

**National Report  
"The Constitutional Court of Ukraine as the Sole Body of  
Constitutional Jurisdiction: the Issue of Autonomy"**

The National Report of the Constitutional Court of Ukraine was drafted within the recommendations of the Organising Committee of the Second Congress of the World Conference on Constitutional Justice to be held in 2011 on the issue of "Separation of Powers and Independence of Constitutional Courts and Equivalent Bodies".

The principle of separation of powers as a priority principle of formation of bodies of state power is not an ideal, universal theoretical construction but rather a way to provide a practical response to the needs of modern society in such type of organization which, on the one hand, is not overly difficult for the society and citizens, and, on the other - is effective and ensures implementation of such functions, without which society can not exist and for the sake of which it, in fact, maintains the state. As a comprehensive organisation of the territorial power the state is to be carefully controlled – both externally (by the important institutions of the civil society) and internally (when the most important and powerful institutions of the state exercise mutual control over each other). To implement such internal control, the authorities must be distributed according to the areas of its implementation and according to the structures that exercise it.

Specific role in the system of separation of powers belongs to the court as a public institution. The court is the natural opponent to all other possible institutions, because it is designed to resolve independently and fairly various social conflicts on the basis of the current legislation, including those where institutions participate themselves. Therefore, any court must be independent.

However, independence acquires special significance in the activity of bodies of the constitutional jurisdiction – the Constitutional Court of Ukraine or the body that exercises its functions since such bodies decide on the issue of constitutionality of the most important legal acts which are adopted by relevant bodies of state power, i.e. they correlate the intentions of the subjects of power with those values and principles that are stipulated in the Constitution of Ukraine – the main document that is the basis of political and legal organisation of society. If a body of constitutional jurisdiction adopts a decision on unconstitutionality of a legal act, this act loses its legal force and thus terminates to act as a social and political act, because its further implementation is contrary to the Constitution of Ukraine. It is clear that in exercising such a radical function, a body of constitutional jurisdiction may enter into sharp dispute with other institutions of state power, and they, in their turn, may seek some means to influence the position of the Constitutional Court in the way preferable for them.

In the submitted report the attempt is made to show what the Ukrainian state has succeeded to do in order to ensure the independence of the Constitutional Court of Ukraine as the sole body of constitutional jurisdiction.

## **1. The Constitutional Court of Ukraine: Aspects of Independence**

### **1.1. Key Features of the Constitutional Status of the Constitutional Court of Ukraine**

The status and basis of the Constitutional Court of Ukraine are determined in a separate Chapter of the Constitution of Ukraine (XII) that emphasises its special place in the system of bodies of state power as the sole body of constitutional jurisdiction in Ukraine (Article 147.1 of the Constitution of Ukraine). At the same time the Constitutional Court of Ukraine is a judicial body: according to Chapter VIII of the Constitution of Ukraine (“Justice”) judicial proceedings in Ukraine are performed by the Constitutional Court of Ukraine and courts of general jurisdiction (Article 124.3 of the Constitution of Ukraine). The Constitutional Court of Ukraine is the judicial body according to the main principles and forms of its activity, which coincide with the main features of the functioning of courts of general jurisdiction.

The Constitutional Court of Ukraine in the Decision No. 13-rp/2008 dated June 26, 2008 in the case on the authority of the Constitutional Court of Ukraine noted that *“according to Article 6.2 of the Constitution of Ukraine bodies of legislative, executive and judicial power exercise their authority within the limits established by the Constitution and in accordance with the laws of Ukraine.*

*Under Article 147 of the Constitution the Constitutional Court of Ukraine is the sole body of constitutional jurisdiction in Ukraine, it decides the issues on the conformity of laws and other legal acts with the Constitution, gives official interpretation of the Constitution of Ukraine.*

*The extent and limits of such authorities of the Constitutional Court are determined by the provisions of Article 150 of the Constitution, factually reproduced by Article 13 of the Law “On the Constitutional Court of Ukraine”. The procedure for the organisation and operation of the Constitutional Court of Ukraine, and the procedure for the review of cases by the Court, are determined by law (Article 153 of the Constitution).*

*The jurisdiction of the Constitutional Court extends to the resolution of all issues stipulated by Article 150 of the Constitution (conformity with the Constitution of Ukraine of laws and other legal acts of the Verkhovna Rada of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea, official interpretation of the Constitution and laws of Ukraine) as well as by some other articles of the Constitution, particularly Article 159 (conformity of a draft-law on introducing amendments to the Constitution of Ukraine with the requirements of Articles 157 and 158 of the Constitution). Whereas in the first case the so-called subsequent constitutional control by the Constitutional Court takes place, i.e. the Court examines constitutionality of current legal acts, it applies preventive constitutional control in the second one (Decision no. 8-rp/98 dated 9, June 1998 in the case on introducing amendments to the Constitution)”.*

## **1.2. The Independence of the Constitutional Court of Ukraine as the Principle of its Activity**

The independence of the Constitutional Court of Ukraine is one of the basic principles of its activities (Article 4 of the Law of Ukraine “On the Constitutional Court of Ukraine”). It means the creation of such conditions for the activity of the Constitutional Court of Ukraine that would exclude any external influence, ensure its independence to perform the authorities determined by law, as well as the Court’s unaccountability in relation to any public or state institutions and impossibility for the latter to control it.

