CONSTITUENT POWER: THE THEORY AND PRACTICE OF ITS IMPLEMENTATION IN UKRAINE

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DOI: 10.17589/2309-8678-2018-6-4-37-61

The article researches the phenomenon of constituent power as a theoretical concept and the practice of its implementation in Ukraine. Constituent power is associated with the process of adopting a constitution and making amendments to it. A distinction is made between primary and institutional constituent powers. The constituent nature of the Constitution of Ukraine in the interpretation of the Constitutional Court of Ukraine is analyzed. The reasons why the Law "On an All-Ukrainian Referendum" was held invalid with regard to the constituent power of the people is considered. There is an inconsistency in the primary and institutional constituent powers' interpretation of amendments to the Constitution of Ukraine. The constitutional reform of 2004, the interference with this reform by the Constitutional Court of Ukraine in 2010 and its return by the parliament in 2014 are examined from the standpoint of the constituent power concept. It is concluded that a new constitutional reform, which would provide a clean slate, could be an acceptable solution in Ukraine. In the future, the text of the reformed Constitution should provide for clear mechanisms for amending the Constitution of Ukraine and the adoption of a new Constitution, which would necessarily include procedures for popular legitimacy.

Keywords: constituent power; popular sovereignty; the people; constitution; constitutional control; Ukraine.

Recommended citation: Hryhorii Berchenko & Serhii Fedchyshyn, *Constituent Power: The Theory and Practice of Its Implementation in Ukraine*, 6(4) Russian Law Journal 37–61 (2018).

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Introduction

The Constitution of Ukraine, adopted on 28 June 1996 remained unaltered for a long time.[1] However, a sufficiently long period of stability ended due to the adoption of the constitutional reform of 12 December 2004. Subsequently, the Constitution also changed in 2011, 2013 and 2016. However, it is the constitutional reform of 2004 that became the cornerstone of not only academic and theoretical discussions, but also resulted in two unprecedented resolutions by Ukrainian authorities, i.e. the Constitutional Court of Ukraine (the CCU) in 2010 and the Supreme Council of Ukraine (the Verkhovna Rada) in 2014. This was a case of "renewal" of the effect of the text of the Constitution of Ukraine, which was originally adopted by the decision of the CCU. The renewal of the 2004 reform took place due to a decision of parliament.

At the same time, the concept of constituent power is increasingly used as a certain precondition which is at the heart of the constitutional order on which the Constitution of Ukraine relies and which determines the further constitutional reform. However, there are quite large discrepancies in its understanding in practice.

The concept of constituent power is not only a real doctrinal prerequisite for theoretical developments, but also finds new roots in court decisions and is used to justify certain laws (e.g. the part of the Law "On the All-Ukrainian Referendum" which permits the adoption of a new version of the Constitution concerning the All-Ukrainian Referendum in response to popular demand). Similarly, the doctrine of constituent power was intended to consecrate the "renewal" of the text of the Constitution in February 2014.

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[1] Конституція України, прийнята 28 червня 1996 р., Відомості Верховної Ради України, 1996, No. 30 [The Constitution of Ukraine, adopted on 28 June 1996, Bulletin of the Verkhovna Rada of Ukraine, 1996, No. 30].

The ideas to convoke the constitutional assembly, constituents and the like, occasionally arise. The concept of the constituent power was, in one way or another, the basis for the functioning of the Constitutional Assembly, and then also for the constitutional commission under the President of Ukraine.

Consequently, the idea of further constitutional reformation, and even of a complete constitutional restoration, literally remains one of the key issues in modern legal discourse. That is why its effective implementation is possible only with a thorough understanding of the nature of the constitution and the theory of the constituent power that gives rise to it.

1. The Concept of Constituent Power as an Element of Modern Constitutionalism

First of all, let us start with the definition. As defined by Tamara El Khoury in the Max Planck Encyclopedia of Comparative Constitutional Law, *pouvoir constituant* (constituent power) is the power to establish the constitutional order of a nation.[2] The theory of constituent power played a key role in the development of the practice of constitutionalism. According to this theory, which specifies a more general theory of national sovereignty and, at the same time, is its original version, the constitution as the basic law is recognized as an act of the primary (constituent) power (*pouvoir constituant*), which belongs directly to the people and has the supreme legal force.[3]

"A legal theory of constituent power basically assumes that it is a legal power, which implies that the undoing power has a legal charter."[4] The theory of constituent power was thoroughly outlined by Emmanuel Sieyès, who first used the term in 1789. He emphasized that the state bodies qualified as the constituted "authorities" cannot amend the constitution as an act of the constituent power. As Volodymyr Shapoval states, this thesis is what resulted in the constitution not being changed often.[5]

The idea of an unlimited constituent power which belongs exclusively to the community of sovereign citizens and is brought into action at their discretion was widespread due to the theory of natural law, thanks to Pufendorf and Wolf, and its practical application is first found in the United States, and then in revolutionary France, along with its theoretical expression in the doctrine of the *pouvoir constituant*, where all state authorities originate and unite.[6] Constituent power has been a revolutionary

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[2] Tamara El Khoury, *Pouvoir Constituant*, Oxford Constitutional Law (December 2017) (Sep. 15, 2018), available at http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e709.

[3] *Шаповал В.М.* Сучасний конституціоналізм [Volodymyr M. Shapoval, *Contemporary Constitutionalism*] 28 (Kyiv: Yurinkom Inter, 2005).

[4] *The Oxford Handbook of Comparative Constitutional Law* 422 (M. Rosenfeld & A. Sajó (eds.), Oxford: Oxford University Press, 2012).

[5] Shapoval 2005, at 29.

