendments to the Constitution of Ukraine conforms to the Constitution of Ukraine (is constitutional) (case involving observance of the procedure for making amendments to the Constitution of Ukraine). – Bulletin of the Constitutional Court of Ukraine, 2010, No. 5.

[6] Bulletin of the Constitutional Court of Ukraine, 2012, No. 2, pp. 25-33.

[7] V.M. Shapoval, V.E. Skomorokha. Constitutional Court of Ukraine. Legal Encyclopedia, Vol. 6 (Editorial Board: Yu. Shemshuchenko (Editorial Board Chairman) et al.), p. 283.

[8] Law of Ukraine On the Constitutional Court of Ukraine.

[9] Ruling in a case initiated by a constitutional filing by Avante Insurance Company JSC seeking an official interpretation of the provisions of Part 2, Article 1 of the Law of Ukraine On the System of Taxation, Article 15 of the Law of Ukraine On Corporate Profit Taxation (Ruling No. 5 of 16 February 2010).

[10] CCU Ruling No. 17 of 19 September 2012 in the case initiated by a constitutional filing of the private enterprise IKIO seeking an official interpretation of the provision of Part 1 of Article 61 of the Family Code of Ukraine.

[11] Ruling in a case initiated by a constitutional filing of 48 Parliament members of Ukraine seeking an official interpretation of the provisions of Part 2 of Article 136 and Part 3 of Article 141 of the Constitution of Ukraine, Paragraph 1 of Part 2 of Article 14 of the Law of Ukraine On Elections of Deputies of the Verkhovna Rada, the Autonomous Republic of Crimea, Local Councils, Village, Town and City Mayors (No. 2 dated 29 May 2013).

[12] Dissenting opinion of Constitutional Court Justice V.I. Shyshkin regarding the Constitutional Court Ruling in a case initiated by a constitutional filing by Avante Insurance Company JSC seeking an official interpretation of the provisions of Part 2, Article 1 of the Law of Ukraine On the System of Taxation, Article 15 of the Law of Ukraine On Corporate Profit Taxation (Ruling No. 5 of 16 February 2010). – Website of the CCU, *http://ccu.gov.ua/uk/doccatalog/list?currDir=98276*; Dissenting opinion of Constitutional Court Justice P.B. Stetsiuk regarding the Constitutional Court ruling in a case initiated by a constitutional filing of 48 Parliament members of Ukraine seeking an official interpretation of the provisions of Part 2 of Article 136 and Part 3 of Article 141 of the Constitution of Ukraine, Paragraph 1 of Part 2 of Article 14 of the Law of Ukraine On Elections of Deputies of the Verkhovna Rada, the Autonomous Republic of Crimea, Local Councils, Village, Town and City Mayors (No. 2 dated 29 May 2013). – Ibid., *http://ccu.gov.ua/uk/doccatalog/list?currDir=201939*.

Perhaps it is for this very reason that such a power [the right of the constitutional court to interpret laws] is almost non-existent in contemporary European practice. Instead, Western countries have the institution of "constitutional complaint" – a concept non-existent in Ukrainian law prior to the approved constitutional amendments. The so-called concealed form of a constitutional complaint (the ability to interpret legislative provisions based on citizen petitions pursuant to Article 94 of the Law of Ukraine "On the Constitutional Court of Ukraine") was rather difficult to implement, lacked a sufficient legislative mandate, and often was not enforced by the Constitutional Court for reasons that were far from objective.[13] Meanwhile, the very idea to introduce the institution of constitutional complaint in Ukraine is not only progressive in terms of its inner essence but also consistent with the main functional purpose of the constitutional control authority in a modern constitutional state, namely protection of human rights and freedoms. This statement directly applies to Ukraine because the mission of the Constitutional Court is defined as "guaranteeing the supremacy of the Constitution of Ukraine as the fundamental law of the state throughout its territory" (Article 2 of the Law of Ukraine On the Constitutional Court of Ukraine). Meanwhile, the "human rights and freedoms and their guarantees" in particular should define the scope and focus of efforts of the Ukrainian state (Part 2 of Article 3 of the Constitution). Hence the perfectly logical decision to directly incorporate the very right to constitutional complaint in Article 55 of the Constitution (by supplementing it with a separate section: "everybody is guaranteed the right to file a constitutional complaint with the Constitutional Court of Ukraine on the grounds provided by this Constitution and in the manner prescribed by law") and the definition of the substance of constitutional complaint in the basic section of the Constitution (basic from the perspective of the CCU). Section XII of the Constitution of Ukraine ("Constitutional Court of Ukraine") has been supplemented with a separate Article 151[1] that reads as follows: "The Constitutional Court of Ukraine shall determine whether or not a law of Ukraine conforms to the Constitution of Ukraine (is constitutional) following a constitutional complaint from a person who believes that the law of Ukraine used in the final court decision in this person's case contravenes the Constitution of Ukraine. A constitutional complaint may be filed after all national legal remedies have been exhausted". For this reason, the introduction of the institution of constitutional complaint in Ukraine much like the abolishment of the power of the Constitutional Court to interpret laws of Ukraine can be generally viewed as positive aspects of the Law of Ukraine "On Amendments to the Constitution of Ukraine – on justice".

Another positive aspect is that the provisions regarding the dismissal by the Ukrainian Parliament and the President of "one-third of the Constitutional Court of Ukraine" have been removed from the text of the Constitution (Clause 26 of Article 85 and Clause 22 of Article 106 of the Constitution). Recall that back in 1996 when the fathers of the constitution passed the Fundamental Law of the state, they provided for a specific system of constitutional law guarantees of independence of CCU judges. Pursuant to Part 2 of Article 148 of the Constitution, they were appointed by the President, the Parliament and the Congress of Ukrainian Judges (six judges each). At the same time, nothing was said about the dismissal of CCU judges either at the level of the Constitution or other laws. The Law "On the Constitutional Court of Ukraine" (dated 16 October 1996) stipulated that the "decision to dismiss a judges of the Constitutional Court of Ukraine shall be made at the session of the Constitutional Court of Ukraine" (Part 2 of Article 23 of the Law of Ukraine "On the Constitutional Court of Ukraine"). Only where a justice has violated conditions of eligibility for the position of a justice (Part 2 of Article 16 of the Law "On the Constitutional Court of Ukraine") or violated the oath, the decision to dismiss the justice had to be passed by the Ukrainian Parliament (irrespective of who appointed the relevant person as a CCU justice). This system was primarily viewed as a certain guarantee of independence of CCU justices of those bodies that appointed them.