The components of the independence of the Constitutional Court of Ukraine are: organisational, personnel and financial independence. The organisational independence is an institutional separation of a judiciary body from the legislative and executive powers and its independent functioning. The personnel independence implies the formation of the judicial corps in order that makes impossible any unjustified influence on this process, as well as termination of the authorities of judges and disciplinary practices. Material and financial independence means that the state provides material and financial resources to meet the needs of the Court.

The guarantees for independence of the Constitutional Court of Ukraine are: securing the main principles of its activities and the order of its formation in the Constitution of Ukraine, organisational guarantees (self-organisation of its activities), state funding (separate line) and independent administration of appropriate State funds, independent information and personnel support, the ability to be a legal entity, material and technical guarantees.

## **1.3. Normative and Legal Autonomy of the Constitutional Court of Ukraine**

The procedure for the organisation and operation of the Constitutional Court of Ukraine, and the procedure for the review of cases, are determined by law (Article 153 of the Constitution of Ukraine). Special law that regulates the activity of the Constitutional Court of Ukraine is the Law of Ukraine No. 422/96-VR “On the Constitutional Court of Ukraine” dated October 16, 1996 (hereinafter referred to as “the Law”).

One of the main features of the organisational and normative and legal autonomy of the Constitutional Court of Ukraine is its right to adopt acts that regulate organisation of its internal work (Article 3.2 of the Law).

The Rules of Procedure of the Constitutional Court of Ukraine (hereinafter referred to as “the Rules of Procedure”) were approved by the Decision of the Constitutional Court of Ukraine dated March 5, 1997 and set the order of internal work of the Constitutional Court of Ukraine. According to the Decision of the Constitutional Court of Ukraine No. 34-r/2008 dated October 14, 2008 the Rules of the Procedure were adopted in the new wording.

*The Rules of Procedure stipulate the procedure for election of the Chairperson of the Constitutional Court of Ukraine and his Deputies, the establishment of Collegia of Judges, standing and temporary commissions of the Constitutional Court of Ukraine, the appointment of secretaries of Collegia of Judges, the appointment of the Head of the Secretariat of the Constitutional Court of Ukraine, the authorities and the order of plenary sessions and sessions of the Constitutional Court of Ukraine, the order of preparation of the materials of a case upon constitutional petitions and constitutional appeals for consideration at the plenary sessions of the Constitutional Court of Ukraine, the procedure for consideration of cases, the basic rules of ethics at the plenary sessions, specifics of the documentation management at the Constitutional Court of Ukraine and other matters of internal work of the Constitutional Court of Ukraine.*

*The Rules of Procedure of the Constitutional Court of Ukraine shall be adopted at a session of the Constitutional Court of Ukraine (§ 76 of the Rules of Procedure).*

*Work conditions for the Constitutional Court of Ukraine, Judges and Employees of the Secretariat are stipulated by § 74 of the Rules of the Procedure. Thus, the Constitutional Court of Ukraine shall approve an approximate schedule for consideration of cases for each quarter, determine days of a week for plenary sessions and sessions of the Constitutional Court of Ukraine, session of the Collegia of Judges, approve schedule for vacations of the Judges, plan for the Judges' business trips, including international ones, appoint Judges of the Constitutional Court of Ukraine for participation in conferences and symposia.*

Work conditions for employees of the Secretariat of the Constitutional Court of Ukraine shall be determined by the Regulation on the Secretariat of the Constitutional Court of Ukraine, Regulations on its structural units and Rules of internal activities.

#### **1.4. The Budget of the Constitutional Court of Ukraine**

The state must provide funding and proper conditions for the functioning of courts and judges, including the Constitutional Court of Ukraine, which is determined by Article 130 of the Constitution of Ukraine, according to which expenditures for the maintenance of courts are allocated separately in the State Budget of Ukraine. In furtherance of this provision Article 31 of the Law stipulates that financing of the Constitutional Court of Ukraine shall be provided for in a separate item of the State Budget of Ukraine. Proposals concerning the amount of financing of the Constitutional Court of Ukraine as well as the draft of relevant budget estimate shall be submitted by the Chairperson of the Constitutional Court of Ukraine to the Cabinet of Ministers of Ukraine and the Verkhovna Rada of Ukraine when the State Budget for each following year is drafted.

The Secretariat of the Constitutional Court of Ukraine drafts proposals regarding the amount of financing of the Constitutional Court of Ukraine and other necessary materials, submits them to the Chairperson for the preparation of the draft of budgetary estimate of the Constitutional Court of Ukraine.

