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Decision of constitutional control authorities as a source of formation of a law case in the continental Europe countries: rather-legal analysis

Prior to analyzing the process of the law case formation in the practice of the Constitutional Court of Ukraine it is necessary to define a place of this institution in the system of agencies of State power, taking into account the principle of checks and balances as well as considering the exclusive unique character of the institution of constitutional justice.

Notwithstanding the increased attention of the scholars to this problem, anyway, it requires clarification of a set of questions. One of them reduces itself to the question whether a revision or transformation of the status and functions of the Constitutional Court is necessary under the conditions of democratic transit. Neither in the professional environment of theorists and practitioners of law, nor among politicians, in society as a whole there are no definite answers to this question. We believe that such a change of the status is not just necessary, but it is unavoidable and it shall take place towards the expansion of a subject of the competence of the Constitutional Court. We consider that the powers of a single agency of the constitutional jurisdiction shall not be limited only to the establishment of constitutionality of legal acts of the highest agencies of State power, and it is necessary to expand them by means of control of both legitimacy of acts and acts of the public authorities.

It is difficult to imagine the modern legal and political system of the countries of the western democracy without such an important component as agencies for constitutional control, among which, first, there are all constitutional courts as well as other courts of justice having jurisdiction thereof (the Constitutional Council of France or the Constitutional Tribunal of the Republic of Poland). For the first time ever in Europe the constitutional court as an agency for constitutional control was integrated into the judicial law system

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in Austria, since in November, 1920 the democratic Constitution was adopted (Federal law). The creation of the constitutional court became an expression of the idea of famous Austrian law theoretician Hans Kelsen. That is why this model of arrangement of the constitutional control is called "Austrian" or "Kelsen`s" one. This type of model of the constitutional control became a frequent practice in such countries of Europe that survived the periods of totalitarianism and authoritarianism and changed their direction to the democracy[1].

The role of agencies of the constitutional justice in the modern democracies has increased not because they have become a powerful authority, but because they have become a real force that can protect the sovereign human rights reflected in the Constitution against the offences by governmental authorities, in particular, those representative agencies that are trying to monopolize this right. Thus, ex-Chief Justice of the United States Supreme Court John Marshall argued for a necessity of constitutional control of acts of the Parliament by the reason that the will of people expressed in the Constitution had the supreme power, and this will set definite boundaries that any authority could not cross. Exactly for the protection of this will the severe control on the part of the courts of justice is required[2]. That is why it is completely no coincidence that the Federal Constitutional Court of Germany always passes its judgments "on the behalf of people".

Thus, the mechanism of legitimization of government the constitutional courts play a role of intermediary between people and government who, on the one hand, protects the right to will expression of people that is realized, first of all, by means of elections and referendum, and, on the other hand, it controls the legitimization of acts of agencies of State power. Exactly in this way the role of courts dealing with constitutional questions was defined by O. Hamilton when he indicted the binding character of decisions of such courts for other branches of government. It appears to him that they are granted with such power because they interpret the acts of the highest level as intermediaries between people and legislation[3].

Consequently, it can be said without prejudice that the nature of the Constitutional Court as a particular agency of State power at the stage of its forma-

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[1] Розанвалон П'єр. Демократична легітимність. Безсторонність, рефлективність, наближеність / Пер. з фр. Євгена Марічева. – Вид. Дім „Києво-Могилянська академія", 2009. – С. 167.

[2] Конституционний контроль в зарубежных странах. – М.: Норма, 2007. – С. 101.

[3] Федералист. Политические эссе А. Гамильтона, Дж. Медисона и Дж. Джея: пер. с англ / Под общ. ред., с предисл. Н.Н. Яковлева, комент. О.Л. Степановой. – М.: Издательская группа «Прогресс» – «Литера», 1994. – С. 505.

tion as a certain institution consisted in the practical realization of the mechanism of checks and balances. Vesting a body of the constitutional jurisdiction with powers of official interpretation of the Constitution and constitutional laws, state makers believed by mistake that it would assist the establishment of power-political balance in society since they proceeded from theoretical and methodological foundations of the theory of social contract. The modern practice of existence of judges of the constitutional jurisdiction in different countries indicates the increase of their role in the process of political struggle between different groups of elite. The court from the body of disputes settlement changed into the body of legitimization of differently directed interpretations of acts of legislation that often have just opportunistic nature taking into account political situation in the country.

Passing from the theoretical questions to the practical determination of a place of the Constitutional Court of Ukraine in the system of government authorities, it is necessary to refer to works of Yu.M. Todyka who believes that the Constitutional court represents an important subject of the state legal relations since being the only body of the constitutional jurisdiction, and it is called to provide constitutional justice and legalness that is one of the principles of the constitutional system[4].

The Professor Max Plank of G. Steinberger Institute of Foreign Public and International Law based on a comparative study of the problems of the constitutional jurisdiction by the European Commission for Democracy through Law (Venice Commission of the Council of Europe) prepared a report where he separated the powers of the constitutional court: jurisdiction concerning the administer justice for violation of the Constitution[5]. According to Yu.A. Yudin, the constitutional courts are the courts of justice the activity of which is carried out in the forms of action that places it in close quarters with courts of common jurisdiction. Notwithstanding the formal definition of the nature of constitutional courts that is given by the legislation of the particular countries, the name of these agencies itself witnesses that they are considered as special tribunals[6]. That is why the question now arises of whether the constitutional court belongs to the agencies of the judicial power?