However, the constitutional amendments made in 2004 amended Clause 26 of Article 85 and Clause 22 of Article 106 of the Constitution of Ukraine in a way that vested the Ukrainian Parliament with the powers to "appoint and dismiss one-third of justices of the Constitutional Court of Ukraine", while the President earned the right to not only "appoint to positions" but also "dismiss one-third of all justices of the Constitutional Court of Ukraine". Negative effects of these innovations were not long in coming. As the political crisis peaked in 2006-2007, it was the President who issued decrees dismissing several Constitutional Court justices, with the texts of these presidential decrees later amended.[14]

[13] CCU ruling to discontinue constitutional proceedings in the case initiated by a constitutional filing of citizen Yevhen Anatoliyovych Tropanets seeking an official interpretation of the provisions of Clause 13 of Part 1 of Article 293, and Clause 2 of Part 1 of Article 324 of the Civil Procedure Code of Ukraine in interconnection with the provisions of Clauses 2 and 8 of Part 3, Article 129 of the Constitution of Ukraine. Dissenting opinion of Justice P.B. Stetsiuk on Constitutional Court Ruling No. 24/2011. – CCU website, *http://www.ccu.gov.ua/docs/1749*.

[14] Decrees of the Ukrainian President On Dismissal of S. Stanik as Justice of the Constitutional Court of Ukraine No. 370 of 1 May 2007, On Dismissal of V. Pshenychnyi as Justice of the Constitutional Court of Ukraine No. 369 of 30 April 2007, On Dismissal of V. Ivashchenko as Justice of the Constitutional Court of Ukraine No. 529 of 14 June 2007.

The removal from the text of the Constitution of Part 3 of Article 123 ("justice shall be administered by the Constitutional Court of Ukraine and courts of the general jurisdiction") and Part 1 of Article 147 ("the Constitutional Court of Ukraine is the sole body with constitutional jurisdiction in Ukraine") raises no obvious objections.

The fact that Article 147 of the Constitution has been supplemented with a new part that defines the principles of operation of the Constitutional Court can be evaluated as generally positive (based on the modern reality, the level of political and legal awareness, the emerging constitutional system in Ukraine, etc.). Seemingly, the constitutional stipulation of the principle of "publicity" in the work of the CCU can put an end to the negative practice of holding an excessive number of CCU sessions in the so-called "written form" (essentially behind closed doors). And yet this form of court sessions is provided for only in the Rules of Procedure of the Constitutional Court of Ukraine (§30. Forms of Examination of Cases in Plenary Sessions of the Constitutional Court of Ukraine),[15] whereas the Constitution expressly states that "the procedure for organisation and proceedings of the Constitutional Court of Ukraine and the procedure by which the Court shall examine cases shall be prescribed by the law" (Article 153). Meanwhile, the constitutional stipulation of such a "principle" of the Constitutional Court's work as "the binding nature of rulings and opinions issued by it" is rather surprising.

Perhaps the biggest shortcoming (or, rather, unmet social expectation of improvements) of the supplements made to the Constitution directly pertaining to the operation of the Constitutional Court is the preservation without change of the existing system for appointing Constitutional Court justices. The procedure established 20 years ago whereby the Constitutional Court of Ukraine is formed through appointment by the President, Parliament and Congress of Ukrainian Judges of "six justices of the Constitutional Court of Ukraine each" did not justify the positive hopes pinned on it. This procedure failed to ensure the so-called equal representation of the interests of different branches of power at the CCU, failed to prevent excessive politicisation of the very justice appointment process, and effectively denied the prospect of appointment as Constitutional Court justices to scholars, particularly constitutional scholars.

Apparently, the amendments pertaining to the "requirements" for candidates for positions of Constitutional Court justices will fail to provide a qualitatively new solution to any of the existing fundamental issues. Article 149 of the Constitution stipulates that "a citizen of Ukraine who speaks the official language, has attained the age of forty as of the date of appointment, has a higher legal education and at least 15 years of professional work experience in law, possesses high moral qualities and is a legal professional with a recognized level of competency is eligible to be appointed a justice of the Constitutional Court of Ukraine". The last requirements (in the order in which they appear) for the candidate for the position of a Constitutional Court justice – "high moral qualities" and the requirement that the candidate be a "legal professional with a recognized level of competency" – do not raise any major reservations from the moral and ethical perspective. However, their direct wording includes obvious signs of value judgment, which potentially brings it closer to the problem of "legal certainty".

The same problem (of legal certainty) is inherent in the provisions dealing with the grounds on which a Constitutional Court justice may be dismissed. In particular, this has to do with the possibility of a Constitutional Court justice getting dismissed if he or she "commits serious disciplinary misconduct, gross or systematic violation of duties, which is incompatible with the status of a Court justice or has revealed that the justice is unfit for the position held" (Paragraph 3, Part 2, Article 149[1] of the Law).

In general, the logic behind increasing the age limit for Constitutional Court justices from 65 to 70 years is unclear. This approach does not seem to resolve any fundamental issue (from the objective perspective), is not consistent with the practice of contemporary European constitutionalism, and is somewhat counterproductive in light of the extremely low life expectancy in Ukraine.

In my opinion, the justice-related amendments made to the Constitution of Ukraine also contain a number of other, generally positive innovations. They include improvements in funding for the Constitutional Court (Article 1481) and measures aimed at ensuring the independence and immunity of Constitutional Court justices (Article 149), the right of the Constitutional Court to issue "opinions on whether or not the questions proposed for a nationwide referendum initiated by the public conform to the Constitution of Ukraine (are constitutional) based on a filing from the President of Ukraine or at least forty-five Parliament members of Ukraine" (Article 151), as well as the stipulation to the effect that the actual "procedure for organizing the proceedings of the Constitutional Court, the status of judges, the grounds for and procedure for filing petitions with the Court, the procedure by which the Court shall examine cases, and the procedure for enforcing Court rulings shall be defined by the Constitution of Ukraine and the law". (Article 153).

All of these positive innovations are expected to contribute to further evolution of constitutional control in Ukraine as well as bring the Constitutional Court of Ukraine closer to its European future. After all, the constitution, a constitutional state and constitutionalism are products of the European political and legal culture. The fundamental institutions of a modern constitutional state, one of them being the institution of constitutional control, can have a future only in their natural socio-political, mental and legal environment.

The European future of the Constitutional Court of Ukraine primarily means the openness (publicity) of its work, the presence of social justice in its decisions and more attention to the issue of human dignity. ■

[15] Rules of Procedure of the Constitutional Court of Ukraine. – Website of the Constitutional Court of Ukraine, *http://ccu.gov.ua/doccatalog/document?id=10715*.