The Chairperson of the Constitutional Court of Ukraine shall submit the draft of budgetary estimate for each year for approval by the Constitutional Court of Ukraine (item 1.3 of § 2 of the Rules of Procedure). The Constitutional Court of Ukraine considers proposals concerning amount of financing the Constitutional Court of Ukraine, approves a draft of budgetary estimate for each financial year, hears the information of the Chairperson of the Constitutional Court of Ukraine on the use of budget assignments (paragraphs 7 and 9 of item 1 of § 7 of the Rules of Procedure).

Management of budgetary funds for maintaining and ensuring activities of the Constitutional Court of Ukraine in accordance with the budget estimate approved by the Constitutional Court of Ukraine belongs to the authorities of the Chairperson of the Constitutional Court of Ukraine (paragraph three of Article 21.2 of the Law). The main areas of expenditure are salaries of the judges and the personnel, purchase of equipment and materials, payment for vehicles, utilities, business trips etc.

The control over effective and special-purpose use of funds is entrusted to the Standing Commission on Budget and Personnel, consisting of four judges.

*The case-law of the Constitutional Court of Ukraine may serve as a proof of urgency of the issue of financial independence of courts. The Constitutional Court of Ukraine in the Decision No. 6-rp/99 dated June 24, 1999 (case on the financing of courts) noted that “one of the constitutional guarantees of judicial independence is a special procedure for financing the courts. An important mechanism to ensure such guarantee is stipulated by paragraph one of Article 130 of the Constitution of Ukraine and sets forth the state’s obligation to provide funding and proper conditions for the functioning of courts and judges by a separate identification in the State budget of Ukraine for the cost of the courts. The centralised mode of financing of the judiciary from the State budget of Ukraine in amounts that are to ensure adequate economic conditions for a full and independent administration of justice, court funding needs (costs for the litigation, utilities, repair and protection of court premises, purchase of office equipment, postage, etc.) should limit any impact on the court and is aimed at ensuring judicial activities based on the principles and the provisions of the Constitution of Ukraine” (paragraph three item 2 of the motivation part).*

### **1.5. Administrative Autonomy of the Court**

The Constitutional Court of Ukraine decides autonomously administrative matters, which include, inter alia, the formation of leadership of the Constitutional Court of Ukraine and its structural units.

Thus, the Chairperson of the Constitutional Court of Ukraine is elected by secret ballot for a single three-year term at a special plenary session of the Constitutional Court of Ukraine from among the judges of the Constitutional Court of Ukraine (Article 148.5 of the Constitution of Ukraine).

Deputy Chairpersons of the Constitutional Court of Ukraine are nominated by the Chairperson of the Constitutional Court of Ukraine and are elected for a single three-year term by secret voting (Article 22.4 of the Law).

Standing Commissions of the Constitutional Court of Ukraine which are auxiliary working bodies on issues of organisation of the Court's internal work are established by the Constitutional Court of Ukraine at its session from among the Judges of the Constitutional Court of Ukraine. Chairpersons of Standing Commissions shall be appointed by the Chairperson of the Constitutional Court of Ukraine for the term of their office (Articles 33.1 and 33.3 of the Law).

The Constitutional Court of Ukraine at its plenary sessions may establish temporary commissions for additional examination of issues related to constitutional proceedings in a case with the participation of experts in relevant branches of law (Article 34 of the Law).

The Collegia of Judges to consider issues concerning initiation of the constitutional proceedings in cases upon constitutional petitions, and the Collegia of Judges to consider the issues concerning initiation of constitutional proceedings in cases upon constitutional appeals shall be established in the Constitutional Court of Ukraine. Decisions on establishment of the Collegia of Judges of the Constitutional Court of Ukraine, approval of the composition and appointment of the secretaries of the Collegia of Judges shall be adopted at a session of the Constitutional Court of Ukraine during the first month of each calendar year. The Collegium of Judges shall be headed by the secretary appointed from among the Judges who are members of the Collegium (Article 47 of the Law).

Research and Advisory Board may be established at the Constitutional Court of Ukraine. Its composition, authorities and procedure for activities shall be approved by the Constitutional Court of Ukraine (§ 73 of the Rules of Procedure).

The Constitutional Court of Ukraine autonomously approves at its sessions the structure and personnel of the Secretariat of the Constitutional Court of Ukraine, which exercises organisational, research and expert, informational and reference as well as other kinds of support for the activities of the Constitutional Court of Ukraine (Article 32 of the Law, § 5.2, § 7 of the Rules of Procedure).

As a body of state power the Constitutional Court of Ukraine has the authority to manage state property. As a legal entity it manages the operating assets (buildings, equipment, etc.), concerning which it exercises the right of ownership, use and disposal.

## **1.6. Execution of the Decisions of the Constitutional Court of Ukraine**

The decisions of the Constitutional Court of Ukraine are mandatory for execution throughout the territory of Ukraine, are final and shall not be appealed.