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[4] Ю.Н. Тодыка, *Конституционное право Украины: отрасль права, наука, учебная дисциплина* / Ю.Н. Тодыка. – Х.: ФОЛИО, 1998. – 291 с., с. 108.

[5] Г. Штайнбергер, *Модели конституционной юрисдикции за демократию через право* / Г. Штайнбергер. Страсбур г: Изд. Совета Европы, 1994. – 51с., с. 35–36.

[6] Ю.А. Юдин, *Модели конституционного правосудия* // Сравнительное конституционное право. – М.: Манускрипт, 1996. – С. 158 – 263., с. 173.

V. Tatsiy and Yu. Groshevyy insist on that the constitutional court is not an agency of the judicial power. Its competence can be divided in common and exclusive. The common competence of the Constitutional court consists in that it considers cases of correspondence of the Constitution and constitutional laws and other acts of the Verkhovna Rada of Ukraine, Constitution and laws of the Autonomous Republic of Crimea, decrees of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, acts of ministries and other chief executives of the central agencies of the executive branch, acts of local government. And the exclusive competence consists in that the constitutional court gives explanations about the adherence to the Constitution of Ukraine by the President of Ukraine, by the Prime-Minister, other officials who are approved by the executive branch of the government[7].

Instead of this M. Tsvik notes that the Constitutional court is included into the judicial system only according to its name since it is called to perform not simply a justice as other courts do, but supervising function[8]. Certainly, the administration of justice enhances the constitutional system of any political system, and the constitutional supervision has a primary importance for the administration of justice. Nevertheless, unlike the supervisory authorities, the judicial branch, administering the justice, both considers the issue concerning the presence of the law violation in the activity of the peculiar citizens, officials and state structures and deals with the questions concerning their liability.

A number of researches are of completely opposite mind. G.A. Shmavonyan considers the constitutional court as an integral part of the structure of the judicial branch of Armenia that is specialized in the settlement of exclusively constitutional, legal questions. This idea is promoted by Yu. Shemshuchenko, who believes that the Constitutional court is a judicial body and an integral part of the judicial branch.

M.A. Nudel assets that while performing of the constitutional control by the regular courts there is no need to define its legal nature. Although, when checking the constitutionality of law, they appear in unusual for the court role of a censor of the legislative branch, nevertheless remain courts. The question about the legal nature of the agencies of the constitutional supervision arises in

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[7] В.Я. Таций, Ю.М. Грошевой, *Правовые способы охраны Конституции.* // Вестник АПрН. Сб. науч. тр. – № 3. – Х.: АПрН, 1995. – С. 35–42., с. 40.

[8] М.В. Цвик, *Актуальные проблемы организации власти в Украине.* // М.В. Цвик, Проблемы законности. Сб. науч. тр. Вып. 30. –Х. : НЮАУ, 1995, – С. 22–30., с. 213–214.

the cases when the special Constitutional court is created. M.A. Nudel sees the main feature of the constitutional courts in the fact that they, alike the regular courts that apply a law to the definite legal relationships, evaluate the law itself and decide a problem concerning its destiny. Thus, they perform a function of absolutely political nature[9].

J. Isensee notes that the idea that law and policy are completely incompatible "elements", and accompanies his statement by the fundamental constitutional and theoretical objections to the constitutional justice. The Professor A. Shayao speaks about the ambiguity of interpretation of the statement concerning the possibility of political participation of the constitutional court. If one such statement means the support for one actor by the constitutional court at the political stage notwithstanding the regulations of the Constitution, so the others understand this to mean the identification of the boundaries of future legislation by the constitutional courts[10].

Thus, the question concerning the place of the constitutional justice is far from complete settlement. Since the problems of policy and law are in the dialectic interrelation we share the following opinion of B.S. Ebseiev: "The Constitutional justice still needs to define the golden mean that separates the judicial activity from a particular political power"[11]. We are of the opinion that it will be easier to find such "golden mean", if we step outside the bounds of the stereotype concerning the division of powers into three branches (legislative, executive, and judicial'). As Yu. Todyka reasonably writes: "any codified constitution is based on the most important political and legal ideas, principles that express the concept and philosophy of the Constitution, its nature and social orientation. The complex of these principles is shown by the notion of the foundations of the constitutional system developed by the European continental doctrine"[12]. Therefore, it is logical to suppose the existence of a special power institute that will evaluate actions of all political actors under the

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[9] М.А. Нудель, *Конституционный контроль в капиталистических государствах* / М.А. Нудель. – М.: Юрид. лит., 1988. – 55 с., с. 112.

[10] А. Шайо, *Конституционализм и конституционный контроль в посткоммунистической Европе* // Конституционное право: Восточноевропейское обозрение. – 1999. – № 3. – С. 80., с. 79.

[11] Б.С. Эбзеев, *Конституционный Суд РФ правовая природа, функции, основные направлениядеятельности* // Вестник Конституционного Суда РФ. – 1996. – № 6. – С. 16–21, с. 18–19.

[12] Ю.Н. Тодыка, *Конституционное право Украины: отрасль права, наука, учебная дисциплина* / Ю.Н. Тодыка. – Х.: ФОЛИО, 1998. – 291с., с. 108.

criterion of their correspondence to the mentioned principles (the genius of the constitutional law).

Having no clear unambiguous position concerning the place of the Constitutional Court in the system of the governmental authorities of the modern Ukraine we will be governed exceptionally by the legislation that defines that this is an body of the constitutional jurisdiction authorized to officially interpret the constitution and laws of Ukraine. It is significant that today the Constitutional Court of Ukraine according to the applicable legislation is seriously limited in its powers in comparison with majority of the countries both of the Western and the Eastern Europe where the experience of activity of the constitutional courts is little more (for example, the powers of bodies of the constitutional justice of Latvia, Poland, Czech Republic, Slovakia etc.).