REDUCING SOCIAL BENEFITS AND PENSIONS: UKRAINIAN CONSTITUTION AND EUROPEAN COURT OF HUMAN RIGHTS PRACTICES

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Socio-economic human rights, with complex and long history of recognition of their importance and value, are enshrined in the constitutions of the majority of countries in the world along with civil and political rights, as all rights are universal, indivisible, interdependent, inviolable and equally necessary for the harmonious development of personality. Today, socio-economic rights are a constitutional indicator of a welfare state, a measure of the effectiveness of the whole human rights system, and an i mportant criterion for evaluating how well the state functions.[1] The Constitution of Ukraine, having established a wide range of socio-economic rights and having proclaimed Ukraine a welfare state, recognised its responsibility and commitment to the society to accomplish the main task in the area of social policy – ensure decent life and development for each member of this society.

Article 22 of the Constitution states that while adopting new or amending existing laws, narrowing the content and scope of existing rights and freedoms, including socio-economic, is not admissible. However, human rights are subject to many restrictions, except for the rights, restricting which is not allowed even under martial law or a state of emergency (Art.64 of the Constitution). Most of the Articles of the Constitution which define socio-economic rights are not on this list. Defining socio-economic human rights in constitutions and at the same time providing for the possibility of restricting them, states often emphasise directly or indirectly that fulfilment of their obligations in regard to socio-economic rights is dependent on the economic situation and the financial capability of the state.

Ukraine is not an exception. Interpretation of the content of Article 22 of the Constitution on inadmissibility of narrowing the content and scope of existing rights and freedoms in the social context, has often become the subject of heated debate in Ukrainian society and explaining by the Constitutional Court of Ukraine. Thus, in its decision in the case on the qualifying period of scientific work dated 19 June 2001,[2] the Constitutional Court noted that the right to a pension, its size and payment amounts may be dependent on the financial capabilities of the state, economic feasibility, socio-economic circumstances in a given period of its development.

Later, the Constitutional Court confirmed this position in its decision on insurance payments of 8 October 2008, recognising that "the types and amounts of social services

[1] Kolotova N.V. Socio-economic rights: constitutional regulation and protection. - Social sciences and modernity, 2013, No.4, p.67-77.

[2] Decision of the Constitutional Court of Ukraine in the case of the constitutional appeal by 93 deputies of Ukraine on the constitutionality (agreement with the Constitution of Ukraine) of a provision in p.2 on determining the qualifying period of scientific work "starting from the date of being awarded a scientific degree or an academic rank" in the Decree of Cabinet of Ministers of Ukraine "On the list of positions of scientific employees at public research institutions, organisations and positions of teaching staff at state higher education institutions of III-IV level of accreditation, holding which gives the right to receive pensions and monetary benefits at retirement under the Law of Ukraine "On scientific and scientific-technological work" as of 27 May 1999 (case on the qualifying period of scientific work) No.9 as of 19 June 2001.

and benefits to the victims ... are defined by the state taking into account its financial capabilities".[3] Along with this, different views were expressed by judges in separate opinions[4] to this decision, in regard to the legal nature of excluding the right of victims of industrial accidents or occupational diseases to compensation for moral damage from the Foundation they had previously had.

In p.4 of the Decision of the Constitutional Court dated 11 October 2005 in the case on the amount of pension and monthly lifetime allowance, it is stated directly that the content of human rights and freedoms means conditions and means which define material and spiritual possibilities of individuals and are necessary to fulfil their needs for subsistence and development. The scope of human rights is a range of quantitative indicators of corresponding capabilities, which characterise its multiplicity, size, intensity and degree of manifestation, and are expressed in certain units. Narrowing the content of rights and freedoms means reducing markers, content characteristics of human capabilities, which are reflected in relevant rights and freedoms, i.e. the qualitative characteristics of law. Narrowing the scope of rights and freedoms means a reduction of the range of subjects, size of territory, time, size or quantity of benefits or any other measurable indicators of application of human rights and freedoms, i.e. their quantitative characteristics.[5]

Interpretation of the narrowing of content and scope of rights and freedoms as their limitation was also given in the Decision of the Constitutional Court as of 22 September 2005 in the case on permanent use of l and,[6] and the scope of human rights was described as their content property, expressed with quantity quantitative indicators of human capabilities, which are reflected in corresponding rights that are not uniform and general. Referencing the abovementioned decision of 2005, the Constitutional Court, in its decision in the case on the subject matter and content of the Law "On the State budget of Ukraine" established that cuts of judges' salaries due to changes in the order of calculating seniority bonus, narrow the existing guarantees, and, correspondingly, contradict the requirements in Art. 22 of the Constitution.[7]

Also, in the separate opinion of judge V. Kampa it was stressed that not all social rights in the Constitution are defined with specific duties of the state to ensure them, and during the consideration of the case by the Constitutional Court, it failed altogether to adhere to the principle of proportionality between social protection of citizens and financial capability of the state, the interests of each individual and the state. Besides, the entities with the right to petition the Constitutional Court will always be dissatisfied with the level of social protection of people in the Law on the state budget, but the Constitutional Court must correlate their requirements with the legally defined financial capabilities of the state.[8]

Analysing the opinion of Constitutional Court judges on financial capability of state to provide for the recognised by the Constitution social rights, and interpretation of Art. 22 of the Constitution, it is necessary to stress that in the decision in the case on the amount of pension and monthly lifetime allowance[9] judges highlighted the importance of establishing in the Constitution the legal guarantees, legal certainty and the related to them predictability of legislative policy in the pension system, in order for the parties of relevant legal relations to have the possibility to predict the outcomes of their actions

[3] Decision of the Constitutional Court of Ukraine in the case of constitutional appeal by the Verkhovna Rada Ombudsman on the constitutionality (agreement with the Constitution of Ukraine) of provisions in subparagraph "b" of subparagraph 4, p.3, Art.7 of the Law of Ukraine "On insurance rates for compulsory state social insurance against industrial accidents and occupational diseases that caused the loss of work capability", p.1, paragraph 3 of p.5, p.9, paragraphs 2, 3 of p.10, p.11 of section I of the Law of Ukraine "On amendments to the Law of Ukraine "On compulsory state social insurance against industrial accidents and occupational diseases that caused the loss of work capability" insurance payments case) No.20 dated 8 October 2008.

[4] See, for example: Separate opinion of the Judge of the Constitutional Court of Ukraine Markush M.A. on the Decision of the Constitutional Court of Ukraine in the case on insurance payments. – Website of the Verkhovna Rada of Ukraine, *http://zakon5.rada.gov.ua/laws/show/v020p710-08*.

[5] Decision of the Constitutional Court of Ukraine in the case of constitutional appeals by the Supreme Court of Ukraine and 50 people's deputies of Ukraine regarding the constitutionality (agreement with the Constitution of Ukraine) of the provisions in paragraphs 3 and 4 of p.13, section XV "Final Provisions" of the Law of Ukraine "On compulsory state pension insurance" and official interpretation of provision in p.3, Art.11 of the Law of Ukraine "On the status of judges" (case on the amount of pension and monthly lifetime allowance) No.8 dated 11 October 2005.