(Article 150 of the Constitution of Ukraine). They do not need any additional confirmation from other bodies of state power.

*According to the legal position of the Constitutional Court of Ukraine, set out in the Decision No. 8-rp/98 dated June 9, 1998 in the case concerning introducing amendments to the Constitution of Ukraine, “the results of subsequent constitutional control under Article 150 of the Constitution of Ukraine, have the form of a decision and those of preventive control, under Article 159 of the Constitution of Ukraine - the form of an opinion of the Constitutional Court of Ukraine. Despite differences in form, decisions and opinions of the Constitutional Court of Ukraine are mandatory for execution. This follows from Article 124.3 of the Constitution of Ukraine according to which justice is administered by the Constitutional Court of Ukraine and courts of general jurisdiction and from paragraph five of this Article, according to which all judgments, regardless of their specific forms adopted by the courts in the name of Ukraine, are mandatory for execution throughout the territory of Ukraine. Thus, adoption of a judicial decision in the form of opinion of the Constitutional Court of Ukraine is mandatory for execution. In the same manner this issue is regulated in the Law of Ukraine “On the Constitutional Court of Ukraine”, which determined that the decisions and opinions of the Constitutional Court of Ukraine are equally binding (Article 69 of the Law). The opinion of the Constitutional Court of Ukraine guarantees the observance of the established order of introducing amendments to the Constitution of Ukraine and the stability of the Constitution of Ukraine provided it is mandatory for the Verkhovna Rada of Ukraine”.*

*In the Decision No. 15-rp/2000 dated December 14, 2000 in the case concerning the order of execution of the decisions, the Constitutional Court of Ukraine emphasised that “decisions of the Constitutional Court of Ukraine regardless whether the order and time frame are determined in them or not, shall be mandatory throughout the territory of Ukraine”.*

*The decisions of the Constitutional Court of Ukraine have direct force and do not require confirmation from any other state bodies of power for taking the their effect. The duty to execute the decisions of the Constitutional Court of Ukraine is required by the Constitution of Ukraine (Article 150.2), which has the highest legal force over all other legal acts (Article 8.2).*

*However, further determination in the decisions and opinions of the Constitutional Court of Ukraine of the order of their execution does not cancel or substitute the general mandatory character of their execution. Regardless of the fact whether there are regulations concerning the procedure of their execution in the decisions or opinions of the Constitutional Court of Ukraine, relevant laws, other legal acts or their separate provisions, recognised unconstitutional by these decisions, are not to be applied as invalid from the day the Constitutional Court of Ukraine adopted the decision on their unconstitutionality”.*

Current legislation does not stipulate the mechanism of execution of the decisions and opinions of the Constitutional Court of Ukraine, which causes some practical difficulties in their implementation.

The legal regulation of liability for failure to execute decisions of the Constitutional Court of Ukraine are envisaged by the provisions of Article 70.4 of the Law according to which failure to execute decisions or adhere to opinions of the Constitutional Court of Ukraine shall entail liability under the law. Today this liability is not set by any law.

### **1.7. The Constitutional Court of Ukraine and the Mass Media**

The Law enshrined the principle of publicity of the sole body of constitutional jurisdiction, which implies openness of the procedure of review of cases upon constitutional petitions and constitutional appeals and public nature of promulgation of the decisions and opinions adopted in these cases by the Court (Article 4).

The press office timely notifies all accredited journalists on the events taking place at in the Constitutional Court of Ukraine, provides every journalist attending hearings or promulgation of decisions with a press release as well as an opportunity for them to quickly (by phone or by fax) convey information to their editorial office. After promulgation of the decision or opinion the judge-rapporteur or the Chairperson of the Constitutional Court of Ukraine may briefly explain the essence of the adopted decision at the press center and answer the questions of the mass media. In addition, the Court holds press conferences on general issues, briefings on the individual aspects of the activities of the Court. At the request of a journalist a meeting with a particular judge may be organised.

## **2. The Independence of the Judges of the Constitutional Court of Ukraine**

*The principle of independence of courts and judges is declared both at the constitutional level (Articles 6, 126, 127, 128, 129, 130 of the Constitution of Ukraine) as well as at the legislative level (Articles 4, 27, 31 of the Law) according to which judges do not face any interference in their activities or external influence on their vote during the execution of their authorities. It is in these very conditions that the rule-of-law principle, full and comprehensive review of cases and substantiation of the decisions of the Constitutional Court of Ukraine may be implemented.*

*Judges of the Constitutional Court of Ukraine are subject to the guarantees of independence and immunity (Article 149 of the Constitution of Ukraine). Chapter 4 of the Law specifies the provisions of the Constitution of Ukraine concerning independence of judges of the Constitutional Court of Ukraine and the immunity of their person and concerning their equality as to their social and welfare provision with the judges of courts of general jurisdiction (Articles 27, 28, 29).*

## **2.1. Immunity of Judges of the Constitutional Court of Ukraine**

Immunity of judges is one of the elements of their status, it is not a personal privilege, and should have only public and legal purpose, i.e. to ensure the impartial administration of justice by impartial and fair court (Decision of the Constitutional Court of Ukraine No. 19-rp/2004 dated December 1, 2004).