[6] *Еллинек Г.* Общее учение о государстве [Georg Jellinek, *General Doctrine of the State*] 488–489 (St. Petersburg: Yuridicheskiy tsentr Press, 2004).

concept from the very beginning.[7] In the USA, the concept of constituent power is derived from the preamble of the U.S. Constitution, which begins with the words "We the People of the United States..."[8]

As Eduard Pontovich states, the establishment of the constitution of a state is bound to give birth to the idea of the existence of a permanent authority, which establishes and revises the constitution, of the people, a community of free and equal individuals. This power, which is supreme in the state, guarantees the inviolability of the rights of the individual since it determines the entire state system. Later, it received the name of the constituent power. This idea could not have originated before. The establishment of constitutions of the modern period and the establishment of the contract of free, equal individuals marked the destruction of the entire historical past. The establishment of a constitution meant, at the same time, the foundation of a new society and a new state, which thus acquired the principles of unity consisting of a community of equal individuals, a mechanical or arithmetic integer. A constitutional treaty does not become a contract between the authorities on the one hand and another civilian power on the other hand, but is the agreement between the people who establish the state power. This circumstance is already the reason for the emergence of the idea that the people should have authority to establish a constitution and the constituent power.[9]

At the same time, the concept of constituent power is not indisputable. The idea of a sovereign constituent power is not the first historical understanding of constitution making. The eclipse of this figure by the notion of the people as the constituent power had to do with four notions linked to the Modern Age, namely the concepts of the social contract, sovereignty, the people understood as the unity of the whole rather than a part of the population, and the separation of powers.[10] Moreover, according to Moris Oriu, the French experience diverted science from the theory of the constituent power. In addition, in his opinion,

> this concept in itself does not stand up to scrutiny, as well as the doctrine of the delegation of government. A nation, separated from their governing bodies, has no more institutional or governing competence. Therefore, the creation or revision of the constitution should be accomplished by regular governmental

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[7] Nico Krisch, *Pouvoir constituant and pouvoir irritant in the postnational order*, 14(3) *International Journal of Constitutional Law* 657 (2016).

[8] *See more The Paradox of Constitutionalism: Constituent Power and Constitutional Form* 375 (M. Loughlin & N. Walker (eds.), Oxford: Oxford University Press, 2007); Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* 320 (Oxford: Oxford University Press, 2016).

[9] *Понтович Э.Э.* Развитие конституции и учредительная власть [Eduard E. Pontovich, *Development of the Constitution and the Constituent Power*] 35–36 (Petrograd: Ogni, 1918).

[10] Andrew Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* 45 (Cambridge: Cambridge University Press, 2017).

jurisdiction. It can only be engaged to adhere to certain formalities for the celebration of constitutional laws.[11]

However, this idea did not find recognition in science and the concept of the constituent power continued its development.

According to Jean-Paul Jacqué, a constituent power is an assembly of bodies responsible for the development and revision of the constitution.[12] He distinguishes between primary and institutional constituent power.

The primary constituent power develops a constitution when there is no other acting constitution. Such a situation may arise either as a result of the formation of a new state, or as a result of a revolution that terminated the operation of the previous constitution.

In both cases, the primary constituent power is unconditional (*inconditionné*) when establishing a new legal order. The source of the primary constituent power is the political order (*ordre politique*), because the constituent power is the power of the fact embodied in its constancy and the ideas embedded in this power, due to which the constitution is developed. The primary constituent power and its legitimacy depend on the success of the revolution. The adoption of the constitution indicates the goals of the government and marks the ascent to power of a certain government on the basis of law. The adoption of the constitution means the disappearance of the primary constituent power, which, having fulfilled its tasks, clears a space for the institutional constituent power.

The institutional constituent power is established by the constitution; this power is charged with amendments of the constitutional act. In this role, it can only act in accordance with the constitutional act and must abide the restrictions contained in the constitution with respect to the procedure for revision of its content.[13]

The authoritative German scholar, Carl Schmitt, wrote about the primary constituent power, distinguishing between the sovereign and commissar dictatorship. It should be mentioned that Schmitt developed the doctrine of the guarantor of the Constitution, as well as the doctrine of sovereignty. He is the author of the statement that "the sovereign is the person who decides on the state of emergency."[14]

Distinguishing between commissar and sovereign dictatorships, Schmitt, in essence, speaks of two fundamentally different strategies of governing behavior in

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[11] *Opuy M.* Основы публичного права [Moris Oriu, *Foundations of Public Law*] 633 (Moscow: Communist Academy Publishing House, 1929).

[12] *Жакке Ж.-П.* Конституционное право и политические институты [Jean-Paul Jacqué, *Constitutional Law and Political Institutions*] 107 (Moscow: Yurist, 2002).

[13] *Id.* at 108.

[14] *Шмитт К.* Политическая теология [Carl Schmitt, *Political Theology*] 15 (Moscow: KANONPressTsB, 2000).

the context of *anomie*.[15] In sovereign and commissar dictatorships, the concept of dictatorship includes the idea of the status that should be provided by the activities of the dictator. Their legal essence lies in eliminating, in order to achieve the goal, legal barriers and obstacles which, in every respect, are an unhindered obstacle to the achievement of this goal. Similar to self-defense, dictatorship is never only a single action but a counteraction as well. Therefore, it assumes that the opponent does not adhere to those legal rules that the dictator considers to be decisive as a legal foundation. The *commissioner* dictatorship abolishes the constitution *in concreto* to protect the same constitution with its specific content. The same argument has been used for a long time (most often and insistently, by Lincoln): if the content of constitution is threatened, it can be secured by the temporary suspension of the constitution. The dictatorship can protect the constitution from destruction.[16]

From the point of view of the commissar dictatorship, the dictator's action must lead to a condition under which rights can be exercised, since any legal norm assumes a normal state as a homogeneous environment in which it exists. As a result, the dictatorship becomes a problem of a certain reality, but it does not cease to be a legal problem. The legal force of the constitution can be suspended, but the constitution itself does not cease to operate, because such suspension relates to a special case. The sovereign dictatorship, however, considers the existing system as on that can be eliminated by its action. It does not suspend the current constitution by virtue of its constitutional right which was established, but makes an attempt to create a condition allowing a constitution which would meet all its requirements to be enforced.[17] In fact, according to Carl Schmitt, a sovereign dictatorship is considered a constituent power.

