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## CONSIDERING THE PROVISIONS OF THE CONSTITUTION OF UKRAINE IN DECISION-MAKING BY LOCAL COURTS

**Abstract.** Purpose. Determining the role and significance of the Constitution of Ukraine, based on the analysis of the provisions from different branches of law and judicial practice of Ukraine, to justify the decisions of local courts and provide proposals for optimizing the enforcement of constitutional provisions by the courts. Research methods. A system of general and special scientific methods developed by humankind was used to achieve the purpose set in the paper. The authors used the following methods: analysis and synthesis, comparative legal one, the ascent from the abstract to the concrete, and others. They were used to systematize the existing knowledge about constitutional law enforcement in the activities of local courts, obtain the results of this systematization, and provide recommendations to law enforcement participants in the courts. Results. The paper defines the role of the provisions of the Constitution of Ukraine in substantiating the decisions of the local courts as the most stable and essential provisions that act as a kind of foundation of the legal system; it suggests optimizing the use by the courts of constitutional provisions through 1) increasing the role and importance of the Scientific Advisory Council of the Constitutional Court of Ukraine through the partial or complete transfer of its work to a professional level with funding envisaging hourly wages; 2) study and permanent discussion of decisions of the Constitutional Court of Ukraine at events within the framework of local courts, in which constitutional provisions are interpreted; 3) predominantly indirect reference by judges of local courts to the provisions of the Constitution of Ukraine (references to decisions of the Constitutional Court and the Supreme Court of Ukraine, in which the constitutional provisions are explained or such provisions are used as arguments). Conclusions. It is concluded that the provisions of the Constitution of Ukraine are characterized by greater constancy, balance, and more coherent content than the provisions of laws and bylaws. The provisions of the Constitution of Ukraine define the general principles of the state and political structure in the state, various human rights, and freedoms. The Constitutional Court of Ukraine clarifies and officially interprets constitutional provisions. Other local courts do not interpret the provisions of the Constitution but refer to them (sometimes with comments) as a weighty argument in justifying a particular decision. The role of the provisions of the Constitution of Ukraine is their highest significance compared with the provisions of other acts. They act as a kind of "arbitrator" during the conflict of provisions of other lower-level regulatory legal acts. Judges of local courts should resolve disputes in cases of conflicting legal provisions by applying constitutional provisions correctly.

References by judges of local courts to constitutional provisions can often be indirect. There are widespread references to court decisions of the Constitutional Court of Ukraine, the Supreme Court of Ukraine, clarifications of their plenums, which already contain references to constitutional provisions, and even their interpretation. The presence in decisions and other acts of local courts of a reference to decisions and explanations of the highest courts of the state and/or their bodies

contributes to the unambiguous interpretation of the provisions of different acts of Ukraine by Ukrainian judges and uniformity in law enforcement based on constitutional provisions.

**Key words:** Constitution of Ukraine, local courts, law enforcement, Romano-German legal system, judicial and administrative precedent, Constitutional Court of Ukraine, Scientific Advisory Council of the Constitutional Court of Ukraine, law enforcement practice.

### 1. Introduction

The legislative system of Ukraine is formed according to the classical rules for forming the regulatory framework of the states of the Romano-Germanic legal system. It has several stages of multi-level legislation. The provisions of the Constitution of Ukraine occupy the highest place in the hierarchy of legal provisions of the state. Pursuant to the rules enshrined in law by ancient Roman jurists, modern scientists, and practitioners, the provisions of lower legal acts should not contradict the provisions of higher acts (and the highest act of Ukrainian legislation is the Constitution of Ukraine). Thus, the provisions of modern general diversified legislation should concretize and explain the constitutional provisions as much as possible. In turn, the provisions of special diversified legislation should clarify the rules for application, supplement and specify the provisions of the general legislation. In Ukrainian legislation, this is most often the case. Constitutional provisions are often applied by citizens, business entities, executive authorities, and courts as provisions of direct action. However, the foregoing does not indicate the lack of problems associated with referring to the provisions of the Constitution of Ukraine during law enforcement activities in the work of the courts.