Pursuant to Article 126.3 of the Constitution of Ukraine, a judge shall not be detained or arrested without the consent of the Verkhovna Rada of Ukraine, until a verdict of guilty is rendered by a court. As the Constitutional Court of Ukraine stated in the Decision No. 19-rp/2004 dated December 2004, the content of judicial immunity as a condition of their professional duties is not limited with the guarantees defined in Article 126.3 of Constitution of Ukraine, additional guarantees of independence and immunity of judges, apart from those already established in the Constitution of Ukraine may also be established by law.

Additional guarantees of the independence of judges of the Constitutional Court of Ukraine are envisaged by Article 28.2 of the Law according to which judges of the Constitutional Court of Ukraine shall not bear legal liability for voting results or expression of their opinions in the Constitutional Court of Ukraine and in its Collegia, except liability for offense or slander when considering cases, adopting decisions and providing opinions by the Constitutional Court of Ukraine.

## **2.2. Material and Financial Guarantees of Independence of the Constitutional Court of Ukraine and its Judges**

The proper functioning of the courts depends on the amount of financing and timely allocation of funds repeatedly stressed in the international legal instruments on judicial independence<sup>1</sup>. Creating appropriate conditions for judges (including compensation for work that should be established with account of special nature of the constitutional jurisdiction, the high status of judges, dignity, professional

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<sup>1</sup> Basic principles of judicial independence were approved by the Resolutions 40/32 and 40/146 of the General Assembly of the United Nations on November 29 and December 13, 1985. They envisage that each Member State shall provide an appropriate means that make the judicial authorities to properly fulfill their functions (Principle 7);

Resolution 1989/60 of 15th plenary session of the Economic and Social Council of the United Nations Organization "The Procedures for the effective implementation of the Basic Principles on the Independence of the judiciary" dated May 24, 1989, according to which while implementing principles 8 and 12 of the Basic Principles of judicial independence the States emphasise the need to allocate relevant resources for the functioning of judicial system (procedure 5);

The Vienna Declaration and Action Programme adopted at the World Conference on Human Rights on June 25, 1993 under which each state must adequately fund the institutions involved in the administration of justice (paragraph 27);

Recommendation № (94) 12 of the Committee of Ministers of the Council of Europe "On Independence, Efficiency and Role of Judges" dated October 13, 1994 according to which: "1. Proper conditions should be provided to enable judges to work efficiently and, in particular, by: a) recruiting a sufficient number of judges and providing for appropriate training such as practical training in the courts and, where possible, with other authorities and bodies, before appointment and during their career. Such training should be free of charge to the judge and should in particular concern recent legislation and case-law. Where appropriate, the training should include study visits to European and foreign authorities as well as courts; d) providing adequate support staff and equipment, in particular office automation and data processing facilities, to ensure that judges can act efficiently and without undue delay (items "a", "d" of Principle III).

degree of responsibility, social and pension insurance) is an important guarantee of the independence of judges.

The State should provide funding and proper conditions for the functioning of judges and their activities, as it is envisaged in Article 130.1 of the Constitution of Ukraine. This should guarantee their impartiality and prevent any bias when taking decisions. The abovementioned provision of the Constitution of Ukraine also establishes the rule by which expenditures for the maintenance of courts are allocated separately in the State Budget of Ukraine (Article 130.1 of the Constitution of Ukraine).

*The Constitutional Court of Ukraine has repeatedly stressed that "one of the constitutional guarantees of judicial independence is a special procedure for financing the courts, as an important mechanism of their support is the state's duty to provide funding and proper conditions for the functioning of courts and judges that is defined in Article 130.1 of the Constitution of Ukraine" (Decisions No. 6-rp/99 dated June 24, 1999, No. 19-rp/2004 dated December, 1, 2004, No. 4-rp/2007 dated June 18, 2007).*

*Providing state funding of court and judges is a condition of stability of their work, which was mentioned in the Decisions of the Constitutional Court of Ukraine No. 4-rp/2007 dated June 18, 2007, Decision No. 7-rp/2010 dated March 11, 2010.*

*Guarantees of the independence of judges as a necessary condition of administration of justice by unbiased, impartial and fair court secured by the Constitution and laws of Ukraine should really be provided and supported (paragraph 7 item 4.1 of the motivation part of the Decision of the Constitutional Court of Ukraine No. 19-rp/2004 dated December 1, 2004).*

In this respect it should be noted that the Verkhovna Rada of Ukraine has repeatedly allowed reducing safeguards of judicial independence while approving the State Budget of Ukraine for relevant year. In particular, it allowed a reduction of the funds of the State Budget of Ukraine allocated for the maintenance of the Constitutional Court of Ukraine, the suspension of the effect of a number of legislative acts on allowance of judges. Such decisions of the Parliament were the subject of consideration of the Constitutional Court of Ukraine.