As for Ukraine, the issue of the content and specific forms of the implementation of constituent power was the subject of a study by Ruslana Maksakova "Constitutional and Legal Problems of the Organization and Implementation of the Constituent Power in Ukraine."[18] According to Maksakova's criterion of implementation approaches, there are three distinct forms of constituent power: 1) revolutionary constituent power; 2) reformatory constituent power; and 3) functional institutional power. Elections,

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[15] *Подоксёнов Д.В.* Чрезвычайное положение и парадокс суверенности // Социосфера. 2013. No. 1. С. 61–63 [Dmitry V. Podoksyonov, *The State of Emergency and the Paradox of Sovereignty*, 1 Sociosphere 61 (2013)].

[16] *Шмитт К.* Диктатура. От истоков современной идеи суверенитета до пролетарской классовой борьбы [Carl Schmitt, *Dictatorship. From the Origins of the Modern Idea of Sovereignty to the Proletarian Class Struggle*] 156–157 (St. Petersburg: Nauka, 2005).

[17] *Id.* at 158.

[18] *Максакова Р.М.* Конституційно-правові проблеми організації та реалізації установчої влади в Україні [Ruslana M. Maksakova, *Constitutional and Legal Problems of the Organization and Implementation of the Constituent Power in Ukraine*] (Zaporozhye: Classic Private University Publishing House, 2012).

referenda, general meetings of citizens at their place of residence, local initiatives, public hearings, and the recall of a deputy are classified as constituent power by the scholar.[19] This is a rather broad approach to the interpretation of the constituent power. A broad understanding of the constituent power makes it synonymous with popular sovereignty. Not having a purpose to analyze all the described interpretations of the constituent power and the forms of its implementations, we shall only mention that such different approaches to the understanding of the constituent power, as well as references to it and its use in the state and legal system, do not contribute to the development of a consistent constitutional concept for reforming the Constitution of Ukraine.

Stanislav Shevchuk's position seems to be more reasonable. He states that constitutionalism, is based on the distinction between the constituent power of the people, who, by means of the exercise of their sovereignty, adopt a constitution which secures the freedom of individuals and guarantees the principle of "limited rule" which arises from the theory of a social contract, and the state's power, which in democracies is closely linked to the electoral power of the electorate.[20] We also agree with Myhailo Savchin, who defines constituent power as an order of organization and procedure for the confirmation of the constitution in accordance with the democratic and open principles of the implementation of the procedure for the adoption or revision of the Basic Law, which has the supreme legal force.[21]

We believe that the Ukrainian concept of the constituent power should be based on the works by Carl Schmitt, Jean-Paul Jacqué, Andrew Arato, András Sajó and other scholars and should be associated with the process of adopting a constitution and making legislative amendments to it.

2. The Nature of the Constitution of Ukraine as an Act of Constituent Power

The CCU declared (para. 2 of the Declaration of Intent of the CCU of 3 October 1997 No. 4-zp in the case of the constitutional filing of Oleksandr Leonidovich Barabash concerning the official interpretation of part 5 of Article 94 and Article 160 of the Constitution of Ukraine (on entry into legal force of the Constitution of Ukraine)):

> The Constitution of Ukraine, being the Basic Law of the State, is, by its legal nature, an act of the constituent power belonging to the people. The constituent power in relation to constituted authorities is supreme: it is in

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19 Maksakova 2012, at 436.

20 *Шевчук С.* Судова правотворчість: світовий досвід і перспективи в Україні [Stanislav Shevchuk, *Judicial Law-Making: World Experience and Perspectives in Ukraine*] 149 (Kyiv: Abstract, 2007).

21 Савчин М.*В. Конституціоналізм* і *природа конституції* [Myhailo V. Savchin, *Constitutionalism and the Nature of the Constitution*] 302 (Uzhhorod: Polygraphic Center "Lira," 2009).

> the Constitution of Ukraine that the principle of the division of state power is declared... and the principles of the organization of the established authorities, including the legislative one, are determined. The adoption of the Constitution of Ukraine by the Verkhovna Rada of Ukraine meant that the constituent power was exercised by the parliament.[22]

The connection of the Constitution of Ukraine with the concept of constituent power became possible due to the preamble of the Constitution ("The Verkhovna Rada of Ukraine on behalf of the Ukrainian people, the citizens of Ukraine of all ethnic groups... adopts this Constitution, the Basic Law of Ukraine") as well as positions of the CCU on this issue.

> The adoption of the Constitution of Ukraine by the Verkhovna Rada of Ukraine was a direct act of the sovereignty of the people, who only once authorized the Verkhovna Rada of Ukraine to do so. This is secured by part 1 of Article 85 of the Constitution of Ukraine, which does not authorize the Verkhovna Rada of Ukraine to adopt the Constitution of Ukraine, as well as by Article 156 of the Constitution of Ukraine, according to which the amendments bill to the sections establishing the principles of the constitutional order in Ukraine after its adoption in the Verkhovna Rada of Ukraine are to be approved by an all-Ukrainian referendum,

as subparagraph 1 of paragraph 4 to the Declaration of Intent of CCU of 11 July 1997 No. 3-zp states.[23]

The above is confirmed in the verdict of the CCU of 10 May 2005 (subparagraph 4.3: "When adopting the Constitution of Ukraine on 28 June 1996, the sovereign will of the people was mediated by the Verkhovna Rada of Ukraine"). In this regard, Yury Barabash asks why the Court expressed the firm belief that it was the people of Ukraine who authorized parliament to exercise their (people's) constituent power and authority.[24] The question is rather rhetorical.

