Constitutional control in the mechanism of exercising public power

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Ключові слова:
публічна влада, державна влада, безпосередня демократія, місцеве самоврядування, конституційний контроль, державний контроль.

Introduction. The exercising of public authorities is associated with the interaction of different structures, the emergence of conflicts and disputes between them concerning the exercising of certain powers. In each case these conflicts must be regulated and in the future the public authorities mechanism should function taking into account the decisions on resolving such disputes. The bodies of constitutional control play a special role in resolving such kinds of disputes. The constitutional control is an important means of democratic development of any state, as well as it is the universal institute of conflict resolving in the system of government relations.

When resolving public-legal conflicts, the bodies of constitutional control are often perceived as arbitrators, i.e. mediators in dispute resolution. Thus, Yu. A. Yudin, emphasizes that in the process of resolving disputes between state institutions, the body of constitutional control acts as the arbitrator in the conflicts between the branches of power1. Yu. G. Barabash keeps to the same point of view2.

In our opinion, this position does not reflect the very essence of constitutional control and the role of constitutional control bodies in the mechanism of exercising public authorities in a democratic country.

After all, the key point that reflects the unique role of constitutional control in the process of exercising the public power in the state is the function of state control on the compliance of acts, actions and decisions of public authorities and other subjects of state-legal relations with the Constitution as the main law of the state. Thus, S.V. Sas points out to the key fact that the body which exercises constitutional control has been programmed to be equidistant from all the centers of power represented by the relevant state authorities. Each of them is under the so-called Sword of Damocles of Constitutional Control because it carries out constitutional authorities and makes a decision of a mandatory significance. ... The mechanism of constitutional control is the most effective of all possible mechanisms to ensure the effectiveness of the system of checks and balances and the implementation of the principle of separation of powers3.

It should be mentioned that constitutional control is functionally beyond any of the traditional branches of state power. However, it decisively influences ensuring a clear balance between the branches of the state powers and is a determining factor in the implementation of public authorities in democratic countries. It makes a very significant impact on all kinds of public authorities: both state power and direct democracy and local government.

Discussing the influence of constitutional control on the mechanism of exercising of state power, it should be noted that the peculiarities of such influence in one or another country largely depends on the model of its organization.

The analysis of the practice of implementing the European Constitutional Control model shows that this institute is a guarantor of the effective functioning of the system of checks and balances. First of all, this is due to the fact that such control is the main function of the specialized organs of constitutional control in contrast to the courts of general jurisdiction; the function of constitutional control is an indirect/secondary one and its implementation is a result of their main activity.

For example, the decisions of the Constitutional Council of France related to the distribution of different branches and levels of powers are divided into two subgroups. Firstly, these are the decisions in which the Constitutional Council interprets Art. 34 of the Constitution of France, which defines the scope of legislative regulation (L – interpretation of laws adopted beyond the scope of legislative regulation and defined in Art. 34 of the Constitution of France as the category of regulations, i.e. by-laws; FNR – confirmation of the legislator’s powers). Within this group, the Constitutional Council established whether the relationships regulated by this Act refer to the procedural or legislative sphere, that is, in fact, delimit the powers of the legislative and executive power. Secondly, these are the decisions in which the Constitutional Council divides the powers of the state legislature as a whole and the overseas departments and territories; their competence is fixed in Art. 74, 74-1 of the Constitution of France (LOM)4.

The Constitutional Court of the Republic of Armenia in its resolution PKS-1063 stated that there is no single approach to the functional separation of powers in the structure of the Constitution of the Republic of Armenia. While the legislative and executive powers are represented as structural institutions, the judiciary one is only distinguished by its functional role5.

The Ukrainian body of constitutional control has also repeatedly defined the essence and fundamentals of the principle of power distribution in its legal positions. The decisions of this body contributed to the effective application of the principle of checks and balances in the mechanism of exercising the state power in Ukraine (ruling of 24 June 1999, № 6rp/1999; ruling of 10 February 2000, № 2-rp/2000; ruling of 1 April 2008, № 4-rp/2008; the conclusion of 30 October 2003, № 1-V/2003).

With regard to the constitutional control under the conditions of the American model or some countries with the mixed model, V. M. Shapoval points out that, ‘although the activity of the supreme courts, which combine their traditional activities with constitutional control, ... has been slightly increasing for the last years in comparison with the past, it is far behind the activity of specialized courts’6.

However, as it is affirmed by the state and legal practice of the United States, the acceptance of responsibility for consideration and the authoritative solution of issues makes the judicial power a really powerful structure in the United States and puts it at the same level as the other two branches of government. Moreover, in a real life many of the most important decisions in the country’s domestic policy have been made by the Supreme Court, not by the President or the Congress7.