[6] Decision of the Constitutional Court of Ukraine in the case of constitutional appeal by 51 people's deputies of Ukraine on the constitutionality (agreement with the Constitution of Ukraine) of provisions in Article 92, p. 6, Chapter X of "Transitional Provisions" of the Land Code of Ukraine (permanent land use case) No.5 dated 22 September 2005.

[7] Decision of the Constitutional Court of Ukraine in the case of constitutional appeals by the Supreme Court of Ukraine on the constitutionality (agreement with the Constitution of Ukraine) of certain provisions in Art.65, Section I, p.61, 62, 63, 66 of Section II, p.3 of Section III of the Law of Ukraine "On the state budget of Ukraine for 2008 and amendments to certain legislative acts of Ukraine", and 101 people's deputies of Ukraine on the constitutionality (agreement with the Constitution of Ukraine) of provisions in Art.67, Section I, p.1-4, 6-22, 24-100, Section II of the Law of Ukraine "On the state budget of Ukraine for 2008 and amendments to certain legislative acts of Ukraine" (case on the subject matter and content of the law "On the state budget of Ukraine") No.10 dated 22 May 2008.

[8] Separate opinion of the Judge of the Constitutional Court of Ukraine Kampa V.M. regarding the Decision of the Constitutional Court of Ukraine in the case on the subject matter and the content of the law "On the state budget of Ukraine" dated 22 May 2008. – Website of the Verkhovna Rada of Ukraine, *http://zakon3.rada.gov.ua/laws/show/v010p710-08/page2*.

[9] See ref. 5.

and be certain in their legal expectations that the right acquired by them according to current legislation, as well as the content and scope of this right will be realised, i.e. the acquired right cannot be revoked, narrowed. Based on the above we can assume that a **person can count at least on the level and amount of government support established by the current legislation**. Such interpretation of Art.22 has found support among Ukrainian lawyers and practitioners.[10]

Another point of view was formulated in the decision of the Constitutional Court of Ukraine dated 26 December 2011 on the constitutionality (agreement with the Constitution of Ukraine) of certain provisions of the Law of Ukraine "On the State Budget of Ukraine for 2011".[11] Constitutional Court recognised as constitutional the establishment by the Cabinet of Ministers of the order and amount of social benefits and pensions for certain categories of citizens, including victims of the Chernobyl disaster, based on the available financial resources of the Pension Fund of Ukraine. The decision also determined that the amount of social payments will depend on socio-economic capabilities of the state, but must also ensure the constitutional right of everyone to an adequate standard of living for themselves and their families, as guaranteed by Art.48 of the Constitution. On the other hand, in the context of the pension reform of 2011, the chief argument of those opposing the reform was a reference to Art.22 of the Constitution and statements on narrowing the content and scope of existing rights in case the proposed changes are introduced.[12]

Thus, the issue of interpretation of state's obligations in social sector, and balancing social rights and financial capabilities of the state has been considered by the Constitutional Court numerous times. So the question of lawfulness of Government and parliamentary decisions to reduce and/or cancel certain social benefits and pensions, the main argument for the corresponding decisions being the financial capabilities of the state, without the obligation to explain the allocation of public funds for other purposes, remains open.

In the situation of the lack of a single consistent position of the Constitutional Court in this matter, it is appropriate to analyse practices of the European Court of Human Rights (ECtHR), which, according to the Law of Ukraine of 2006 "On the enforcement of judgments and the application of the case-law of the European Court of Human Rights" is the source of law in Ukraine.

With extended dynamic evolutionary interpretation of provisions in the European Convention on Human Rights and Fundamental Freedoms (ECHR) by the ECtHR, the scope of the Convention covers a broad range of socio-economic rights not reflected in its text. Despite the fact that social rights are not present in the text of the Convention and its Protocols, ECHR has been perceived as a unique effective mechanism for protection of many groups and categories of rights, including those related to social benefits and pensions. These categories of cases are generally considered under Art.1 of Protocol 1 to the ECHR, which enshrines the right to peaceful enjoyment of possessions and includes in its content the right to pension and other benefits of the social security system. Notably, ECHR's judgment in the case *Stec and Others v. the United Kingdom*[13] established a final rejection from distinguishing between social benefits based on individual contributions, and payments not based on them, for assessment of application of Art.1, Protocol 1 of the ECHR. It was also recognised that during creation of a pension system by a state, individual rights and interests arising from it belong within the scope of Art.1, Protocol 1 regardless of the payment of contributions and fees, which fund the pension system.

At the same time, formation of social security system is recognised as a state's margin of appreciation. Thus, gradually expanding the interpretation of Art.1, Protocol 1 of the ECHR, the European Court has not changed the important rule of independent decision-making by states regarding formation and operation of social security systems, which has been clearly set out in the judgment in the case *Stec and Others v. the United Kingdom*[14] and confirmed many times, including practices concerning Ukraine (in particular, in the judgment *Sukhanov and Ilchenko v. Ukraine*,[15] *Suk v. Ukraine*[16]). In the judgment in the case *Suk v. Ukraine*, the ECtHR confirmed that a state can introduce, suspend or stop respective payments while introducing legislative changes. However, if the legislative provision that defines certain additional payments is current, and the necessary conditions – complied with, state authorities may not refuse individuals to provide such payments, as long as the legal provision remains in force. Confirming the absence under Art.1 of Protocol 1 of restrictions on states' freedom to decide, whether or not to have any form of social security system and choose the type or amount of payments within such a system, the Court clearly emphasised the obligation of a state to consider the current legislation, which defines payments as the right to social benefits (on the

[10] For example, H.Klymovych stated that guarantees in Art.22 of not narrowing the content and scope of existing rights and freedoms in the adoption of new laws or amendments to current laws mean that a state may under no circumstances (except those in Art.64 of the Constitution of Ukraine) narrow, reduce or cancel the already existing human rights, including the right to receive the assigned pension in full. See: Klymovych H. Taxation of pensions is a gross violation of the Constitution of Ukraine. – Slovo i dilo (Word and Action), 2 June 2015, *http://www.slovoidilo.ua/2015/06/02/novyna/pravo/opodatkuvannya-pensij-hrubo-porushuye-konstytucziyu-ukrayiny-ekspert*.

[11] Decision of the Constitutional Court of Ukraine No.1-42 as of 26 December 2011 on the constitutionality (agreement with the Constitution of Ukraine) of p.4, Section VII "Final Provisions" of the Law of Ukraine "On the state budget of Ukraine for 2011". – Website of the Constitutional Court of Ukraine, *http://www.ccu.gov.ua/uk/doccatalog/list?currDir=166235*.

[12] Ilkiv A. We should either follow the constitution or abolish it. – Ukrayinska Pravda (Ukrainian Truth), *http://www.pravda.com.ua/columns/2010/12/10/5662180*.