*Literature review.* Within the framework of modern legal science of Ukraine, a significant number of researchers have studied the problems of the judicial system and law enforcement by various courts. They are as follows: Belianevych (Belianevych, 2009), Bisiuk (Bisiuk, 2012), Demchenko (Demchenko, 2010), Dzhumahel'diyeva (Dzhumahel'diyeva, 2007), Harahonych (Bysaha, Harahonych, 2006), Hrudnytskyi (Hrudnytskyi, 2020), Illarionov (Illarionov, 2016; Illarionov, 2018), Khrimli (Khrimli, 2011), Koverznev (Koverznev, 2013), Mamutov (Mamutov, 1997), Nemchenko (Nemchenko, 2013), Nikolenko (Nikolenko, 2004; Vasyliiev, Nikolenko, 2004), Pashkov (Pashkov, 2009), Podtserkovnyi (Podtserkovnyi, Belianevych, 2016; Podtserkovnyi, 2018), Rudenko (Rudenko, 2015; Rudenko, 2020), Smitiukh (Smitiukh, 2006), Stepanova (Stepanova, Lomakina, 2008; Stepanova, 2015), Turkot (Turkot, 2015), Urkevych (Urkevych, 2018; Urkevych, 2019), Ustymenko (Ustymenko et al., 2011; Ustymenko, Dzhabrailov, 2012), Vinnyk (Vinnyk, 2011), Zavorodnii (Zavorod-

nii, 2014), and others. In our previous papers, there were arguments in favor of maintaining the functioning of the optimal system of economic courts in Ukraine (Derevianko, 2014), arguments in favor of the development of a regulatory framework, and the formation of a separate specialized investment court of Ukraine (Derevianko, 2020), and arguments in favor of the urgent need to clarify the subject dispute, the scope of the special Law and the jurisdiction of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (Derevianko, 2021). However, today few scientific papers deal with analyzing the effectiveness of applying the provisions of the Constitution of Ukraine in law enforcement within the judicial branch of government.

*Research methods.* A system of general and special scientific methods developed by humankind was used to achieve the purpose set in the paper. The authors used the following methods: analysis and synthesis, comparative legal one, the ascent from the abstract to the concrete, and others. They were used to systematize the existing knowledge about constitutional law enforcement in the activities of local courts, obtain the results of this systematization, and provide recommendations to law enforcement participants in the courts.

*Purpose.* Determining the role and significance of the provisions of the Constitution of Ukraine, based on the analysis of the provisions from different branches of law and judicial practice of Ukraine, to justify the decisions of local courts and provide proposals for optimizing the enforcement of constitutional provisions by the courts.

### 2. The significance of the provisions of the Constitution of Ukraine as the Basic Law of the state

Ukraine is a state with a legal system formed based on the provisions and principles of the Romano-German legal system. According to it, the primary source of law is a regulatory legal act. A common law legal system was formed based on postulates different from this system. The main source of law is a judicial or administrative precedent. Based on the established rules of the Romano-Germanic legal system in Ukraine, a harmonious and balanced system of legislation has been formed, conditionally built according to the hierarchy of legal acts and their norms. The provisions of the Constitution of Ukraine as the Basic Law