First, the main subject of the Court control is acts of the highest agencies of State power, but not their actions. Even though the article 152 of the Constitution of Ukraine allows to draw conclusion concerning that along with acts the Constitutional Court can rule unconstitutional the actions of the constitutional and legal relationship subject since „material or moral damage caused to individuals or legal entities by acts and actions ruled unconstitutional are compensated by the State in accordance with the law". However, due to lack of practice of official interpretation and practice in the application of this norm, it has an abstract and theoretical character.

Second, it is unconditional, that the Constitutional Court carries out only abstract control and it is not obliged to found out facts that afford ground for drawing conclusion about the legitimacy of activity of the relevant agencies of State power that very often leads to the inactivity of the Court in cases when it is referred to violation of the constitutional procedure on the part of the people's deputies or other subjects of the government when making certain important decisions for State and society (for example, the Court in this aspect made decisions dated July 7, 2009 under № 17-рп/2009 and dated July 14, 2009 under №18/рп/2009, according to which it abrogated two laws based on the violations of the examination procedure established by the Constitution of Ukraine, adoption and entry into force thereof). The Court is provided with such obligation only during the impeachment procedure of the President of Ukraine.

Third, in Ukraine, unfortunately, we can see just the embryo state of the institute of the constitutional responsibility that is an important component of the legal protection of the Constitution of Ukraine and legitimization of the State power. The only effective way to influence the Constitutional Court the

subjects of the constitutional and legal relations is to make a decision concerning the unconstitutionality of the acts of the Verkhovna Rada of Ukraine, The President of Ukraine, the Cabinet of Ministers of Ukraine and the Verkhovna Rada of the Autonomous Republic of Crimea that results in their cancellation[13]. Moreover, nowadays the Court does not possess a real mechanism of prosecution of chief executive officers of State, except the indirect participation in the impeachment procedure of the President of Ukraine. Although in the constitutional law of the foreign countries the personal nature of the responsibility is often applied and it concerns both the President and other chief executive officers of State. Thus, in Austria, Bulgary, Greece, Georgia, France the body of the constitutional jurisdiction deals with a problem concerning the deprivation of the deputy seat, in particular, because of violation of the requirement concerning the incompatibility (in spite of the fact that in Ukraine there are three decisions of the Constitutional Court regarding the deputies of combining, the cases of violation are not unusual). In Turkey the Constitutional Court of Ukraine is authorized to strip a member of the parliament of immunity[14]. The Federal Constitutional Court of Germany is authorized to consider accusations against the federal and land courts in case of violation by one of them of the provisions of the Constitutional law or the constitutional system while performing their duties or independent from them[15]. Such personal responsibility will be especially efficient in relation to those officials of State who ignore or violate acts of the Constitutional Court of Ukraine.

Thus, the role of the body of the constitutional justice in the modern democratic State is extremely weighty. The Constitutional Court as a body of the constitutional control is an integral part of the mechanism of legitimization of State power, since it is called to protect sovereign rights guaranteed by the Constitution against the unlawful act and decisions of agencies of public authority, thus giving them additional legitimacy. The Court has such a power, because it acts as a guardian of the Constitution that in itself is a social

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13 А. Стрижак, *Конституційний Суд України в системі органів державної влади України* // Конституційний Суд у системі органів державної влади: актуальні проблеми та шляхи вирішення: матеріали міжнародної конференції, м. Київ, 16 травня 2008 року / Конституц. Суд України; упорядн.: К.О. Пігнаста [та ін.]. – К.: Ін Юре, 2008. – С. 9.

14 В.М. Шаповал, *Суд як орган конституційного контролю (із зарубіжного досвіду)* // Вісник Конституційного Суду України. – 2005. – № 6. – С. 32.

15 А.Н. Соколов, *Правовое государство: от идеи до ее материализации*. – Калининград: ФГУИПП „Янтарный сказ", 2002 – С. 251–252.

contract where, on the one hand, the basic human rights and freedoms are defined, and on the other hand, the State authority limit is determined. For the purpose of such democratic legitimization the Constitutional Court shall possess certain powers fixed in the constitutions of the developed European countries[16].

It is possible to improve the activity of the Constitutional Court of Ukraine in the sphere of interpretation of the Constitution concerning the disputes regarding the scope of rights and obligations of the highest agencies of State power and solution of a problem regarding the correspondence (constitutionality) of the laws to the constitution, other acts of agencies of State power taking into account the following. First, except the determination of the constitutionality of acts of the highest agencies of State power the Constitutional Court of Ukraine shall exercise control over the legitimacy of both acts and actions of these agencies and chief executive officers of State mentioned in the Constitution. Second, in the specified sphere the Constitutional Court shall be given powers that will clearly provide the need in certain cases to exercise not only abstract control, but also find out facts that will give basis to draw a conclusion about the constitutionality. Third, it is necessary to introduce the institute of the constitutional responsibility of agencies and officials for failure to perform acts of the Constitutional Court of Ukraine and to develop a mechanism of implementation of these acts[17].