[13] Stec and Others v. the United Kingdom, Grand Chamber judgment of 12 April 2006.

[14] Ibid.

[15] Sukhanov and Ilchenko v. Ukraine, judgement of 26 June 2014. – Website of the Verkhovna Rada of Ukraine, *http://zakon3.rada.gov.ua/laws/show/974_a16*.

[16] Suk v. Ukraine of 10 March 2011. – *Ibid., http://zakon3.rada.gov.ua/laws/show/974_715*.

basis of previous contributions or without them) as such that provides the right to possession, under Art.1 of Protocol 1 in relation to persons who meet the requirements of such legislation.

In general, issues of reforming and changing national social legislation, including pension legislation, leading to a reduction of benefits, revoking a certain type of benefits, have been considered by the ECtHR on numerous occasions.

Thus, ECtHR's judgment in case of *Airey v. Ireland* of 1979[17] recognised dependence of execution of socio-economic rights on the situation in a state, especially financial. Also, the Constitutional Court referenced this judgment in its judgment of 2011 (mentioned above). The Constitutional Court also referenced the judgment in the case of *Kjartan Ásmundsson v. Iceland*[18] concerning the reduction of amount of sailors' pensions. The applicant filed a complaint regarding the introduction of new rules of disability evaluation due to financial difficulties of the sailors' pension fund. The previously evaluated at 100% disability of the applicant due to inability to perform work that he was doing before the accident, was re-evaluated at 25%. The main factor of assessment according to the new rules was the ability to perform any work, not the type that had been performed previously. Individuals with disability at less than 35% were not paid any pension at all, which enabled the fund to revoke the applicant's pension. The ECHR ruled that the legitimate interest of the fund to address its financial problems is incompatible with the fact that only 54 people's pensions were revoked, while the remaining 689 continued to receive theirs in the same amount as before the introduction of the new rules. Accordingly, the Court established a violation of Art.1 of Protocol 1 to the Convention. However, the Court emphasised that revoking a pension is different from non-discriminatory, proportionate and reasonable reduction of pension amount, which, in theory, would provide a possibility for the case to be heard in a different way.

Also in this judgment the ECtHR confirmed the previously formulated position that the right to a pension and other benefits of the social security system cannot be interpreted in accordance with Art.1 of Protocol 1 to the ECHR as such that gives a person the right to a pension of certain size. Although a significant reduction of its size may be regarded as such that affects the essence of this right.

Lawfulness of reducing the amount of payments without discrimination was thoroughly analysed and presented in the judgment in the case of Khoniakina v. Georgia.[19] The Court found that reducing or stopping the payment of pensions to former judges of the Supreme Court of Georgia constitutes state interference in the exercising of the right to peaceful enjoyment of possessions, which however can be justified (in case it is legal, pursues a lawful goal, is proportionate, a fair balance is observed between the general interest and the requirements to protect individual rights, etc.), which was in the end established by the Court However, only judge A.Gyulumyan in a separate opinion noted that

the respondent state has not demonstrated at all, how budget stability may be jeopardised in case increased pensions are paid to 21 individuals.[20]

In the case *Bakradze v. Georgia*,[21] the ECtHR considered the issue of reduction of pension payments for former employees of the prosecutor's office in connection with the reform of relevant legislation. Moreover, the changes were retrospective in nature, covering both future retirees, and those who have been already granted lifetime pensions in the amount of appropriate level prosecutor's salary. The Court confirmed its position presented in the judgment in Khoniakina case that pension rules and procedures established by law are subject to change, including through adoption of new retrospective provisions.

In the case *Cichopek and 1.627 other applications v. Poland*,[22] the Court stressed once again that conducting a pension reform, the result of which was a reduction of the size of payments (more than by half for the first applicant) for former state security service functionaries with a reduction of pension coefficient for work in the security services during the communist regime, can be considered justified, if the reform pursued a lawful goal to ensure a fairer pension system; to revoke pension privileges enjoyed by certain groups and categories of retirees (including members of the former communist political police). One of the main criteria taken into account by the Court was generally not to place excessive burden on the applicants by the pension reduction scheme. At the same time, ECtHR did not provide either further details or interpretation of excessive burden for a retiree in case the pension is reduced more than by half.

ECtHR's stand has also remained unchanged in the case of *Markovics and Others v. Hungary* regarding the restructuring of pension system for the discharged members of armed forces.[23] If any changes, including

[17] *Airey v. Ireland,* judgement dated 9 October 1979.

[18] *Kjartan Ásmundsson v. Iceland,* judgement dated 12 October 2004.

[19] *Khoniakina v. Georgia,* judgement dated 19 June 2012.

[20] *Dissenting opinion of judge Gyulumyan. Khoniakina v. Georgia,* judgement dated 19 June 2012.

[21] *Aleksi Bakradze against Georgia,* judgment of 8 January 2013.

[22] *Cichopek and 1.627 other applications v. Poland,* judgement of 14 May 2013.

[23] *Markovics and Others v. Hungary,* judgment of 24 June 2014.

those which led to pension amount reduction, were proportionate and consistent with the pursued objective, namely, rationalisation of the pension system, the use of funds and aggregate reduction of certain payments, then the Court recognises such state interference as justified.

Thus, according to ECtHR practices, state interference with social and pension rights of applicants, which was performed on the grounds of clearly and properly formulated law instead of arbitrarily, does not overstep the margin of appreciation and requirements in Art.1 of Protocol 1. I.e., does not violate Art.1 of Protocol 1 of the ECHR.

Confirmation of such stand of the Court can be found in its practices against Ukraine. Thus, in the case of *Velikoda v. Ukraine*,[24] which also dealt with legislative changes aimed at reducing the amount of pension paid to people affected by the Chernobyl disaster, the ECtHR, confirming the possibility of changing the law on pension benefits, pointed out the absence of future guarantees against such changes in case a judgment is made in favour of the applicant to establish the amount of pension or payments. The European Court clearly stated that further operation of the national judgment ends, when the legislation that has previously regulated pensions payments of the applicant is changed. The Court also noted that reducing the applicant's pension was clearly due to economic policy considerations and financial difficulties faced by Ukraine. In the absence of any evidence to the contrary and recognising that the respondent state has a broad margin of appreciation as to achieve a balance between the rights that are in dispute and economic policy, the Court does not consider that such a reduction was disproportionate to the pursued lawful aim or that it put an undue burden on the applicant.[25]

So today we can consider the legal stance of the ECtHR clearly articulated on the application of the margin of appreciation doctrine in the issues of type, form and amount of social security payments in general, including pension payments and their changes, reforms to reduce or even cancel such payments. Moreover, with some exceptions, cases dealing with reduction of the size of social benefits, pension payments were deemed inadmissible as lacking clear substantiation.