of the state are conditionally at the highest level of this hierarchy. Provisions of other regulatory legal acts during their development, discussion, adoption, etc. must necessarily take into account the provisions of constitutional norms. However, according to the theory of law, a well-known truth is the existence of permanent conditional “races” between the legal and legislative systems. Due to the constant development of social, political, economic, cultural and other relations, society, and technology, the legal system is usually ahead of the legislative system. Thus, in the field of management, new types of activities appear that are partially similar to existing ones or are fundamentally new. In previous works, we pointed out the need to legitimize: 1) relations on the use of hydrogen engines; 2) relations on deduction, extraction, “mining”, etc. units of cryptocurrency; 3) relations between participants in the gambling business in case of restoration of its legitimacy; 4) relations between the participants in the transport communication with the Moon and Mars, as well as relations related to the extraction and delivery of minerals from other planets to Earth, since such types of economic activity are becoming more real (Derevianko, 2021). Gaps in law that arise due to changes in socio-economic reality are first eliminated by applying the rules of the analogy of law. In the second stage, regulations appear that regulate new relations. Based on scientific and technological progress, modern relations in the economy indicate the emergence of new types of economic activity and, accordingly, indicate the need to expand both the scope of regulatory acts and the scope of economic legislation (Derevianko, 2021, p. 80). New types of activities, rules, principles, economic, environmental, natural, and other conditions of human life cause the need to enshrine new rules of life in state regulations. Therefore, it is quite natural for such changes to cause the need to coordinate the provisions of individual acts with the provisions of the Constitution of Ukraine. The latter is objectively less susceptible to change and is more universal. Considering them when regulating various human activities objectively entails judges of civil, economic, administrative, and other courts refer to constitutional provisions when adopting a decision, a ruling, etc. The court most often cites constitutional provisions from Section II of the Constitution “Rights, Freedoms and Obligations of a Human and Citizen” that proclaim guarantees of personal, housing, religious, political, property, economic, labor, family, educational, and other rights (Constitution of Ukraine, 1996). When considering cases of violation of electoral or political rights

of citizens, the number of which is proportional to the number of active electoral events in the state, and the frequency is directly related to the dates of regular elections, the justification of judicial acts refers to the constitutional provisions of articles from Section III “Elections, Referendum” and Section IV “Verkhovna Rada of Ukraine” (Constitution of Ukraine, 1996). However, judges often refer to the provisions of other sections of the Constitution of Ukraine. However, even more common are cases of indirect reference to constitutional provisions.

As mentioned above, Ukraine belongs to the states of the Romano-German legal system, in which the primary source of law is a regulatory legal act. Another widespread and acknowledged legal tradition in the world is the common law legal system, the primary source of which is judicial or administrative precedent. In today’s realities, in many countries, particularly Ukraine, these legal traditions have converged for a long time. In states, the common law legal system is gradually gaining weight in the importance of regulations and reducing the importance of precedent. However, in Ukraine, as in the state of the Romano-German legal system, this phenomenon is manifested in a very slow reduction in the weight of regulatory legal acts and an increase in the role of judicial and administrative precedent. The judicial system is one of the most conservative and most subordinated among government agencies and services. This is reflected in the fact that judges, as a rule, do not want to be pioneers in fundamentally resolving new cases or disputes. The vast majority of court decisions are made based on studying previous similar cases. Since the primary source of law in Ukraine is a regulatory legal act, judges in their professional activity should be guided by the law and internal personal conviction. However, when making a decision, a judge often examines similar cases and decisions on them made by the judge or colleagues working in the same or other courts of Ukraine. Moreover, for the same interpretation of legal provisions and their application in decision-making by judges, the judicial system has developed official advisory activities of lower-level courts by higher-level court bodies, in particular their plenums.

### **3. Indirect reference to the provisions of the Constitution of Ukraine**

Explanations of the plenums of higher specialized courts and the Supreme Court of Ukraine regarding the correctness, accuracy, and relevance of the interpretation of specific legislative provisions are essentially precedents for judges of other courts, i.e., lower-level courts. The subordination mentioned above leads to the fact that decisions of the courts



of appeal can often be considered judicial precedents for the courts of the first instance, just as decisions of the courts of cassation can be regarded as judicial precedents for the courts of appeal. In justifying their decisions, judges of higher instances refer to the provisions of the Constitution of Ukraine. Accordingly, when justifying their decisions, lower-instance judges often refer not directly to the provisions of the Constitution but to explanations or decisions of higher courts, which, in turn, directly refer to constitutional provisions.