M.M. Petina distinguishes four spheres of constitutional control concerning ensuring the mechanism of functioning of the public authorities applied by the U.S. Supreme Court, i.e. the powers of the court to declare unconstitutional the Act of the Congress; the right of the court to declare invalid any provision of the state constitution, state law (statute), or any other action of the state that is within the competence of the federal government, enshrined by the US Constitution; the right of the Supreme Court to abolish the state Supreme Court’s ruling if it affects federal matters; ability to check the constitutionality of actions of public officials while exercising their powers or adopting the normative act of the delegated legislation8.

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Regardless of the model of functioning of the constitutional control, it is considered as the strongest deterrent to any attempts of subjects of state power to acquire the powers not inherent in their status, and thus to achieve acceptable balance of various branches of power in the state. Being a central element of the system of checks and balances, the constitutional control is able to provide a reasonable balance of the entire system of power (naturally at the condition that its decisions are beyond any doubt). Systemically interpreting the Constitution ... it is possible to maintain such balance even when constitutional norms can cause one branch of government power to overweight another one9.

Organs of constitutional control make influence on the functioning of direct democracy as a separate type of public authorities. The amount of this influence is different in various countries.

Thus, in accordance with Art.7 of the Law of Ukraine ‘On the Constitutional Court of Ukraine,' the powers of the Constitutional Court of Ukraine include provision of the court's opinions on the conformity of the Constitution of Ukraine with the issues offered to be discussed at the all-Ukrainian referendum as a result of a popular initiative. Chapter 12 of the Law defines the peculiarities of the order of constitutional control; in particular, it defines the subject of control, the circle of participants and the content of resolution10.

In addition, the Constitutional Court is empowered to consider constitutional complaints of both individuals and legal entities in private law, including violations of electoral legislation. As of April 17, 2020, there are only several (four) complaints. There is no practice to consider such complaints. But in the long run, such form of constitutional control of direct democracy is possible.

And, of course, the constitutional control over the implementation of the direct democracy is carried out by the Constitutional Court of Ukraine within its authority to exercise constitutional norms of control. Among the most recent decisions on this matter there is the ruling of 20 June 2020, № 6-r/2019 in the case of the constitutional representation of 62 people deputies of Ukraine on the conformity of the Constitution of Ukraine (constitutionality) with the Decree of the President of Ukraine ‘On Early Termination of Powers of the Verkhovna Rada of Ukraine and the Appointment of Early Parliamentary Elections'11.

In France, the decisions of the Constitutional Council on electoral and referendum disputes are divided into the decisions taken in the sphere of: parliamentary elections (AN – Elections to the National Assembly, SEN – Elections to the Senate); presidential elections (PDR); referendum (REF). The Constitutional Council is also empowered to analyze the procedure of running elections in terms of its legality while reviewing the publications (ELEC). In these decisions, the Constitutional Council provides an assessment of specific law-enforcement situations in the field of elections and referendums, as well as it states presence or absence of electoral or referendum offences12.

Unlike the Constitutional Council of France, there are a number of countries to the constitutional competence of which belongs a dispute resolution regarding the results of referendums (Slovakia, Armenia, Georgia, Kazakhstan, and Montenegro). In some European countries the bodies of constitutional control are mandatory entities of electoral and referendum legal relations. (Croatia, Moldova, Azerbaijan, Albania, Greece, Romania)13.

Speaking about the role of bodies of constitutional control in the sphere of ensuring the functioning of local self-government, it should be borne in mind that clarifying the role of constitutional control in this context is associated with the overall functional purpose of constitutional control bodies. For example, the Constitutional

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13 Kovalchuk V.B. Constitutional Justice in the Mechanism of Legitimisation of the State Power: Foreign and Domestic Experience. URL : naub.oa.edu.ua › konstytutsijna-yustytsiya-v-mehanizm...
Court of Ukraine, by virtue of its assigned constitutional powers, is called, first of all, to make a control of constitutionality of regulatory legal acts regulating the issues of local self-government in Ukraine and thus to ensure compliance of legislative decisions in this area with the constitutional principles and norms. Thus, as of April 17, 2020 the constitutional control organ on the functioning of the institute of local self-government adopted 18 decisions.

It is necessary to pay attention to the fact that according to Article 41 of the Law of Ukraine ‘On the Constitutional Court of Ukraine’ (the previous version) the body of local self-government was the subject of the right to apply to the Constitutional Court of Ukraine on official interpretation of the Constitution and laws of Ukraine. Local governments have used this right quite often. The new Law ‘On the Constitutional Court of Ukraine’ excluded local self-government bodies from the list of legal entities for the constitutional submission to the Constitutional Court concerning the official interpretation of the Constitution.