In addition to reforms and amendments to pension legislation in different circumstances and for different purposes, ECtHR practices of considering cases of reductions or withdrawal of benefits, assistance or pensions due to financial, economic crisis can be also considered well-formulated.

So, if reductions of the amount of payments (e.g., from €2,435.83 to €1,885.79) took place during economic crisis and the corresponding interference did not place an undue burden on claimants, then such state interference is also not viewed as a violation, as long as the government stays within the boundaries of common sense. In the judgment in the case of *Koufaki and ADEDY v. Greece*,[26] which dealt with the implementation by the Greek government of strict economy measures and cuts in public expenditure due to crisis, including the reduction of salaries, social benefits, pensions paid to government employees, the ECtHR found that the national government is in a better position than an international judge for the most correct choice of measures to balance public expenditure and revenues. The Court will respect relevant national judgments if they have been made on proper grounds. ECtHR has deemed the mentioned case inadmissible as lacking clear substantiation, as "the introduced measures were justified by the unprecedented crisis in the modern history of Greece and in the interest of society, including, as a state of the euro area, the obligations of which include adherence to fiscal discipline and maintaining stability of the area".[27]

Due to financial problems, the Government of Portugal also resorted to limiting and reducing pension benefits, which caused considerable dissatisfaction among the population and appeals to the ECtHR. However, in the judgment in the case of *Da Conceicao Mateus And Santos Januari v. Portugal*,[28] the Court agreed with the arguments of the Government of Portugal, having established that in the context of unprecedented financial problems faced by Portugal, and given the limited and temporary nature of the cuts in pensions, the Government complied with the principle of fair balance between the interests of the public and protection of individual rights of applicants regarding their pension payments. The amount of pension benefits was reduced by about 10% overall, which certainly does not allow to assert that individuals have been deprived of pension. A similar decision was made by the Court in the *Savickas and Others v. Lithuania*[29] case on the temporary reduction of

[24] Velikoda v. Ukraine. The ruling on inadmissibility dated 3 June 2014.

[25] Ibid.

[26] Koufaki and ADEDY v. Greece, judgment of 7 May 2013.

[27] The impact of the economic crisis and austerity measures on human rights in Europe Feasibility study/ Steering Committee for Human Rights (CDDH). Strasbourg, 11 December 2015// Electronic resource. Access mode: *http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH(2015)R84%20Addendum%20IV_EN.pdf*.

[28] Da Conceicao Mateus and Santos Januari v. Portugal, judgment of 8 October 2013.

[29] Savickas and Others v. Lithuania, judgment of 15 October 2013.

pensions for former judges due to financial crisis, when the Court found that Lithuania did not overstep its margin of appreciation.

Further reduction of social benefits in Portugal was not viewed as temporary any more, yet, in its judgment in the case of *da Silva Carvalho Rico v. Portugal*,[30] the Court again regarded the reduction of pension amount as a proportionate restriction of the applicant's right to protection of possessions for the purpose of achieving mid-term economic recovery in the country, even if such reductions were no longer temporary.

Analysing the abovementioned Court judgments against Portugal, one can agree with I. Leijten that the European Court is deliberately using a less generous approach in the issues of reductions of salaries, pensions, social benefits and other austerity measures taken by states in a crisis. The space for redress of grievances on reduction of social security level is being deliberately narrowed by the Court due to sensitivity and politicised nature of such issues, their dependence on financial circumstances and with the purpose of preventing a potential massive flow of complaints of this type.[31]

So, the rights to social security payments, regardless of their nature, just like the issues of their reduction or cancellation of certain payments or benefits are covered by Art.1 of Protocol 1 of the ECHR. However, the margin of appreciation given by the Court to states in this issue is extremely broad, and applicants' chances to prove discriminatory or disproportionate approach are very small, as real protection of the size of social and pension benefits in the event of reduction or cancellation is not reviewed positively by the Court in reality. So, in the event Ukrainian Government reduces or cancels social payments for any category of persons, even the chances of getting such complaints recognised as admissible at the ECtHR are currently insignificant. On the other hand, European Court practices will facilitate the strengthening of arguments and proving the lawfulness of national government's actions in cases of corresponding changes and reforms of social legislation.

According to Art.46 of the Constitution of Ukraine on ensuring a standard of living not lower than the minimum living standard, in case of such reductions, payments must remain at a level above the subsistence line. Some Ukrainian practice researchers drew attention specifically to the possibility of protection of such minimum amounts. However, back in 2010, the ECtHR considered the cases of *Pronina v. Ukraine* and *Bogatova v. Ukraine*,[32] which concerned receiving pensions, the amount of which was smaller than the specified by the law subsistence level. Failure to provide a certain level of life

or establishing a pension at a level below the subsistence line was not recognised as a violation of Convention standards, although Ukrainian courts' disregard of the applicant's references to the Constitutional norms was found to be a violation of Art.6 of the ECHR.[33]

Along with this, the European Court of Human Rights, reviewing complaints regarding pensions and social benefits insufficient to sustain a dignified quality of life, acknowledged the possibility of them going to trial, for instance, under Art.3 of the Convention, while announcing its judgments on inadmissibility of cases *Larioshina v. Russia*, *Pancenko v. Latvia*,[34] etc. In cases of inadmissibility of the applicant's situation, in order to sustain human dignity, in exceptional cases, the state may be required to ensure minimum security, including financial support.[35] Yet, the Court does not explicitly define insufficient payments and assistance under Art.3 of the Convention.

Thus, despite a broad range of socio-economic rights enshrined in the Constitution of Ukraine, the excessively general character of corresponding articles, absence of expressly defined obligations of the state to ensure them, inadequate financing and inability of the court system to protect most social rights[36] together with controversial practices of the Constitutional Court and a broad margin of appreciation given to states by the European Court of Human Rights in the issues of reducing the size of social payments or cancelling certain types and forms of such payments, will not contribute to protection of social rights of Ukrainian people, transforming these rights to declaration rather than action. Also declarative, rather than practiced in the context of the possibility to reduce social payments, pensions (at least to the level above the subsistence line, as guaranteed by Art.46 of the Constitution), is the prohibition to narrow the content and scope of rights defined by Art.22 of the Constitution. ■

30 da Silva Carvalho Rico v. Portugal, judgment of 1 September 2015.

31 Leijten Ingrid Property protection and austerity measures: is Strasbourg backing off? – Leiden Law blog/ Posted on November 19, 2013, *http://leidenlawblog.nl/articles/property-protection-and-austerity-measures-is-strasbourg-backing-off*.

32 Pronina v. Ukraine, judgement of 18 July 2006, Bogatova v. Ukraine, judgement of 7 October 2010.

33 Fedorova A. Protection of social rights under the European Convention on Human Rights. Value for Ukraine. – Law of Ukraine, 2012, No.11-12, p.241-252.