The Supreme Court of Ukraine and the Constitutional Court of Ukraine are the highest courts in the judicial hierarchy, and due to the excessive subordination of the judicial system, their decisions, in particular and especially in terms of interpreting the provisions of the Constitution or applying the provisions of the Constitution to justify decisions, act as dogma or judicial precedent. In the legal and legislative systems of the Romano-German legal system, court decisions and parts thereof are not rules of law but are acts that explain how to apply legal rules. These acts of the highest-level courts of Ukraine actually act as regulatory legal acts when justifying decisions of local lower-level courts. At the same time, the provisions of the Constitution of Ukraine are primarily applied by the higher courts, and the lower courts use their comments, arguments, and justifications when justifying their own decisions.

In addition to indirect citation of constitutional norms and application of the provisions of the Constitution of Ukraine, local courts often use mixed citation of such provisions. Thus, to justify the decision, the judge of the local court directly refers to the constitutional provision, explains its meaning through the decision of the Constitutional Court of Ukraine, the Supreme Court of Ukraine, the court of cassation, and, what should be most effective in terms of the specifics of a particular court dispute, gives the final interpretation of the constitutional provisions and the norms of legislative and/or bylaws that concern it, widely disclose its essence and establish the legal truth in the dispute.

The most widespread provisions in decision-making by local courts, among other constitutional provisions, relate to general theoretical provisions and are fundamental in justifying the protection of general human and civil rights. Thus, when confirming the right to judicial protection, judges of local courts refer to part one of Article 8 of the Constitution of Ukraine, according to which the principle of the rule of law is recognized and applies in Ukraine. The right to judicial protection is closely linked to

such a fundamental principle of a state governed by the rule of law as the rule of law. The interpretation of the concept of “the rule of law” is provided in the decision of the Constitutional Court of Ukraine No. 15-RP/2004 of November 2, 2004, in the case concerning the constitutional submission of the Supreme Court of Ukraine regarding the compliance of the provisions of Article 69 of the Criminal Code of Ukraine with the Constitution of Ukraine (constitutionality) (the case on the appointment of a more lenient sentence by the court). This decision states: “The rule of law is the rule of law in society. The rule of law requires the state to implement it in law-making and law enforcement activities, in particular in regulations, which in their content should be imbued primarily with the ideas of social justice, freedom, equality, etc. One of the manifestations of the rule of law is that the law is not limited only to legislation as one of its forms but also includes other social regulators, in particular norms of morality, traditions, customs, etc., which are legitimized by society and are determined by the historically achieved cultural level of society. All these elements of the law are united by a quality that corresponds to the ideology of justice, the idea of law, which is primarily reflected in the Constitution of Ukraine. This understanding of law does not give grounds for its identification with the law, which can sometimes be unfair, including restricting the freedom and equality of the individual. Justice is one of the basic foundations of law, which is crucial in defining it as a regulator of public relations, one of the universal dimensions of law” (Decision of the Constitutional Court of Ukraine, 2004).

#### **4. Direct reference to the provisions of the Constitution of Ukraine**

When justifying decisions, judges of local courts often directly refer to the provisions of the Constitution of Ukraine. However, the high degree of subordination of the judicial system of Ukraine and the unwillingness to take full responsibility for the decision taken or a fully justified attempt to justify the decision as much as possible encourage a judge of a local court to refer to the decision of the Constitutional Court of Ukraine, the Supreme Court of Ukraine or the explanations of the advisory bodies of higher courts, in addition to directly referring to the constitutional provision. This is the case when considering both general and specific disputes. For example, for a long time, judges of economic courts referred to the decision of the Constitutional Court of Ukraine in the case concerning the constitutional appeal of the Open Joint-Stock Company Kirovogradoblenergo on the official interpretation of the provisions of part eight