So, we have determined that the Constitutional Court is authorized to act in law-enforcement and judicial activity sphere. Nevertheless, there is an opinion that a decision of the Constitutional Court shouldn't be considered to be a precedent, it should be considered as an act of prejudgement. Thus, the Russian expert in constitutional law TG Morshchakova insists that original decisions of the Constitutional Court of the Russian Federation are a special form of prejudgement, but not a precedent. The term "prejudgement" means that the fact once established cannot be established once again by this or other court. It shall be qualified as an established one and other court can refer to the established fact that is reflected in the decision of the court in this case.

The fact established by the Constitutional Court and the subject-matter of which consists in that a particular provision does not correspond to the Con-

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[16] Конституційний Суд України: Рішення. Висновки. 1997–2001 / Відповід. редакт. канд. юрид. наук П.Б. Євграфов. – К.: Юрінком Інтер, 2001 – С. 123–135.

[17] А.О. Селіванов, *Конституція. Громадянин. Суд. Професійні та суспільні погляди.* – К.: УАІД „Рада" 2009. – С. 173.; Цимбалістий Т. Реалізація актів Конституційного Суду України // Вибори та демократія. – 2008 – № 1 (15). – С. 27.

stitution cannot be established by anyone, that arises from the peculiarities of the legal regime of the Constitutional Court. In this context, the question arises: what is the difference between prejudgement and precedent. A prejudgement is just an established fact that is not subject t proving in another case. While a precedent creates new conduct standards, rules that have essential meaning for other courts during the hearing of similar cases or causes. In other words, during the hearing of a case a court can refer to former judgments of the similar problem.

T. Tsymbalystyy considers that the prejudicial nature of the decisions of the Constitutional Court of Ukraine consists in the prohibition to contest facts and legal relations (established by the Constitutional Court) in other legal proceedings[18].

Also it is widely believed that the prejudicialness is based on the legal feature legal force of the judicial decision and is determined by the subjective and objective limits according to which the parties and other individuals who took part in the case as well as their successors cannot again contest established legal relations in such case by the judicial decision in another legal proceedings. The subjective limits consist in that the same individuals, or their successors or, at least, one individual, in regard to which these circumstances were established, participate in two cases. The objective limits refer to circumstances established by a court decision or verdict[19].

As to subjective and objective limits of judicial decisions, it will be completely reasonable not to use subjective limits of decisions of the Constitutional Court of Ukraine. Taking into account that the series of decisions the Constitutional Court of Ukraine concern the social rights of citizens and affect interests of a great number of people, to use them only in regard to individuals who took part in the hearing of this case, of course, is unreasonable. Moreover, that the subjects of such constitutional petitions in accordance with the article 40 of the Law are the President of Ukraine, at least, forty five people's deputies of Ukraine, the Supreme Court of Ukraine, Ukraine Parliamentary Commissioner for Human Rights (Ombudsman), the Supreme Council of the Autonomous Republic of Crimea, in other words, subjects who do not use updated social rights and cannot use due to their status.

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[18] Т.О. Цимбалістий, *Конституційна юстиція в Україні: [навч. посіб.]* / Т.О. Цимбалистий – К.: Центр учбової літератури, 2007 – 200 с.

[19] В.І. Тертишников, *Цивільний процесуальний кодекс України: Науково-практичний коментар* / В.І.Тертишников.– Х.: Видавець СПД ФО Вапнярчук Н.М., 2007 – 576 с.

Another question is what facts (circumstances) can be established by the Constitutional Court of Ukraine. At first glance, these decisions shall refer to just admission by the of Constitutional Court of Ukraine the fact of unconstitutionality of a legal act, and, as a result, any individual and legal entity, whose rights and obligations this decision concerns, has a right to require the application of this decision of the Constitutional Court of Ukraine by the court of general jurisdiction, and the latter shall take it into account passing a judgement in a particular case. However, if we analyze this question more deeply, at least, the following will come from the decision of the Constitutional Court of Ukraine[20]:

– fact of non-conformity of legal acts to the Constitution of Ukraine;
– fact of violation procedure established by procedure of its examination approval, or entry into legal force;
– fact of excess of constitutional powers in its approval.

However, let us leave the possible legal consequences of the mentioned above facts established by Constitutional Court of Ukraine for an individual research. Also, it is reasonable in this case to mention a scientific opinion that the prejudicialness shall not be mixed with binding nature of a judicial decision, since the binding nature means the presence of enforceable authoritative order in the judicial decision.

At the same time the binding nature of a judicial decision as law-enforcement act occurs only in connection with the direct obligation of a particular subject to perform certain acts or retain therefrom. The obligation of a court to understand prejudicial fact without proving comes not from a judicial decision, but from the fact of entry into legal force, and therefore, the acquisition of uniqueness character by a judicial decision. Exactly the uniqueness of the judicial decision provides the facts established by the court and legal relations with finality that means for the court to take these facts without proving, and for individuals who took part in the case it means an impossibility of contestation. This is the notion of prejudicialness[21].

As it seen from the abovementioned opinion, the prejudicialness and binding nature of judicial decision are different notions in matter. However, such

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[20] А.В. Савчак, *Преюдиціальність рішень Конституційного Суду України: теоретично-правовий аспект* // Публічне право № 2 (2011). – С. 28–31.