Moreover, on the ground of this argumentation, in the above decision, the CCU declared that the Constitution of Ukraine entered into force immediately upon its adoption, without being published (official publication took place only 14 days after its adoption).

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22 Available at http://zakon5.rada.gov.ua/laws/show/v004p710-97.

23 Available at http://zakon3.rada.gov.ua/laws/show/v003p710-97.

24 *Барабаш Ю.Г.* Право визначення конституційного ладу народом України // Конституційна асамблея: політико-правові аспекти діяльності. 2012. No. 3. С. 4–12 [Yury G. Barabash, *The Right to Determine the Constitutional Order by the People of Ukraine*, 3 Constitutional Assembly: Political and Legal Aspects of Activity 4 (2012)].

Having no doubt in the legitimacy of the current Constitution, there is a question in this context – which power (primary or institutional) did the Verkhovna Rada use when adopting the Constitution of Ukraine? It turns out that it was primary power, but it acted on behalf of the people as the only legitimate national representative political body.

Also, according to the CCU (para. 21 of the Declaration of Intent of 26 April 2018 No. 4-p/2018),

> being a result of the exercise of the constituent power of the people, the Constitution of Ukraine, by establishing a procedure for amending it, determines the procedural limits for the exercise of power and the people themselves.[25]

Therefore, being by its nature the result of the implementation of the primary constitutive power, it regulates the institutional constituent power of the people.

As Yury Barabash rightly notes, the constituent power of the Ukrainian people as a constitutional phenomenon is only acquiring its distinct features.[26] At the same time, the concept of constituent power is not only a real doctrinal prerequisite for theoretical developments and the practice of rule-making, law enforcement and interpretation of the norms of law, but is sometimes understood superficially and used to substantiate rather debatable legislative provisions. In particular, this is a question of the statutory provision of the Law "On the All-Ukrainian Referendum," specifically the part which allowed the adoption of a new version of the Constitution at an all-Ukrainian referendum on the people's initiative, contrary to the constitutional language itself.

Moreover, let us take the liberty to put question the allegedly axiomatic nature of the implementation of the concept of constituent power in the current Basic Law. Questions arise in the analysis of its entire text, in particular, Article 5 of the Constitution, as well as Section XIII on amendments to the Constitution.

3. Institutional Constituent Power and the Constitution of Ukraine

3.1. Adoption of the New Constitution

On the one hand, Article 5 of the Constitution speaks of the exclusive right of the people to define and change the constitutional order, and on the other hand, in the

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[25] Available at http://zakon3.rada.gov.ua/laws/show/v004p710-18.

[26] *Барабаш Ю.Г.* Установча влада українського народу як конституційний феномен // Право України. 2009. №. 11. С. 79 [Yury G. Barabash, *The Constituent Power of the Ukrainian People as a Constitutional Phenomenon*, 11 Law of Ukraine 73, 79 (2009)].

text of the Constitution, there are no procedural provisions regarding institutional constituent power, that is, there is no mechanism for implementation of the people's right to determine the constitutional system, if the right to adopt a new constitution is meant by it. The CCU has had to respond to this question and it finally rendered a judgment declaring the present ability of citizens, at a referendum held at the people's initiative, to establish a new system of adopting the Constitution under a procedure which has to be outlined in the Constitution and laws of Ukraine (Decision of the CCU of 16 April 2008 No. 6- rp/2008).[27]

This order has never been reflected in the Constitution. At the same time, the appropriate attempt was made at the *de jure* level of the law. Certain statutory provisions of the Law "On the All-Ukrainian Referendum" of 6 November 2012 No. 5475-VI provided for the right to adopt a new constitution at a nationwide referendum held at the people's initiative.[28] Thus, part 2 of Article 15 states:

> By means of the all-Ukrainian referendum held at the people's initiative, the Ukrainian, people being the holders of sovereignty and the only source of power in Ukraine, are entitled to exercise their exclusive right to define and change the constitutional order in Ukraine by adopting the Constitution of Ukraine (the constituent power) as prescribed by this Law.

The legitimization of the corresponding procedure in the law was directly deduced from the concept of the constituent power. However, this Law was declared unconstitutional in accordance with the Decision of the CCU of 26 April 2018 No. 4-p/2018. The reason for its unconstitutionality was the violation of the procedure for the adoption of the law itself. Composing the rationale of the judgment, the CCU also referred to norms of substantive law, but all of these provisions concerned issues of unconstitutionality of norms regarding amendments to the Constitution of Ukraine. In the text of the decision there is no express reference to the unconstitutionality of the norm envisaging the possibility of adopting a new constitution of Ukraine at a referendum.

3.2. Amendments to the Constitution of Ukraine

With regard to amendments to the Constitution, a few questions arise when analyzing Section XIII, which is directly devoted to this procedure.

As recorded in the text of the Constitution, there is a clear procedure; according to which the Verkhovna Rada is chiefly responsible for amendments. Only amendment

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[27] Available at http://zakon0.rada.gov.ua/laws/show/v006p710-08.