### **2.3. The Principle of Incompatibility in the Activities of the Judges of the Constitutional Court of Ukraine**

According to Article 127 of Constitution of Ukraine, judges may not belong to political parties and trade unions, engage in any political activity, hold a representative mandate, occupy any other paid positions, perform other remunerated work except scholarly, teaching, and creative. Similar requirements are established by the laws of Ukraine "On the Constitutional Court of Ukraine" and "On the Judiciary and Status of Judges".

The establishment in the national legislation of the requirements on incompatibility of judicial office with the implementation of other activities is caused by the necessity to follow the principle of division of powers, set forth in Article 6 of the Constitution of Ukraine. This is an important means of ensuring independence and impartiality of the judiciary and avoiding influence on judges. The principle of incompatibility is one of the elements of legal mechanism of checks and balances that ensures the prevention of interference of the judiciary into the activities of legislative and executive bodies and that of officials of the latter into the judges' activities.

#### **2.4. Qualifications for the Judges of the Constitutional Court of Ukraine**

The independence of a judge depends on his/her professional qualifications. High level of qualification has to protect the judge of the Constitutional Court from the career "temptations" and may be the best guarantee of his/her independence since it also implies the judge is not internally subordinated. The argument for a judge when deciding or voting for or against should be determined by legal position that corresponds to the Constitution of Ukraine, and is free from political favours and any environment. This position is determined by competence and professionalism of a judge, allowing him/her to resist any influence.

The Constitution of Ukraine and the Law define the requirements for the judges of the Constitutional Court of Ukraine. Judge of the Constitutional Court of Ukraine shall be a citizen of Ukraine, who reached on the day of the appointment the age of forty years, has a higher legal education and practical experience, at least ten years of scientific or educational work, has a command of the state language and has resided in Ukraine for the past twenty years. At the same time the body which has the right to appoint judges of the Constitutional Court of Ukraine, being aware of the role of the Constitutional Court of Ukraine in a democratic society, should ensure appointment of a person who meets most the requirements of the high status of judge of the Constitutional Court of Ukraine.

A Judge of the Constitutional Court of Ukraine assuming the office swears to honestly and conscientiously perform the high duties of a Judge of the Constitutional Court of Ukraine, ensure the supremacy of the Constitution of Ukraine, protect the constitutional order of the State, constitutional human and citizen's rights and freedoms (Article 17 of the Law).

#### **2.5. Age Qualification as a Factor of Judicial Independence in Decision-Making**

The Constitution of Ukraine contains no such notion as a qualification in this respect. However, the Basic Law establishes that a judge of the Constitutional Court of Ukraine shall be a citizen of Ukraine, which at the time of appointment has reached the age of 40 years (Article 148.3 of the Constitution of Ukraine). This requirement of the Constitution of Ukraine may be regarded as being caused by the kind and character of the activity performed by judges of the Constitutional Court

of Ukraine (see the Decision of the Constitutional Court of Ukraine No. 5-rp/2000 dated April 18, 2000 (case on the age qualification).

A Judge of the Constitutional Court of Ukraine is the bearer of the judicial power. He represents the sole body of constitutional jurisdiction in the state, is authorised to interpret the Basic Law of Ukraine, laws of Ukraine, and to assess the laws and some by-laws for compliance with the Constitution of Ukraine, to execute constitutional control. Decision-making on these issues requires specific life experience and social maturity, the objective basis of which is the attainment of a certain age by a person. Therefore, setting age qualifications should enable balance and substantiation while adopting decisions by a judge of the Constitutional Court of Ukraine, his/her impartiality, and thus self-reliance and independence in their decision.

The Constitution and laws of Ukraine provide similar requirements for other officials (President of Ukraine, Authorised Representative of the Verkhovna Rada of Ukraine on Human Rights).

## **2.6. Disciplinary Independence of Judges of the Constitutional Court of Ukraine**

The Law does not regulate issues of disciplinary responsibility of judges of the Constitutional Court of Ukraine. However, some features of the proceedings as a result of violation of oath or incompatibility requirements are regulated by the Rules of Procedure. The issue on violation by a Judge of the Constitutional Court of Ukraine of the requirements of incompatibility shall be considered upon a conclusion of the Standing Commission on Regulations and Ethics of the Constitutional Court of Ukraine at a session of the Constitutional Court of Ukraine. Should the fact of such violation be established the Judge shall be forewarned that within the term determined by the Constitutional Court of Ukraine he/she must resign from office determined as incompatible. If a Judge of the Constitutional Court of Ukraine fails to fulfill the forewarning of the Constitutional Court of Ukraine concerning his/her resignation from the incompatible office all the materials shall be transmitted for consideration by the Verkhovna Rada of Ukraine within three days from the end of the term for fulfillment of the forewarning of the Constitutional Court of Ukraine (Article 62 of Rules of Procedure).