[21] Р.О. Гаврик, *До питання про сутність преюдиційності фактів, встановлених рішенням суду першої інстанції, що набрали законної сили* / Р.О. Гаврик // Актуальні проблеми юридичної науки: Збірник тез Міжнар. наук. конф. «Восьмі осінні юридичні читання».– Хмельницький, 2009.– Ч. 3.– С. 435–437, с. 436.

an opinion, despite its reasonableness concerning judicial decisions in a whole, cannot concern decisions of the Constitutional Court of Ukraine in full, in particular, such a property as obligatoriness since:

– first, decisions of the Constitutional Court of Ukraine do not contain an direct reference for a subject to execute certain actions or to retain therefrom;
– second, decisions of the Constitutional Court of Ukraine do not contain enforceable authoritative order (since decisions of the Constitutional Court of Ukraine to hold unconstitutional any of act is sufficient for loss of effect of this act;
– third, decisions of the Constitutional Court of Ukraine are not such law-enforceable acts by nature as decisions of courts of common jurisdiction etc.

From the other hand, there is another scientific opinion consisting in that the prejudicialness is considered as obligatoriness for courts of facts confirmed by a judicial decision entered into legal force, hearing a case related to the case the decision was made in[22].

The notion of the prejudicialness of decisions of the Constitutional Court of Ukraine differs from the notion of the prejudicialness of decisions of courts of common jurisdiction in the content, in particular, by its subjective limits.

The article 74 of the Law concerns just decisions of the Constitutional Court of Ukraine in cases regarding the constitutionality of laws and other legal acts of the Verkhovna Rada of Ukraine, the President of Ukraine, acts of the Cabinet of Ministries of Ukraine, legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea, but they do not concern other acts of the Constitutional Court of Ukraine Constitutional Court of Ukraine and also official interpretation of the Constitution and laws of Ukraine.

Indication of the decision prejudicialness made by the Constitutional Court of Ukraine, in our opinion, by no means does not differ such a decision from others that do not have such an indication and give no basis to talk about the possibility of its retroactive effect time (however, of course, to provide the Constitutional Court of Ukraine by the legislator with a right to define the moment of loss of effect of the unconstitutional act or a particular provision of such act will be quite progressive and more likely justified step on the way of Ukraine building as legal and social State).

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[22] Цивільний процесуальний кодекс України: Науково-практичний коментар / В.І. Тертишников.– Х.: Консул, 2003.– 408 с., с. 234, 3.

Therefore, regardless the practical moments of application of the article 74 of the Law, we can state that in the theoretical and legal aspect the provisions of this article are not often used by the Constitutional Court of Ukraine, and the indication in the number of judicial decisions to its prejudicialness cannot witness its special status or its peculiarity in comparison with other decisions.

Analyzing the theoretical and methodological approaches to the determination of the nature and legal nature of the decisions of the Constitutional Court we can see that in the theory of constitutional law close to the notion of the "precedent" the notion of the "legal positions". The researches of the practice of Constitutional courts functioning in different countries and national judicial agencies mostly believe that the legal position is contained in the case-law. However, as noted in the literature, this practice contains both precedents and legal positions. It is recognized that "in contrast to the precedent that defines a decision on the substance of the case, the legal positions are just a legal instrument the use of which by the Court does not define a judgment in a case"[23]. According to V. Tumanov the precedents are to be such situations where institutions of constitutional justice refer to its decisions in the previous cases, and to the legal positions, when one uses in decisions such phrases like "the Constitutional Court has repeatedly noted in its practice", "the Constitutional Court yet again reminds" etc. However, there is hardly any need to carry out such a comparison, because very often the courts of constitutional jurisdiction in its subsequent decisions refer only to a particular legal position that is contained in a previous decision in a similar case, and not to the overall judgment. Therefore, the actual legal position of such courts are more valuable from the scientific and practical points of view, since one its` decision can contain a few legal positions, and the situation can be investigated with respect to the violation of a few articles of the constitutional law of State, while a part of the previous decision and only some legal positions can refer to the similar case.

As for the correlation of the notions "precedent" and "legal position" G.A. Gadzhyiev noted that the term "legal position" had no legal definition, and most likely it should be understood to mean a legal principle suitable for the decision of a group of similar legal collisions[24]. N.V. Vitruk gives more detailed definition of this notion: "The legal positions are legal conclusions and visions

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[23] В.А. Туманов, *Европейский суд по правам человека. Очерк организации и деятельности* – М., 2001. – 304, с. 10.

[24] Г.А. Гаджиев, *Правовые позиции Конституционного Суда Российской Федерации как источник конституционного права* // Конституционное правосудие в посткоммунистических странах: Сборник докладов. М., 1999, с. 116.

of courts of the constitutional jurisdiction as a result of interpretation (explanation) by the court of the spirit and letter of the Constitutional law and interpretation of the constitutional sense (aspect) of the provisions of the sectoral laws and other regulations within its jurisdiction that remove the uncertainty in specific constitutional and legal situations and are the basis of the final decisions of the Constitutional Court"[25].

The legal positions of the judicial agency are its attitude to some legal problems fixed in the judicial decisions. This is a result of analysis of arguments and conclusions of the court creating intellectual and legal content of the judgment that is nothing else than the essence of the legal decision. The precedent within its classical meaning is a decision that contains created by the court common legal rule (ratio decidendi) the decision is based thereon and the courts hearing the similar cases are obliged to follow it. In this sense, the legal position as the principles, it is based thereon, are obligatory for use in similar situations by all other legal entities, in other words the legal position almost does not differ from the ratio decidendi[26].

Analyzing the structural and essential features of the "legal position" the following should be noted: common and binding nature; legal force equated to the legal force of the Constitution itself, the presence of constitutional and legal rules, the similarity in the judiciary and other law enforcement to the nature of precedent[27]. All this helps to draw a conclusion that the decisions of the Constitutional Court "are taking form of constitutional legal norms". Since the legal norm the unconstitutional nature that is hold unconstitutional by this court losses its force both in the considered regulatory legal act and all other legal acts. The declaration of the "legal position" by the Constitutional Court as an official independent source of law, on the one hand, would mean the declaration of the judicial legislation along with law-making power of the legislative branch, on the other hand, would lead to the achievement of a certain compromise between supporters and opponents of judicial – making power by the Constitutional Court.