[28] Закон України від 06.11.2012 No. 5475-VI «Про всеукраїнський референдум», Відомості Верховної Ради України, 2013, No. 44–45 [Law of Ukraine No. 5475-VI of 6 November 2012. On the All-Ukrainian Referendum, Bulletin of the Verkhovna Rada of Ukraine, 2016, Nos. 44–54].

of Sections I, III and XIII requires the people to participate directly (at a referendum). In this regard, the question is how this procedure relates to Article 5 of the Constitution, which refers to the people's right not only to determine, but also to amend the constitutional system. The aforementioned Law "On the All-Ukrainian Referendum" gave people the right to amend the Constitution at a referendum, without the participation of the Verkhovna Rada of Ukraine, but this provision was declared as contrary to Section XIII of the Constitution of Ukraine. As the CCU states (para. 21 of the Declaration of Intent of 26 April 2018 No. 4-p/2018),

> As a result of the exercise of the constituent power of the people, the Constitution of Ukraine, by establishing a procedure for amending it, determines the procedural limits for the exercise of power by the people themselves.[29]

We can also cite subparagraph 2 of the operative part of the Decision of the CCU of 27 March 2000 No. 3-rp/2000 (all-Ukrainian referendum at the people's initiative case).[30] The CCU stated that

> the issues approved by the all-Ukrainian referendum at the people's initiative, set forth in paragraphs 2, 3, 4, and 5 of Article 2 of the Presidential Decree "On the Proclamation of an All-Ukrainian Referendum at the People's Initiative," are obligatory for consideration and decision-making in the procedure established by the Constitution of Ukraine, in particular, its Section XIII "Amendments to the Constitution of Ukraine" and the laws of Ukraine.

In other words, the CCU practically made it impossible for the people to implement constituent power directly at a referendum by amending the Constitution of Ukraine; in the CCU's opinion, it should necessarily be mediated by the Verkhovna Rada of Ukraine by amending the Constitution of Ukraine in its Section XIII. Consequently, the recognition of the referendum as a way to implement constituent power in Ukraine is problematic, since the Constitution of Ukraine itself does not consider it necessary when making amendments to it (a referendum is only obligatory for Sections I, III and XIII).

At the same time, there is a question regarding whether the current procedure can be amended to comply with the concept of the constituent power as such. A distinction given by Georg Jellinek is quite interesting. In his opinion, in states with constitutions based on the constituent power of the people, – amendments are made either by a direct popular vote or by dissolution of the parliament chambers with another appeal to voters, discussion of revisions in special "audit" chambers

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[29] Available at http://zakon3.rada.gov.ua/laws/show/v004p710-18.

[30] Available at http://zakon2.rada.gov.ua/laws/show/v003p710-00.

or at conventions. In other states, various extraordinary forms of amendment are employed, among which the majority requirement plays an important role. Then, multiple voting to revise or vote in the subsequent one-on-one legislative meetings is often required.[31]

As stated, only Sections I, III and XIII of the Constitution of Ukraine require a direct popular vote when making amendments to them. The rest of the amendments do not stipulate a popular vote or the dissolution of the Verkhovna Rada. In this regard, attention should be drawn to the fact that the dissolution of the parliament is a mandatory stage in the amendment of many constitutions (e.g. in the Netherlands and Iceland). Therefore, it is worth supporting Yury Barabash in his view that such a procedure for constitutional reform is one of the most optimal[32] and should be considered for implementation during the reform of the current Basic Law.

4. Constitutional Reform of 2004

In practice, Ukraine faced the problem of constituent power when amendments to the Constitution took place with procedural violations in 2004. On 8 December 2004, the Verkhovna Rada of Ukraine adopted a Bill No. 4180 on amendments to the Constitution – the Law of Ukraine of 8 December 2004 No. 2222-IV "On Amendments to the Constitution of Ukraine" (hereinafter the Law No. 2222).[33] Thus, amendments to the Constitution of Ukraine are the first changes to be finally approved, since the adoption and entry into legal force of the text of the Constitution on 28 June 1996.

At the same time, experts and scholars drew attention to the fact that there were some procedural violations during the adoption of the abovementioned law when introducing amendments to the Constitution of Ukraine (i.e. the absence of corresponding preliminary findings by the CCU, block voting, and a lack of discussion). These violations were referred to in the Conclusion of the National Commission for Consolidation of Democracy and the Supremacy of Law of 27 December 2005 on compliance with the terms of the constitutional procedure when amending the Constitution of Ukraine in 1996 by adopting the Law of Ukraine of 8 December 2004 No. 2222-IV "On Amendments to the Constitution of Ukraine" and on the compliance with its provisions on the general principles of the Constitution of Ukraine of 1996 and European Standards.

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31 Jellinek 2004, at 511.

32 *Барабаш Ю.Г.* Державно-правові конфлікти в теорії та практиці конституційного права [Yury G. Barabash, *State and Legal Conflicts in the Theory and Practice of Constitutional Law*] 181 (Kharkiv: Pravo, 2008).

33 Закон України від 08.12.2004 No. 2222-IV «Про внесення змін до Конституції України», Відомості Верховної Ради України, 2005, No. 2 [Law of Ukraine No. 2222-IV of 8 December 2004. On Amendments to the Constitution of Ukraine, Bulletin of the Verkhovna Rada of Ukraine, 2005, No. 2].

Some experts pointed out a number of other violations that they believed were committed. Vsevolod Rechitsky argued that the amendments to the Constitution were adopted in conditions of public emergency,[34] which is prohibited by the Constitution itself. In the opinion of B. Futea's opinion, a U.S. federal court judge, despite the fact that the amendments to the Constitution of Ukraine did not formally relate to Chapters I, III and XIII, Article 5 of the Constitution stipulates that

> The right to determine and change the constitutional order in Ukraine belongs exclusively to the people and shall not be usurped by the State, its bodies or officials.

Therefore, the procedure for revision of the Basic Law under all circumstances is to provide for the mandatory holding of a referendum as a way of ratifying a constitutional law passed by parliament.

Since the only body in Ukraine with constitutional jurisdiction is the CCU, an assessment of the arguments for violations when adopting amendments to the Constitution of Ukraine and providing these arguments with legal consequences could be made by means of verification of constitutionality of the law on amendments to the Constitution. At the same time, it should be noted that the exercise of constitutional legality control on amendments to the constitution has its own specific characteristics as compared with the exercise of such control over common laws, and the status of such laws as compared with common laws is often declared in the doctrine as being different from common laws passed by parliament.