If the body which appointed a Judge of the Constitutional Court raises the issue concerning violation by this Judge of oath the Constitutional Court of Ukraine shall examine the issue and upon conclusion of the Standing Commission on Regulations and Ethics adopt a decision on availability of grounds for consideration by the Verkhovna Rada of Ukraine of the issue concerning dismissal of a Judge of the Constitutional Court of Ukraine from the office, or on absence of the grounds for dismissal from the office of a Judge of the Constitutional Court of Ukraine (Article 63.1 of Rules of Procedure).

## **2.7. Termination of the Authorities of the Judge**

Judges of the Constitutional Court of Ukraine are subject to the guarantees of independence and immunity and to the grounds for dismissal from office envisaged by Article 126 of the Constitution (Article 149 of the Constitution of Ukraine).

According to Article 126 of the Basic Law of Ukraine judge is dismissed from office by the body that elected or appointed him or her in the event of the expiration of the term for which he or she was elected or appointed; the judge's attainment of the age of sixty-five; the impossibility to exercise his or her authority for reasons of health; the violation by the judge of requirements concerning incompatibility; the breach of oath by the judge; the entry into legal force of a verdict of guilty against him or her; the termination of his or her citizenship; the declaration that he or she is missing, or the pronouncement that he or she is dead; the submission by the judge of a statement of resignation or of voluntary dismissal from office. The same reasons for dismissal of judges of the Constitutional Court of Ukraine are reproduced in Article 23 of the Law. Strict adherence to the established order of dismissal of a judge of the Constitutional Court of Ukraine is one of the guarantees of its independence (Decision of the Constitutional Court of Ukraine No. 19-rp/2004 dated December 1, 2004).

## **2.8. One-Term Appointment**

According to Article 9 of the Law a Judge of the Constitutional Court of Ukraine shall be appointed for the term of nine years with no right to reappointment. This hard imperative is due to the place and role of the Constitutional Court of Ukraine as the sole body of constitutional jurisdiction in the system of state bodies of power of Ukraine. Introducing the procedure of appointment of a judge of the Constitutional Court of Ukraine for a longer period or permanently would exclude the possibility of timely rotation of judges engaged in constitutional proceedings and would not create the necessary dynamism of the Court. The possibility of reappointment would lead to loyalty of a judge to the body that appointed him/her for the first time. However, such loyalty should be excluded. An appointed judge does not represent the interests of the body of state power that appointed him/her. He/she performs a public function in the interests of the society, the state, and must decide on cases from the perspective of law and be outside politics. Retention of some obligations of Judge of the Constitutional Court of Ukraine before the body of state power that appointed or elected him/her, would question the objectivity and impartiality of the Court as the sole body of constitutional jurisdiction in Ukraine and neutralise the constitutional principle of separation of powers.

### **3. Norms of the Rules and Procedure as a Factor of Independence of Judges of the Constitutional Court of Ukraine**

#### **3.1. Institute of Dissenting Opinion**

Judge of the Constitutional Court of Ukraine has a right to dissenting opinion. He/she is able to implement this right within seven days after the day of voting, irrespective of his/her voting “for” or “against” adopting a decision or providing an opinion. A dissenting opinion of a Judge of the Constitutional Court of Ukraine shall be published in the Bulletin of the Constitutional Court of Ukraine, other official publications of Ukraine and on the official web-site of the Constitutional Court of Ukraine. It is promulgated explicitly and in public along with the Decision adopted collegially.

#### **3.2. Form of Procedure, Transparency of Proceedings and Independence of a Judge’s Position**

At plenary sessions of the Constitutional Court of Ukraine cases may be considered both in the form of oral hearings (i.e. all participants in constitutional proceedings are heard at a plenary session), and in the form of written hearings (i.e. examination of materials and documents collected at previous stages of constitutional proceedings and additionally provided during a plenary session in order to ensure impartial and complete consideration of a case). The form of hearing shall be determined by a procedural ruling of the Constitutional Court of Ukraine, which may also resolve other issues concerning organisation of a plenary session of the Constitutional Court of Ukraine on a case. Oral hearing are obligatory if for comprehensive examination of the circumstances of a case and adoption of a legally sound decision it is necessary that participants in the constitutional proceedings are heard at a plenary session of the Constitutional Court of Ukraine. They may also be conducted upon the motions of subjects of the right to constitutional petition, constitutional appeal as well as bodies and officials whose acts are disputed concerning their constitutionality or need official interpretation. Oral hearings may be conducted only on separate issues of a case determined by a ruling adopted at a plenary session of the Constitutional Court of Ukraine.