of Article 5 of the Law of Ukraine On Restoring the Solvency of the Debtor or Declaring It Bankrupt (the case against creditors of communal enterprises) (Decision of the Constitutional Court of Ukraine, 2007). It should be noted that the actual decision-making by the Constitutional Court of Ukraine or the Supreme Court of Ukraine takes place concerning a significant number of decisions of other courts. Thus, the process is mutual. In case of inaccurate or incomplete interpretation by a judge of a local court of the provisions of the Constitution of Ukraine, the Constitutional Court of Ukraine will be able to supplement, clarify or correct the error. Moreover, this is defined by part 1 of Article 147 of the Constitution of Ukraine, according to which the Constitutional Court of Ukraine decides on the compliance of the laws of Ukraine with the Constitution of Ukraine and in cases of other acts provided for by this Constitution, exercises official interpretation of the Constitution of Ukraine, as well as other powers under this Constitution (Constitution of Ukraine, 1996). Based on the above provisions, the Constitutional Court of Ukraine carries out an official interpretation of the Constitution of Ukraine. Still, it does not have an absolute monopoly on references to the provisions of the Constitution of Ukraine in its decisions. The interpretation of constitutional provisions provided by them must necessarily be taken into account and applied by judges of local courts. This is not only appropriate, but also necessary.

Judges of local courts can refer to constitutional provisions by studying the scientific achievements of scientists in the field of state (constitutional) law and other branches of law. Such a practice is absolutely justified. However, the responsibility for the relevance, accuracy, and correctness of the application and interpretation of a particular constitutional provision lies not with the scientist but with the judge, who is guided by the law and inner personal conviction. Scientists and other experts comment on the legislation and influence the internal conviction of the judge. The law enforcement practice will assess whether the judges' application of a specific legal provision is correct and whether their conviction is correct. The judge may make a mistake. In this case, judges of appeal, cassation courts, and the Supreme Court of Ukraine will be able to correct the error. Regarding the provisions of the Constitution, the final assessment under the above provisions of the Constitution of Ukraine itself will be provided by the Constitutional Court of Ukraine.

### 5. Conclusions

Thus, the provisions of the Constitution of Ukraine are characterized by greater con-

stancy, balance, and more coherent content than the provisions of laws and bylaws. In addition, it is the introduction of amendments and additions to the Constitution that can be carried out as a result of receiving a positive vote of at least 301 people's deputies, while only 226 positive votes are enough to amend other laws. The provisions of the Constitution of Ukraine define the general principles of the state and political structure in the state, various human rights, and freedoms. The Constitutional Court of Ukraine carries out clarification and official interpretation of constitutional provisions. Other local courts do not interpret the provisions of the Constitution but refer to them (sometimes with comments) as a weighty argument in justifying a particular decision. The role of the provisions of the Constitution of Ukraine is their highest significance compared with the provisions of other acts. They act as a kind of "an arbitrator" during the conflict between provisions of other lower-level regulatory legal acts. Judges of local courts should resolve disputes in cases of conflicting legal provisions by applying constitutional provisions correctly.

References by judges of local courts to constitutional provisions can often be indirect. There are widespread references to court decisions of the Constitutional Court of Ukraine, the Supreme Court of Ukraine, clarifications of their plenums, which already contain references to constitutional provisions, and even their interpretation. The presence in decisions and other acts of local courts of a reference to decisions and explanations of the highest courts of the state and/or their bodies contributes to the unambiguous interpretation of the provisions of different acts of Ukraine by Ukrainian judges and uniformity in law enforcement based on constitutional provisions. It is possible to optimize the enforcement of constitutional provisions by the courts through 1) increasing the role and importance of the Scientific Advisory Council of the Constitutional Court of Ukraine through the partial or complete transfer of its work to a professional level with funding envisaging hourly wages; 2) study and permanent discussion of decisions of the Constitutional Court of Ukraine at events within the framework of local courts, in which constitutional provisions are interpreted; 3) predominantly indirect reference by judges of local courts to the provisions of the Constitution of Ukraine (references to decisions of the Constitutional Court and the Supreme Court of Ukraine, in which the constitutional provisions are explained or such provisions are used as arguments).