In the legal doctrine and practice of the constitutional controlling bodies of different countries, two different approaches were formed. According to the first one, the constitutional controlling body is not empowered to verify the laws on amendments to the constitution. This position was set out in the Decision of the Constitutional Council of France on 26 March 2003 (*Décision n° 2003-469 DC du 26 mars 2003*).[35] The Constitutional Council declared that it can only pass a judgment in cases established by the constitution itself. At the same time, the law on amending the constitution has a special nature and is not a common law that is subject to constitutional control.

The opposite is to recognize laws on amending the constitution as being common laws and, thus, the constitutional controlling body has the right to verify their

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[34] *Речицький В.* Втілюючи принципи верховенства права: політико-правовий коментар положень Рішення Конституційного Суду України у справі про додержання процедури внесення змін до Конституції України // Вісник Конституційного Суду України. 2010. No. 6. С. 142–151 [Vsevolod Rechitsky, *Implementing the Principles of the Rule of Law: Political and Legal Comment on the Provisions of the Decision of the Constitutional Court of Ukraine in the Case of Adhering to the Procedure for Amending the Constitution of Ukraine*, 6 Bulletin of the Constitutional Court of Ukraine 142 (2010)].

[35] Available at https://www.conseil-constitutionnel.fr/decision/2003/2003469DC.htm.

constitutionality. An example of such an approach is the Decision of the Constitutional Court of Moldova of 4 March 2016.[36] The Constitutional Court of Moldova declared unconstitutional the procedure of amendments to the constitution adopted by the parliament 15 years ago to change the procedure of electing the president. The finding of the Constitutional Court referred to the restoration of civil rights for citizens to elect the president. This decision was criticized: the Constitutional Court cannot amend the Constitution. It has the right to make decisions on the constitutionality of less important laws than constitutional ones. After its adoption, any constitutional law becomes a part of the Constitution. And, in this case, according to the former Moldovan Ambassador to the U.N. and the Council of Europe, Alexei Tulbure, "the court has no authority to amend anything."[37]

Consequently, there are two approaches to the rights of the constitutional controlling body in terms of considering the laws to amend a constitution. A number of countries support this right, while others deny it. Moreover, as a rule, it depends on the activism or self-limitation of the constitutional court itself and stems from the practice of its activities and the legal doctrine of the country in question. Therefore, it is impossible to consider only one of the approaches as uniquely right.

In the case of Ukraine, the Constitution provides for preliminary constitutional control of the proposed law on amending the Constitution of Ukraine in compliance with Articles 157, 158. As for the next constitutional revision, there are no explicit provisions for eligibility or ineligibility in the CCU in such cases. Therefore, it is necessary to analyze the legal positions of the CCU on this issue, which are quite controversial.

First of all, it is worth mentioning the legal position of the CCU concerning its Decision of 11 March 2003 No. 6-rp/2003 in the case on the constitutional filing of a petition by 73 people's deputies in compliance with the Constitution of Ukraine for the right for the President of Ukraine to veto the Law of Ukraine "On Amendments adopted by the Verkhovna Rada of Ukraine to Article 98 of the Constitution of Ukraine" and its proposals:

> The fact is that the authority to amend the Constitution of Ukraine is exercised by the Verkhovna Rada of Ukraine by adopting laws... The procedure for

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[36] Hotărâre nr. 7 din 04.03.2016 privind controlul constituționalității unor prevederi ale Legii nr. 1115-XIV din 5 iulie 2000 cu privire la modificarea şi completarea Constituției Republicii Moldova [Decision No. 7 of 4 March 2016. On the Control of the Constitutionality of Some Provisions of Law No. 1115-XIV of 5 July 2000 on Amendments to the Constitution of the Republic of Moldova] (Sep. 15, 2018), available at http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=558&l=ru.

[37] Экс-посол РМ в Совете Европы: «Решение Конституционного суда – коварная игра Плахотнюка и попытка избежать протестов; КС не может вносить изменения в Конституцию» // Totul.md. 8 марта 2016 г. [Former Ambassador of the Republic of Moldova to the Council of Europe: "The Decision of the Constitutional Court Is an Insidious Play by Plakhotnyuk and an Attempt to Avoid Protests; The Constitutional Court Cannot Amend the Constitution," Totul.md, 8 March 2016] (Sep. 15, 2018), available at http://old.totul.md/ru/newsitem/1015020.html.

> the adoption of laws amending the Constitution of Ukraine by the Verkhovna Rada of Ukraine, as defined in Section XIII of the Basic Law of Ukraine, does not provide for a specific procedure for signing and promulgating such laws.[38]

Thus, the CCU refused to accept the specific legal nature of the laws on amendments to the Constitution, in particular their constituent nature. The CCU also refused to accept the fact that, in this case, the Verkhovna Rada of Ukraine does not exercise a legislative function, but implements the constituent power on behalf of the people, and that the law on the relevant amendments is an act of the constituent power of the people and therefore is not a common law. The fact of the recognition of the equal status of common laws and laws on amendments to the Constitution of Ukraine from the doctrinal perspective allowed establishment of the possibility of exercising the following constitutional control over them by the CCU in the same way as over the ordinary act of parliament.

Nevertheless, the CCU refused, by its Decision of 5 February 2008, to start proceedings in the case concerning compliance with the Constitution of Ukraine (constitutionality) of the Law of Ukraine "On Amendments to the Constitution of Ukraine," the Law of Ukraine "On Amendments to Section IV 'Final and Transitional Provisions,'" and the Law of Ukraine "On the Constitutional Court of Ukraine."[39]

At the same time, in another Decision – concerning the powers of the CCU of 26 June 2008 No. 13-rp/2008 – the CCU came to a different conclusion. According to its opinion, the Court is authorized to exercise the following constitutional control over the law on amending the Constitution of Ukraine after its entry into force. At this stage, the conceptual contravention of the positions of the CCU in its various decisions was first laid.