#### **3.3. Possibility to Consider the Constitutionality of a Law beyond the Limits of Constitutional Appeal or after its Withdrawal as an Element of Independence of the Court**

According to Article 61.3 of the Law if in the course of consideration of a case upon a constitutional petition or a constitutional appeal there has been revealed non-conformity with the Constitution of Ukraine of legal acts (separate provisions thereof) other than those in which constitutional proceedings are initiated and which have an impact on adopting a decision or providing an opinion on the case, the Constitutional Court of Ukraine shall recognise such legal acts (separate provisions thereof) as unconstitutional.

The order of withdrawal of the constitutional petition or constitutional appeal is provided by Article 44 of the Law. A constitutional petition (appeal) may be withdrawn upon the written submission of the subject who filed it with the Constitutional Court of Ukraine at any time before the day of its consideration at the plenary session of the Constitutional Court of Ukraine. A procedural ruling on termination of proceedings in a case upon a constitutional petition, constitutional appeal which is being withdrawn shall be adopted at a session of the Constitutional Court of Ukraine.

According to paragraph 51<sup>1</sup> of the Rules of Procedure the Court shall terminate consideration of constitutional petition, constitutional appeal if after adoption of a ruling by the Collegium of the Constitutional Court of Ukraine on refusal to initiate the proceedings in a case a subject of a right to constitutional petition, constitutional appeal withdraws constitutional petition, constitutional appeal upon a written submission according to Article 44 of the Law. Pursuant to paragraph 51 of the Rules of Procedure of the Constitutional Court of Ukraine the Court shall terminate constitutional proceedings in a case if after initiation of proceedings in a case but before the beginning of consideration of a case on merits at a plenary session of the Constitutional Court of Ukraine a constitutional petition, constitutional appeal is withdrawn upon the written submission of a subject of the right to constitutional petition, constitutional appeal according to Article 44 of the Law of Ukraine “On the Constitutional Court of Ukraine”.

In our opinion, the right of a court to define and decide independently on the issues of constitutionality of an act within the frameworks of constitutional proceeding which has been initiated is a sign of rather broad discretion of the Constitutional Court of Ukraine and its independence. Meanwhile it may be justified that the Court does not have a right to initiate proceedings independently.

#### **3.4. The Role of the Constitutional Court as a “Negative Lawmaker” (Hans Kelsen)**

The practical activities of the Constitutional Court of Ukraine testify that its decisions have normative character, engender certain legal consequences and are directed to regulation of some public relations. Recognition of a normative act unconstitutional is an act of normative significance since the content of a normative act changes or disappears. In view of the mandatory and final character of decisions of the Constitutional Court of Ukraine, as well as the fact that legal acts declared unconstitutional lose their legal force, one can allege the role of the Constitutional Court of Ukraine as a “negative lawmaker”. Hence, decisions of the Constitutional Court of Ukraine on unconstitutionality of this or that act are self-sufficient since they are adopted by the body authorised by the Constitution of Ukraine. These acts do not foresee additional issuance of legal acts by legislative and executive bodies affirming repeal of the unconstitutional act. Recognition of a normative act or separate provisions thereof as non-conforming with the Constitution of Ukraine shall compel relevant body to repeal this act or its

provisions and accordingly becomes a ground for cancellation in the established order of the provisions of other normative acts which are based on the act or provisions thereof declared unconstitutional.

Decisions of the Constitutional Court of Ukraine concerning official interpretation of legal norms by their nature are interpretational, but not normative acts. The function of normative acts is to establish new norms of law, repeal or amend the norms previously in force. Interpretational acts do not perform such a function. At the same time, since there is no legal certainty concerning consequences of decisions of the Constitutional Court of Ukraine on official interpretation in the current legislation, they may be ground for judicial appeal in courts of general jurisdiction of decisions and acts if they were made by subjects guided by wrong interpretation of their authorities.

The Constitutional Court of Ukraine is not entitled with the right to legislative initiative thereby it shall not be a subject of a legislative process. Absence of this possibility should be regarded as an additional legislative factor which prevents the body of the constitutional jurisdiction to exceed its functional limits and to become a “positive” lawmaker.

### **3.5. Influence of a Nature of Appeal (before or after Adoption of Normative Act) on Relations between the Constitutional Court of Ukraine and other State Bodies**

The jurisdiction of the Constitutional Court of Ukraine concerning conformity with the Constitution of Ukraine (constitutionality) includes laws of Ukraine and other legal acts of the Verkhovna Rada of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea adopted both before and after the Constitution of Ukraine enters into force. Objects of consideration concerning conformity with the Constitution of Ukraine are laws and other legal acts which entered into force only, i.e. the Constitutional Court of Ukraine examines laws and other legal acts concerning their constitutionality only in order of the subsequent constitutional control. Draft laws shall not be object of the constitutional control by the Constitutional Court of Ukraine except draft laws on introducing amendments to the Constitution of Ukraine. According to the content of Articles 150 and 152 of the Constitution of Ukraine the object of constitutional control by the Constitutional Court of Ukraine shall be laws and other legal acts which are in force only.