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[25] Н.В. Витрук, *Правовые позиции Конституционного Суда Российской Федерации: понятие, природа, юридическая сила и значение* // Конституционное правосудие в посткоммунистических странах: Сборник докладов. М., 1999, с. 89.

[26] М.Н. Марченко, *Юридическая природа и характер решений Европейского Суда по правам человека* // Государство и право. 2006. № 2. с. 11–12.

[27] Н.В. Витрук, *Правовые позиции Конституционного Суда Российской Федерации: понятие, природа, юридическая сила и значение* // Конституционное правосудие в посткоммунистических странах: Сборник докладов. М., 1999, с. 89.

Placing the theoretical researches in the field of the nature and designation of the Constitutional Court`s decisions onto the national practice of activity of the Constitutional Court of Ukraine it is necessary to note that the acts of Constitutional Court of Ukraine are the acts of application of norm of law that is why they cannot be normative legal acts. The Constitutional Court of Ukraine has no law-making powers confirmed in the constitution or in the law, and a judge cannot replace a legislator. The task of the Constitutional Court of Ukraine is not to change due to its decisions the norms of the Constitution of Ukraine, but to find out its factual content, not to correct the constitutional dictates, but just to interpret.

In the decision of the Constitutional Court of Ukraine dated March 25, 1998 № 3-рп/98 in the case under the constitutional submission from the Central Executive Committee concerning the official interpretation of the provisions of the part 11 and 13 of the article 42 of the Law of Ukraine " Concerning Elections of People's Deputies of Ukraine" (the case concerning the interpretation of the Law of Ukraine "Concerning Elections of People's Deputies of Ukraine") there was noted that the filling of gaps in the laws, the individual provisions of which are ruled by the Constitutional Court of Ukraine, does not belong to its powers[28].

In accordance with the article 6 of the Constitution of Ukraine, the State power in Ukraine is carried out on the principles of its division into legislative, executive and judicial.

We advance the view of V. Shapovalova who considers that the decisions and conclusions of the Constitutional Court of Ukraine cannot have a nature of normative legal acts that can dynamically regulate social relations. They could not contain independent provisions that would be positive normative realia by nature[29].

V. Ie. Skomorokha has another opinion, considering that the decisions of the Constitutional Court of Ukraine concerning the official interpretation of the Constitution and laws of Ukraine actually have all signs of normative acts: they are obligatory; they make amendments in the applicable normative legal

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[28] Рішення Конституційного Суду України у справі за конституційним поданням Центральної виборчої комісії щодо офіційного тлумачення положень частин одинадцятої та тринадцятої статті 42 Закону України «Про вибори народних депутатів України» (справа про тлумачення Закону України «Про вибори народних депутатів України») від 25 березня 1998 року № 3-рп/98 [Електронний ресурс]. – Режим доступу: http://www.ccu.gov.ua/uk/doccatalog/list?currDir=8826.

[29] В. Шаповал, *Становленя конституціоналізму в Україні: проблеми теорії* / В. Шаповал // Право України. – 1998. – № 5. – С. 29, 29.

acts that do not meet the Constitution; they relate to an indefinite number of recipients; they are applied not once; and they are in full force and effect despite the execution. Being referred to the normative acts, the decisions of the constitutional courts, obviously, shall take place in the hierarchy between the constitution and the laws, since normative act can be canceled or replaced by the act of equal or greater legal force[30].

Any interpretive act including the decisions of the Constitutional Court of Ukraine is of auxiliary character. Accordingly, the legal force of the interpretative act cannot be equated to the legal force of the legal acts that were the subject of interpretation. The decisions of the Constitutional Court of Ukraine concerning the official interpretation of the Constitution and laws of Ukraine under the legal force are "sub-constitutional" and "sublegislative"[31].

Khrystova G.O., considering the legal nature of the acts of the Constitutional Court of Ukraine, believes that they are not the law-making acts including the "negative" one; they do not belong to the normative legal acts; they are not a part of the legislative system of Ukraine. The decisions and conclusions of the Constitutional Court of Ukraine are additional sources of law because they do not contain initial rules of conduct, however, have a normative nature. According to the subject of adoption, procedure of adoption, the nature of the demonstration of normativity they are close to such a source of law as precedents, however, have their essential features, since they act as precedents of interpretation, "quasi-precedents". The acts of the constitutional control have a combined (normative-individual) nature. The acts of the Constitutional Court of Ukraine concerning the interpretation of the Constitution and laws of Ukraine are interpretative acts and belong to the acts of normative nature[32].

The Constitutional Court`s of Ukraine decision concerning the normative interpretation is an interpretative act. It has a normative content, because it contains norms-explanations, but it is not a normative legal act[33]. As to the

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[30] В.Є. Скомороха, *Конституційна юрисдикція в Україні: проблеми теорії, методології і практики* / В.Є. Ско-мороха. – К.: МП «Леся», 2007. – 716, с. 452.

[31] В.П. Тихий, *Основні повноваження Конституційного Суду України* (коментар до статті 150 Конституції України) / В.П. Тихий // Вісн. Конституційного Суду України. – 2003. – № 4. – С. 30–35.