5. Decision of the Constitutional Court of Ukraine of 30 September 2010

The position of the CCU, set out in Decision of 26 June 2008 No. 13-rp/2008, found its logical development in Decision of 30 September 2010 No. 20-rp/2010 in the case concerning the compliance of the Constitution of Ukraine (constitutionality) with the Law of Ukraine of 8 December 2004 No. 2222-IV "On Amendments to the Constitution of Ukraine" (on compliance with the procedure for amending the Constitution of Ukraine) (hereinafter Decision No. 20-rp/2010). The CCU declared the Law No. 2222 to be unconstitutional and, in subparagraph 4 of clause 6 of the Decision, it expressly stated that the recognition of the law as unconstitutional in connection with violation of the procedure for its consideration and approval, means

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[38] Available at http://zakon3.rada.gov.ua/laws/show/v006p710-03.

[39] Available at http://zakon3.rada.gov.ua/laws/show/va06u710-08.

the revival of the previous version of the norms of the Constitution of Ukraine, which were amended, supplemented and excluded by the Law No. 2222.

It is worth paying attention to the fact that the Constitution does not say anything about the "revival of the previous version of the norms of the Constitution of Ukraine," and this conclusion was made by the CCU on the basis of a similar procedure involving the revival of the operation of the versions of common laws. In this case, the text of the Constitution in force which by its nature differs from common laws and is the Basic Law as well as the act of the constituent power, underwent a modification while another version of its norms was restored as a result of a court decision, which is quite an extraordinary phenomenon.

The Venice Commission, in its special finding "On the Constitutional Situation in Ukraine" of 17 December 2010, conducted a detailed analysis of this situation, cautiously pointing out the risks caused by the decision of CCU, in particular pointing out that (para. 70):

> The activities of the main state bodies are currently based on rules changed by the court, and not on the rules which were amended by the Verkhovna Rada of Ukraine as a democratic legitimate body.

Having considered the two values – the legal procedure and the necessity to control its compliance and legal certainty as well as respect for the political legitimacy of the law on amending the Constitution adopted by the political representative body of the people, i.e. the Verkhovna Rada – the CCU actually determined the value of the necessity to observe the legal procedure as a priority and the amendments to the Constitution of Ukraine were invalidated due to technical issues.

At the same time a procedural violation was made since some of the amended norms had not been preliminarily verified by the CCU in compliance with Articles 157, 158 of the Constitution. The CCU, in its Decision No. 20-rp/2010, gave no evaluation to the amendments in accordance with Articles 157, 158 of the Constitution. Taking this fact into account, the question is: what was the purpose of authorizing the CCU to provide preliminary constitutional control? Relying on the fact that such control was not fully implemented preliminarily, disregarding its purpose and post factum evaluation of the amendments from the material side, that is, in accordance with Articles 157 and 158, the recognition of the entire law as unconstitutional was too formal.

Even Bohdan Futey, who emphasized the unconstitutionality of the adopted Law No. 2222, drew attention to the fact that the CCU had adopted a decision that was contrary to the other decisions adopted by the Court before, without indicating the influence of a new decision on its previous decisions. His remarks also concerned the legitimacy of elected governing bodies, appointed or created under the Constitution

by the amendments of 2004.[40] The decision also received numerous positive and negative judgments (Viktor Kolisnyk, Vsevolod Rechitsky[41]).

6. Restoration of the Text of the Constitution of Ukraine in 2014

Subsequently, the decision of the CCU was considered incompatible with the Constitution, and it was proposed to adopt the "Act on the Restoration of the Legitimacy of the Constitutional System in Ukraine" (by people's deputy Inna Bogoslovskaya). Such proposals became reality in the context of the political crisis when, on 21 January 2014, the Verkhovna Rada of Ukraine adopted the Law "On Restoring Some Provisions of the Constitution of Ukraine" (hereinafter the Law of 21 February 2014)[42], and on 22 February 2014 it adopted Resolution No. 750-VII "On the Text of the Constitution of Ukraine Last Revised or Amended on 28 June 1996, as Amended and Supplemented by the Laws of Ukraine of 8 December 2004 No. 2222-IV, of 1 February 2011 No. 2952-VI, and of 19 September 2013 No. 586-VII" (hereinafter the Resolution of 22 February 2014).[43]

It is interesting that in the abovementioned Resolution of 22 February 2014, in addition to the reference to the legal position of the CCU (Decision of 5 February 2008) and the Venice Commission (conclusion of 17 December 2010), the following logical chain was constructed:

– The Constitution of Ukraine is the act of the constituent power of the Ukrainian people;

– The parliament has exclusive powers to amend the Constitution of Ukraine as an element of the constituent power;

– The Verkhovna Rada of Ukraine is the exclusive body which is authorized with constituent power and this unquestionably makes it impossible for other bodies of state power or their officials to take any action regarding the amendment of constitutional norms.

As we see, in its argumentation, the Verkhovna Rada of Ukraine focuses on the concept of constituent power. Thus, the special nature of the laws on amendments to the Constitution, their constituent nature, is focused on. Correspondingly, the Constitution provides for a special procedure for the adoption of such laws within

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[40] *Футей Б.* Зауваження до рішення Конституційного Суду України від 30 вересня 2010 року // Права Людини в Україні. 16.11.2010 [Bohdan Futey, *Remarks on the Decision of the Constitutional Court of Ukraine of 30 September 2010*, Human Rights in Ukraine, 16 November 2010] (Sep. 15, 2018), available at http://khpg.org/index.php?id=1289922329.

[41] Rechitsky 2010.

[42] Available at http://zakon5.rada.gov.ua/laws/show/742-18.