Thus, the role of the provision of the Constitution of Ukraine was determined to justify

the decisions of local courts as the most stable and essential and acting as a kind of foundation for the legal system of the state; separate directions for optimizing the enforcement of constitutional provisions by the courts are proposed. The following scientific research

should be aimed at improving the components of the legal status of courts and the legal regime of judges, in particular, at finding mechanisms for reorganizing the judicial system of Ukraine through the formation of new and/or liquidation of existing judicial institutions.

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## **РОЛЬ І ЗНАЧЕННЯ НОРМ КОНСТИТУЦІЇ УКРАЇНИ ДЛЯ ОБҐРУНТУВАННЯ РІШЕНЬ МІСЦЕВИХ СУДІВ**

**Анотація. Мета.** На основі аналізу положень різногалузевого законодавства України та судової практики визначити роль і значення норм Конституції України для обґрунтування рішень місцевих судів, надати пропозиції щодо оптимізації процесів правозастосування судами конституційних положень. **Методи дослідження.** Для досягнення мети статті було використано вироблену людством систему класичних загальнонаукових і спеціальних методів наукового пізнання. Серед методів найширшого застосування отримали методи аналізу та синтезу, порівняльно-правовий, сходження від абстрактного до конкретного та інші, завдяки чому було систематизовано наявні знання про конституційне правозастосування у діяльності місцевих судів, підведено підсумки цієї систематизації і надано рекомендації учасникам правозастосовної роботи у судах. Результати. Визначено роль норм Конституції України для обґрунтування рішень місцевих судів як найбільш сталих та важливих і таких, що виступають своєрідним фундаментом правової системи держави; запропоновано оптимізувати процеси правозастосування судами конституційних положень за рахунок: 1) підвищення ролі та значення Науково-консультативної ради Конституційного суду України через часткове або повне переведення її роботи на професійний рівень із фінансуванням згідно з нормами погодинної оплати праці; 2) вивчення та перманентного обговорення на заходах у межах місцевих судів рішень Конституційного суду України, в яких тлумачаться конституційні норми; 3) переважно непрямого посилання судьями місцевих судів на норми Конституції України (посилання на рішення Конституційного суду і Верховного суду України, в яких роз'яснюються положення конституційних норм або такі норми застосовуються як аргументи). **Висновки.** Зроблено висновок, що норми Конституції України вирізняються більшою сталістю, вираженістю і більш струнким змістом у порівнянні із нормами законів і підзаконних актів. Нормами Конституції України визначаються загальні засади державного та політичного устрою у державі, різноманітні права і свободи людини. Роз'яснення та офіційне тлумачення конституційних норм здійснює Конституційний суд України. Інші місцеві суди не тлумачать норми Конституції, а посилаються на них (деколи із коментарями) як на вагомий аргумент при обґрунтуванні того чи іншого рішення. Роль норм Конституції України полягає у їх вищому значенні у порівнянні із нормами інших актів. Вони виступають свого роду «арбітрами» під час конфлікту норм інших нормативно-правових актів нижчого рівня. Вирішити спори у конфлікті правових норм повинні судді місцевих судів правильним застосуванням конституційних норм.

Посилання судьями місцевих судів на конституційні норми частіше можуть бути непрямыми. Поширеними є посилання на судові рішення Конституційного суду України, Верховного суду України, роз'яснень їх пленумів, в яких уже є посилання на конституційні норми а то й їх трактування та ін. Наявність у рішеннях та інших актах місцевих судів посилання на рішення і роз'яснення найвищих судів держави та/або їхніх органів сприяє однозначному трактуванню норм різних актів України українськими судьями та однотипності у правозастосуванні на основі конституційних норм.

**Ключові слова:** Конституція України, місцеві суди, правозастосування, романо-германська правова сім'я, судовий та адміністративний прецедент, Конституційний суд України, Науково-консультативна рада Конституційного суду України, правозастосовна практика.

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