34 Pancenko v. Latvia, judgement of 28 October 1999, Larioshina v. Russia, judgement of 23 April 2002.

35 Budina v. Russia, ECtHR, case No.45603/05 of 18 June 2009.

36 Koziubra M. Human rights and the rule of law. – Law of Ukraine, 2010, No.2.

ON THE LAWFULNESS OF STATE INTERFERENCE WITH THE RIGHT TO PRIVACY IN THE INTERNET SOCIETY

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In international law there is now specific definition of the "right to privacy" concept. However, we can assume that the content of the term is disclosed in provisions of many national constitutions and international documents, namely: Art.8 of the European Convention on Human Rights (ECHR) (1950), Art.14 and 17 of the International Covenant on Civil and Political Rights (1966),[1] Art.16 and 40 of the Convention on the Rights of the Child (1989),[2] Art.14 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990),[3] Art.22 of the Convention on the Rights of Persons with Disabilities (2008),[4] Art.4 of the African Charter on Human and People's Rights (1986).[5]

The ECHR establishes a minimal set of rights to be protected in every state that is a party to the Convention, and also introduces a mechanism that allows individuals to use it against the state in case of violation of ECHR provisions by the state and the lack of possibility to resolve the issue within national legislation of states using legal remedies.[6] The definition of the right to privacy is presented in Art.8 of the ECHR:[7]

"(1). Everyone has the right to respect for his private and family life, his home and his correspondence.

(2). There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Analysis of international legal acts indicates presence of certain circumstances that justify state interference with the right to privacy. Such circumstances are presented in international documents in almost identical form and are similar to each other.

In contemporary sense, modern society is a complex structure of social relationships between entities that operate on the basis of cooperation, communication and exchange of information, which is today regarded as one of the most valuable resources.

Usually, such interactions between entities result in publication of facts from private life, ensuring the integrity of which must be guaranteed in a democratic society. Interference with the right to privacy can be regarded as "the most dangerous activity of a state", which violates civil rights of individuals, as noted in Rv. Duarte (1990 65 DLR (4th) 240, at 249).[8]

The idea of the right to privacy is that people have the right to enjoy life in their own homes, and communicate with each other without the risk of being listened to or becoming a victim of government surveillance. Private space includes correspondence and communication with other people, as well as social and other activities at home. It is also embodied in the following four elements: confidentiality of communications and correspondence; confidentiality of information received by a third party (data protection); security of person (invasive medical procedures, searches for a person, clothes or things); and territorial privacy (including private vehicles or other private items, and even observation of behaviour in the common space, such as outdoors, in the pool or other public place).

Historically, the right to privacy has been defined since the 19th century. An example is the French civil code of

1 The International Covenant on Civil and Political Rights (1966) – *http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx*.
2 The Convention on the Rights of the Child (1989) – *http://www.ohchr.org/en/professionalinterest/pages/crc.aspx*.
3 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) – *http://www2.ohchr.org/english/bodies/cmw/cmw.htm*.
4 The Convention on the Rights of Persons with Disabilities (2008) – *http://www.un.org/disabilities/convention/conventionfull.shtml*.
5 The African Charter on Human and People's Rights (1986) – *http://www.achpr.org/instruments/achpr/*.
6 Nick Taylor State Surveillance and the Right to Privacy.
7 European Convention on Human Rights (official translation). – Website of the Verkhovna Rada of Ukraine, *http://zakon3.rada.gov.ua/laws/show/995_004/*
8 The Canadian case, Rv. Duarte (1990 65 DLR (4th) 240, at 249) – *http://www.canlii.org/en/ca/scc/doc/1990/1990canlii150/1990canlii150.html*.

1804, which considers this right as a means of protection from interference by the state. In 1763, during his speech at the Palace of Westminster, Earl and former Prime Minister W. Pitt defined exactly when the state should stay out of citizens' private life: "Even the poorest person, living in his humble village hut, can withstand all powers of the Crown. The hut can be fragile – its roof may be very thin – winds can blow through it – storms can damage it – rain can get inside – yet the King of England cannot – all his power does not justify arbitrary access inside private property, even if it is just a half-ruined hut."[9]

The right to privacy is generally considered a negative right, i.e. such that should be free from any intervention, and also includes the responsibility of the state to protect individuals from such interference. At the same time, it is defined as a positive right, which includes the right to human dignity, security of person and reputation and is the basis for ensuring other fundamental rights such as freedom of speech.

The right to privacy is enshrined in the Universal Declaration of Human Rights, Art.12: "*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks*."

Referring to the context of Internet environment, the right to privacy applies primarily to intercepting correspondence. The European Court of Justice defines the term "e-mail/correspondence" as a collection of electronic means of communication,[10] such as e-mail and the use of websites. This term was defined in the case of *Klass v. Germany*, as well as in *Copland v. UK*.[11] Thus, in case of monitoring e-mail or other Internet activity, illegal access to personal data, the right to privacy applies.

The right to privacy is also applicable in case of publishing personal information on a particular website. Case-law stipulates that it is applicable in relation to certain images, such as photos and video materials, publication of which could damage the reputation of individuals. This also concerns people's identity and personality, the right to establish and develop relationships with others, and the right to entrepreneurship. It should be noted that media are not required to report the publication of such materials.

The right to privacy is not an absolute right, and it may be limited in certain circumstances. In the Internet environment, the right to privacy may be violated through interference, usually in the form of monitoring online activities of certain individuals. **Interference is any action, the goal of which is to prevent publication or distribution of information in the Internet**. In real life, interference with the right to privacy is usually expressed in actions aimed at destroying publications and equipment used for their preparation, in the persecution of journalists, artists and other people working in the field of information and art. In the context of Internet environment, such interference means **conducting illegal activities to eliminate unwanted information and block access to it**. Such acts adversely affect the right to freedom of expressing their views by the persons in question, and subject to censorship the published materials available for public. Internet is the environment of operation of complex automated systems for state monitoring of online content related to almost all areas of user activity. This lack of definition in the areas of control poses a risk to adequate protection of the freedom of speech. And yet, some types of such interferences are lawful and justified, in particular, measures to eliminate and prevent distribution of child pornography, which belongs to the category of criminal offences, but even these activities are to be carried out in compliance with strict criteria for their execution.

In international legal practice there are cases in which state interference with the rights is justified and is carried out:

- in compliance with the law;
- with a lawful aim;
- is necessary in a democratic society.

Compliance of interference with the law. Interference with the right to privacy is lawful and justified only if such interference is carried out by the state and its law enforcement bodies in compliance with law. In the event of such actions being contrary to the law, they automatically violate the rights of individuals enshrined in Art.8 of the ECHR and are characterised as unlawful. As it turned out, some branches of law are especially vulnerable in this respect, including legislation on secret surveillance, protection of children and intercepting correspondence of prisoners. It should be noted that the criterion of "compliance with the law", above all, should include a solid legal framework with clear and substantial provisions, as well as safeguards against arbitrary action by public authorities.