On the other hand, the new Law provides for the protection of constitutional rights and freedoms of citizens by addressing the Constitutional Court of Ukraine with a constitutional complaint on the conformity of the Constitution of Ukraine (constitutionality) with the law of Ukraine (its separate provisions), which is applied in the final court decision in the case of the subject of the right to constitutional complaint (Article 55). Although, as of April 17, 2020 it has been registered 1852 constitutional complaints to the Constitutional Court of Ukraine, only a few directly relate to local self-government issues. But in the future, both citizens of Ukraine and legal entities have ample opportunities to initiate constitutional control measures, the main question of which in this case is whether there is violation of the disputed norms of the rights of the citizen and (or) the population concerning local government.

It should be noted that in some foreign countries local self-government bodies and territorial communities have been granted a right to submit a constitutional complaint as special guarantees. Such right is guaranteed in Germany, Austria, Czech Republic, and Slovenia. As for borrowing experience of these countries in the state legal practice in Ukraine, it should be noted that to ensure the rights of local communities, it would be advisable to acknowledge them as subjects of the constitutional complaint regarding the protection of municipal interests, but only after the local self-government reform has been completed.

Consequently, the constitutional control is one of the most important institutions for protection of local self-government and the right of citizens to implement it. It is a specific tool of transformation of the constitutional model of local self-government into the level of specific normative binding orders which makes it possible to participate actively in the institutional, functional and to a certain extent in the political and legal improvement of the institution of local self-government. It becomes, in turn, a basis for assessing this institution in terms of its conformity with the ideals of a democratic, legal and social state formulated in the Constitution.

Having analyzed the influence of constitutional control on the mechanism of public power, it is worth paying attention to the peculiarities of the functional nature of such influence and the form of its implementation.

In our opinion, the main functional areas of the influence of the constitutional control bodies on the mechanism of functioning of public authorities are: norms of constitutional control, including the promotion of the lawmaking of the representative bodies of public power while adopting regulatory acts; official interpretation of the Constitution and laws; constitutional control in the sphere of competence disputes between public authorities; constitutional control in the sphere of protection of rights and freedoms of a man and a citizen, including the sphere of direct democracy realization; control over the implementation of constitutional responsibility for violation of the Constitution by the highest officials concerning holding elections and referendums and activities of political parties.

Constitutional control as a form of a state control is exercised in certain forms, that is, certain ways of practical implementation of control activities which is implemented within the limits of the powers conferred on

the bodies of constitutional control and is used to achieve the aforementioned goal with the highest efficiency of control activities.

Forms of the state control include: verification, inspection, revision, expert examination, monitoring. All these forms of government control have features that are manifested during various control activities and depend on many circumstances, including subject and object of control. As for the constitutional control, it is usually carried out in the form of the verification of constitutionality of acts, as well as actions (inaction) of public authorities, organizations or public associations, but can be done in such special form as the formal interpretation of the Constitution and laws.

**Conclusions.** Since the constitutional control is in the sphere of ensuring the state organization as a whole, it is a specific type of a state control. Therefore the subjects of constitutional control are only the state authorities that ensure the realization of state power. The direct object of the constitutional control is relations in the sphere of exercising powers by public authorities or their officials possessing a special constitutionally legal status. The purpose of the constitutional control is to stop attempts of any public body to exceed its constitutional powers or implement it in an unconstitutional manner. Thus, the main purpose of constitutional control as a specific type of state control is the protection and defence of the constitutional order.

The constitutional control bodies are the most powerful constitutional bodies in the mechanism of public authority which have the right of control over all other bodies including bodies that possess representative functions.

**Summary**

The article analyzes the theoretical foundations of the influence of the institute of constitutional control on the mechanism of exercising certain types of public power: state power, direct democracy and local self-government. The peculiarities of the functional nature of such influence and the forms of its realization are investigated. The basic functional directions of the mechanisms of influence of constitutional control bodies on the functioning of public power in domestic and foreign state-legal practice are determined.

**Анотація**

У статті проаналізовано теоретичні засади впливу інституту конституційного контролю на механізм здійснення окремих видів публічної влади: державної влади, безпосереднього народовладдя та місцевого самоврядування. Проведено дослідження особливостей функціональної природи такого впливу та форм його здійснення. Визначено основні функціональні напрямки механізмів впливу органів конституційного контролю на функціонування публічної влади у вітчизняній та зарубіжній державно-правовій практиці.

**References:**


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