[32] Г.О. Христова, *Юридична природа актів Конституційного Суду України: автореф. дис. ...* канд. юрид. наук: 12.00.01 / Г. О. Христова. – Х., 2004. – 20 с.

[33] В.П. Тихий, *Основні повноваження Конституційного Суду України* (коментар до статті 150 Конституції України) / В.П. Тихий // Вісн. Конституційного Суду України. – 2003. – № 4. – С. 30–35.

legal nature of the decisions of the Constitutional Court concerning the holding of legal act unconstitutional, so these acts have a force of a normative legal act and function as "negative" law-maker. Decisions do not set standards of law, but just free the legislation system of regulations that conflict with the Constitution of Ukraine.

According to S.V. Shevchuk, the normative content is contained in the decisions of the Constitutional Court of Ukraine concerning the constitutionality of laws and other legal acts, official interpretation of the Constitution and laws of Ukraine and conclusions in regard to the constitutionality of projected laws concerning the amendments to the Constitution of Ukraine. The normalization of the cats of the Constitutional Court of Ukraine is based on the legal views. Their special nature consists in that they have "mild" nature in contradistinction to sharply defined "tight" legal norms, and, in general, are analogous to ratio decidendi of a judicial decision in the countries of the common law, taking into consideration that there is a practice in the Constitutional Court of Ukraine to refer to its taken legal positions previously taken[34].

A.O. Selivanov notes that the legal force of decisions and conclusions of the Constitutional Court of Ukraine exceeds the legal force of any law, and thus, they acquire the legal force of the Constitution that cannot be applied without considering the Constitutional Court's legal propositions moreover in violation of these decisions[35].

Ye. P. Yevgrafova considers that the legal nature of Constitutional Court's decisions concerning unconstitutionality of legal acts consists, first, in exercise of certain functions of regulatory acts by them; second in peculiarities of their legal meaning and purpose for compulsory execution by agencies of State power, regulatory bodies of the Autonomous Republic of Crimea and local government, their officials and employees; third in peculiarities of legal force exceeding the legal force of laws (it is followed from the provisions 150 and 152 of the Constitution of Ukraine); fourth, in peculiarities of validity in time of decisions.

Legal force of decisions taken on issues of official interpretations and laws of Ukraine has a slightly different specific character. First, such decisions are

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[34] С.В. Шевчук, *Нормативність актів судової влади : від правоположення до правової позиції* [Електронний ресурс]. – Режим доступу: http://www.Scourt.gov.ua/clients/vs.nsf/0/96D2874F40B.

[35] А.О. Селіванов, *Верховенство права в Конституційному правосудді. Аналіз конституційної юрисдикції* / А.О. Селіванов. – Київ; Харків: Акад. прав. наук України, 2006. – 400, с. 27.

organically related to the Constitution and laws of the state as interpretative acts of constitutional jurisdiction. Second, the legal force of decisions of the Constitutional Court of Ukraine on official interpretation of the Constitution exceeds the legal force of laws and other legal acts valid in space, time and related to a number of persons together with the Constitution provisions being a subject of official interpretation.

We take the view that the legal force of interpretative acts cannot be made equivalent to the force of regulatory acts being a subject of interpretation. Moreover, the legal force of interpretative acts is valid until the act, which provisions have become a subject of interpretation, is valid. New law was passed, its provisions being a subject of interpretation amended and, accordingly, the meaning, legal force and interpretative act validity changed. Any interpretative act, including a decision of the Constitutional Court of Ukraine has an auxiliary character. Correspondingly, the legal force of interpretative acts cannot be made equivalent to the force of regulatory acts being a subject of interpretation[36].

The legal act regulatory character does not mean its automatic belonging to regulatory acts. Assigning of regulatory acts to a certain kind of acts needs a careful analysis of their regulatory nature, standardization character, purpose and goal of the legal acts considering the place of passing authority in mechanism of state and legal forms of its activity.

The Constitutional Court's decisions concerning unconstitutionality of legal acts cannot be recognized as regulatory act however it does not mean that they do not have expression of standardization. The regulatory nature of these acts is mostly determined by constitutional control body's legal propositions, stated in their reasoning part. Interpretative acts belong to the acts of standardization character, but not to regulatory acts since they contain standards-explanations and not law standards[37].

Considering the questions on binding character of the constitutional justice decisions, V.V. Lazarev states: "Binding character of the Constitutional Court's decision does not mean that its whole content is such that it has completely legal and proceeding nature as a source of the constitutional law. First of all

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[36] В. Таций, *Межі тлумачення Конституційим Судом Конституції і законів України* / В. Таций, Ю. Тодика // Вісн. Конституційного Суду України. – 2002. – № 2. – С. 60–63, 62.

[37] І.М. Шевчук, *Акти Конституційного Суду України: правова природа та дія* / І. М. Шевчук // Науковий вісник Волинського національного університету імені Лесі Українки. – 2010. – № 25. – С. 50–54.

it refers to the substantive provision – to execution of decision. But obligatory and reasoning part, forming the system of legal arguments also have a great meaning through the legal proposition, lying at the root of the decision and expressing legal understanding of the respective constitutional principle, standard and proper constitutional essence and of disputed legal provision"[38].

Summarizing the results of the analysis of the place, value of acts of the Constitutional Court of Ukraine and the theoretical and methodological study of the case law formation in its practicing, one can draw a conclusion concerning the presence of three points of view about the appropriate definition and perception of decisions of the Constitutional Court of Ukraine as a precedent in modern legal science.