Lawful aim of interference. After the interference is deemed compliant with the law, the next question arises – do these actions pursue a lawful goal according to p.2, Art.8 of the ECHR, which includes a list of goals that a state can pursue legally, namely: (*a*) collection and storage of information on private individuals "in the interests of national security, public safety"; (*b*) intercepting correspondence of prisoners "for the prevention of disorder or crime"; (*c*) ensuring the protection of children's rights or actions "for the protection of health or morals" or "for the protection of the rights and freedoms of others"; (*d*) expulsion or deportation in the interest of "economic wellbeing of the country".

Usually, during litigation, proving government interference with the right to privacy with reference to pursuing a lawful goal, is the responsibility of the defendant. Also, they have to prove that such actions were carried out on the grounds of national significance, such as preventing a threat to national security, but in

[9] Speech on the Excise Bill, House of Commons (March 1763), quoted in Lord Brougham, Historical Sketches of Statesmen Who Flourished in the Time of George III (1855), I, p.42

[10] CASE OF KLASS AND OTHERS v. GERMANY (Application no. 5029/71, 1978) – *http://hudoc.echr.coe.int/eng?i=001–57510#{"itemid":["001–57510"]}*.

[11] Copland v. United Kingdom (Application No 62617/00, 2007) – *http://hudoc.echr.coe.int/eng?i=001–79996#{"itemid":["001–79996"]}*.

the real world, cases are common where likely facts that give grounds for interference are fabricated in support of one's position. Plaintiffs, in their turn, challenge such position of the opponent, referring to the falsity of facts that provide grounds for such interference. Despite plaintiffs claims, precedents confirm the fact that court recognises existence of lawful goals as ground for such interference, especially in cases that concern healthcare and protection of moral values of people, their rights and freedoms. An example is the ruling in the case *Open Door Counselling v. Ireland* (1992). Thus, in most cases, the court recognises the existence of a lawful goal and rarely accepts the fact of its absence.

Necessity in a democratic society. The final step in establishing the lawfulness of interference with the right to privacy is recognition of the necessity of such action in a democratic society. In this process, proving the existence of compelling grounds for interference is not sufficient. In the decision in the case *Handyside v. The United Kingdom*[12] the Court notes that "the "necessity" criterion is not synonymous with such notions as "irreplaceability", "permissibility", "desirability" or "rationality" and is thus different in the specifics of its interpretation and proving.

Next, in the decision in *Olsson v. Sweden*,[13] the Court explains that the concept of necessity requires proving the fact that interference was carried out on the basis of a pressing social need, and that it must be proportionate to the lawful aim pursued. Thus, the Court dismissed the attempts to actively analyse the meaning of the term "necessity", instead giving preference to proving the proportionality policy.

Defining the term "*democratic society*". Let us remember that case-law does not provide a clear definition for the term "democratic society". How should this concept be interpreted? In the case *Dudgeon v. The United Kingdom* the Court has singled out two necessary elements characteristic of a democratic society: tolerance and ensuring freedom of a width of views. In the context of Art.8 of the ECHR, it also stressed the importance of the rule of law in a democratic society and the need to prevent arbitrary interference. Moreover, the Court thought that the Convention was created to support and facilitate ideals and values of a democratic society.[14] So, **the most important aspect of a democratic society is a balance between the rights of individuals and the interests of society, which is based on the principle of proportionality.**

Principle of proportionality. In general, the idea of the principle of proportionality is that human rights are not absolute and the exercising of these rights should be done in the context of general interests of the society. This principle is very actively used in today's ECtHR practices. In many of its decisions the Court noted: *search for a fair balance between specific aspects of general interests of society and specific aspects of protecting fundamental rights and freedoms of individuals is an essential characteristic of the European Convention on Human Rights*.[15]

Application of the principle of proportionality in the context of ECHR's Art.8. Analysing compliance of decisions made by national courts with the provisions of Art.8 of the ECHR, the Court refers to the principle of proportionality, which determines the balance between interests of individuals and the state. The main objective of the Court in this process is to establish the fact of relevance and effectiveness of operation of authorised judicial bodies at every stage of proceedings within the national judicial system.[16] Confirming that the interference with the right to privacy corresponds to the lawful goal, is a very complicated procedure, which includes consideration of a number of factors, such as: the need to be protected from interference with the right to privacy, the severity of interference and commitment of state to ensure that the requirements of society are met. It should be noted that in the context of protection against interference with the right to privacy, in the case *Dudgeon v. The United Kingdom*,[17] protection of the right to privacy of sexual relations requires a special method to prove the existence of significant grounds to interfere in relations of this kind, and usually the existence of such grounds is extremely difficult to prove.

The logic of justifying such type of interference is very simple – the more serious the case of interference, the harder it is to prove the fact of its lawfulness.

The negative impact on fulfilment of society's needs that occurred as a result of interference with the right to privacy on the basis of threats to national security is easier to justify than cases of interference with the rights related to morality and general values of individuals.

To summarise the presented above, we can say that in order for interference with a right enshrined in provisions of p.1 Art.8 of the ECHR to be lawful, it must comply with the provisions and criteria of p.2 Art.8 of this Convention. In particular, such interference must be carried out in compliance with the law, pursue a lawful aim and be necessary in a democratic society based on the principle of proportionality. Moreover, it is a commonly known fact that the right to privacy is not limited to inviolability of the home, privacy of correspondence, and is applicable on a much wider scale, and each time when a state violates the boundaries of citizens' private space, it must be able to justify its actions, substantiate the need for interference with this fundamental right – the right to privacy, in a most detailed manner, based on national legislation, as well as norms of international law, taking into account the common values of society.

As a result, the level of protection of the right to privacy in each state depends solely on the quality of enforcement of the right defined in Art.8 of the ECHR, and on the balance between the needs of society and those of individuals. ■

[12] Handyside v. the United Kingdom (Application no. 5493/72) – *http://hudoc.echr.coe.int/eng?i=001–57499#{"itemid":["001–57499"]}*.

[13] Olsson v. Sweden (Application no. 10465/83) – *http://hudoc.echr.coe.int/eng?i=001–57548#{"itemid":["001–57548"]}*.

[14] The European Convention on Human Rights (1948) – *http://www.coe.int/en/web/conventions/full–list/–/conventions/treaty/005*.

[15] Ibid.

[16] Ursula Kilkelly. The right to respect for private and family life: a guide to the implementation of Article 8 of the European Convention on Human Rights / Council of Europe, reprinted with corrections, August 2003, Germany. – 2001.

[17] Dudgeon v. the United Kingdom (Application no. 7525/76) – *http://hudoc.echr.coe.int/eng?i=001–57473#{"itemid":["001–57473"]}*.