The first point of view consists in the fact that the decisions of the Constitutional Court are binding, but they are not appropriate to be talked as about sources of law. Thus, O. Yu. Kotov is not agreed with the opinion that decisions of constitutional jurisdiction judges are sources of law, arguing that the precedent term concerning their decision is not sufficiently defining their essence under the number of features[39]. V.S. Nersesyants, based on the principle of power separation denies standardization of judicial decisions and affirms that acts of all judicial system parts – courts of general, arbitration and constitutional jurisdiction despite their external differences – are exactly enabling acts and are binding only in this point[40].

The second point of view consists in the fact that objective necessity for state legal system is recognition of constitutional jurisdiction judges' decisions as a source of law. Thus, V. A. Krazhkov notes that it would be faulty to ignore the role of constitutional jurisdiction judges' decisions as a precedent giving other subjects the right direction in interpretation of the Constitution and engenders assumption that in future upon settlement of similar questions the court will share the same proposition. The stated perception of decisions creates the preconditions for Ukrainian constitutional space to be harmonized.

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[38] В.В. Лазарев, *Конституционный Суд России и развитие конституционного права* // Российское право 1997 г. №11.

[39] О.Ю. Котов, *Влияние решений Конституционного Суда России на гражданское судопроизводство*, М., 2002, С. 50–52 Нерсесянц В.С., *Суд не законодательствует и не управляет, а применяет право* (о правоприменительной природе судебных актов) // Судебная практика как источник права. М., 1997, С. 34–41.

[40] В.С. Нерсесянц, *Суд не законодательствует и не управляет, а применяет право* (о правоприменительной природе судебных актов) // Судебная практика как источник права. М., 1997, С. 34–41.

It provides for that subjects of law correct the acts passed by them, implement them according to the interpretation reflected in conclusions of the Constitutional Court with respect to the similar situation. In this aspect it should be noted that such decision of the Constitutional Court of Ukraine automatically obtains the status of precedent and binding for the court as well. It adds stability to legal relations and carries respect to the parties of the constitutional process, having the right to count on the fact that in this case the Constitutional Court will follow the same legal logic it followed before considering the issues with close meaning[41]. On this occasion the thesis logically comes out with respect to the fact that pointing to the resolutions of the Constitutional Court as to the sources of law, researches are inclined to determine them as a precedent.

The third point of view consists in the fact that the source of law shall be legal propositions expressed by the Constitutional Court in its decisions, but not the decisions. On this occasion M.N. Marchenko stated that recognition of «legal proposition of the Constitutional Court», or rather its final decisions, the legal basis of which is based on the legal proposition as an independent source of law, would mean from one part, an evolution of the legal thought towards recognition of judicial law-making, along with parliamentary law-making, and on the other – would mark finding of a certain «compromise» in a quite long and not very productive dispute between supporters of complete recognition of the judicial practice as a source of law and supporters of its complete denial[42].

Thus, with regard to doctrinal beliefs regarding the legal nature of decisions of the Constitutional Court of Ukraine it should be noted that the acts (decisions) of the Constitutional Court are evaluated and equated among certain scholars to regulatory acts, and other scholars specify a clear resemblance to the legal nature of judicial precedent.

Thus, it can be noted that the problem of recognition of acts belonging to the Constitutional Court of Ukraine as sources of law – court precedent – is not on the level of theoretical and methodological disputes regarding perception of judicial rulemaking as an objective phenomenon, but on the level of reconsideration of State power's role and essence based on the principle of power separation and the system of checks and balances. In addition, such

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[41] В.А. Кряжков, Л.В. Лазарев, Конституционная юстиция в Российской Федерации. М, 1998, С. 228 (глава написана В.А. Кряжковым).

[42] М.Н. Марченко, Судебное правотворчество и судейское право. – М.: ТК Велби, Изд-во Проспект, 2007, с. 124–125.

reconsideration needs further regulatory consolidation. Arguing it should be noted that the current Ukrainian legislation provides for the independence of judges, establishes a clear power separation into three branches with institutional embodiment of each of them, and also defines the scope of powers and fields of the supreme bodies of legislative, executive and judicial branches. Systematic interpretation of the stated domestic law provisions enables to make a conclusion of necessity not only to specify competence of the certain state government authority, but a conceptual change of the Constitution of Ukraine. Moreover, in domestic and foreign literature approximation of legal systems in terms of world community globalization is emphasized based on analysis of actual processes in the world legal space, which means mutual implementation of the legal system certain elements with further revision and adaptation to the social and political and socio-economic realities of the internal environment of the country. The bodies of constitutional jurisdiction will take a special place among other upon such conditions. Despite the fact that final result of the Constitutional Court of Ukraine is its decision and findings in specific cases, a great importance for law application is determining principles followed upon passage of respective acts, its argumentation, and motivation of its decisions. Thus, the nature of the legal propositions of the Constitutional Court of Ukraine stems from characteristics of the latter as the sole body of constitutional jurisdiction of Ukraine, which is designed to ensure the supremacy of the Constitution of Ukraine throughout the state. The legal proposition is a form and result of interpretation of the Constitution and laws of Ukraine by the Constitutional Court of Ukraine that are included in the acts of the Constitutional Court of Ukraine and refer to various branches of legal regulation. In addition they have a special legal nature, case character and together with acts of the Constitutional Court of Ukraine, where they have been stated, shall be considered as a source (form) of law. Therewith, legal uncertainty, the lack of clear guidance in the legislation of the legal propositions nature of the Constitutional Court of Ukraine shows the urgent necessity of defined issues to be regulated.