[43] Available at http://zakon3.rada.gov.ua/laws/show/750-18.

the framework of the procedure for amendment of the Constitution of Ukraine – such amendments only may be introduced by the Verkhovna Rada of Ukraine.

However, while acknowledging the concept of the constituent power, the exclusivity of the powers of the Verkhovna Rada of Ukraine to amend the Constitution of Ukraine seems to be controversial. First, Section XIII itself provides for the holding of an all-Ukrainian referendum on approval of amendments to Sections I, III, and XIII of the Constitution of Ukraine. Secondly, in paragraph 4 of the Decision of the CCU of 16 April 2008 in the case of the constitutional petitions of the President of Ukraine on the official interpretation of the provisions of parts 2 and 3 of Article 5, Article 69, part 2 of Article 72, Article 74, part 2 of Article 94, and part 1 of Article 156 of the Constitution of Ukraine (the case on the adoption of the Constitution and laws of Ukraine in a referendum), it was declared that

> *the form of exercise of the constituent power by the people* is an all-Ukrainian referendum proclaimed by popular initiative upon the demand of not less than three million Ukrainian citizens who have the right to vote, provided that the signatures for its appointment are collected in at least two thirds of the regions and that there are at least one hundred thousand signatures in each region.

That is why the Verkhovna Rada of Ukraine, in its argumentation, trying to defend the exclusivity of its powers and insisting on the lack of corresponding powers in the CCU, opened a Pandora's box. This is because the emphasis on the special constitutive nature of the Constitution and laws on the introduction of amendments to it as acts of the constituent power may lead to entirely different conclusions than those which were made by the Verkhovna Rada itself.

The position of B. Futea, which we cited above, is an example of another view. Vsevolod Rechitsky adds that

> In February 2014, the Verkhovna Rada considered the decision of the Court [Decision No. 20-rp/2010] as a challenge to the Rada itself, interpreting the change of the form of government as an amendment of the "constitutional system." Alas! The parliament did the same, i.e. amending the constitutional system without a referendum, in 2004.[44]

The question is: what the constitutional system is and how to understand it in the context of Article 5 of the Constitution of Ukraine. It is possible that the Verkhovna Rada of Ukraine may make such amendments to the Constitution of Ukraine, which will affect the constitutional system (even if it is not Sections I, III and XIII) without

[44] *Речицький В.В.* Аксіоми конституціоналізму і Основний Закон України [Vsevolod V. Rechitsky, *Axioms of Constitutionalism and Basic Law of Ukraine*] (Sep. 15, 2018), available at http://www.ji-magazine.lviv.ua/2016/Rechyckyj_Aksiomy_konstytucionalizmu.htm.

violating the procedures. Instead, such amendments are the exclusive prerogative of the people and the Verkhovna Rada has actually usurped the power. Such an interpretation of part 1 of Article 5 of the Constitution is not excluded and can be admitted. That is, the absolute acquisition of the constitutive power by default by the Verkhovna Rada of Ukraine is not legally consistent and we must not forget about the constituent power of the people in its direct form.

Evaluating the argument for amending the constitutional order, it is worth emphasizing the ambiguity of the very concept of a "constitutional system," the uncertainty of the procedure and the procedure for its amendment as a norm, and the absence of a corresponding universally accepted doctrinal model. If we consider that, in 2010, the CCU amended the constitutional order and that it was amended unlawfully, what does this mean? Does it mean that the form of government has changed as a result of a decision of the CCU or only that a procedural aspect has been touched upon, or does it mean an unauthorized intervention has been made by the CCU with regard the text of the Constitution unrelated to the content of such intervention, in other words, assignment of authorizations, violation of the principle "only what is expressly permitted and provided" and the principle of the division of powers (procedural aspect)? Did the CCU interfere with the authority of the people (according to this logic, a referendum should be held)? Does it only mean that the alteration of the text of the Constitution could only be carried out by the Verkhovna Rada as the authorized body following the procedure specified in Section XIII of the Constitution, and in no other way? Consequently, the argument itself about the unlawfulness of amendment of the constitutional system by the CCU raises so many questions, answers to which tend to be ambiguous.

A CCU judge, Vyacheslav Ovcharenko, having been dismissed from the CCU by Resolution of the Verkhovna Rada of Ukraine of 24 February 2014 No. 775-VII, appealed against his dismissal in the Higher Administrative Court, which declared the decision of the parliament unlawful (Resolution of 18 June 2014 No. 800/119/14). This decision was revised by the Supreme Court of Ukraine (Decision of 2 December 2014 No. 21-302a14[45]), which rejected the judge's claim and declared Regulation No. 775-VII to be lawful. The Supreme Court not only confirmed that the dismissal of the judge conformed to legislation, but also assessed the material grounds for such a dismissal, namely the adherence to the judge's oath. The Verkhovna Rada considered the fact that the judge voted for the corresponding Decision No. 20-rp/2010 to be a violation of his oath. The motivation of the Supreme Court was based on the following:

> The Constitution of Ukraine does not authorize the Constitutional Court of Ukraine to invalidate a constitutional norm, regardless of the legal form in which it was set out.

[45] Available at http://reyestr.court.gov.ua/Review/44321854.

> In accordance with paragraph 1 of part 1 of Article 85 of the Constitution of Ukraine, the Verkhovna Rada of Ukraine is authorized to amend the Constitution of Ukraine within the scope of, and under the procedure provided in, Section XIII of this Constitution.
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> By its Decision No. 20-rp/2010, the Constitutional Court of Ukraine... did not ensure the supremacy of the Constitution of Ukraine, amended it, violated the fundamental constitutional principle of democracy, amended the constitutional system of Ukraine, violated the constitutional principle of the distribution of the power and the legitimacy of existing state bodies, which resulted in their activities based on norms amended by the Constitutional Court of Ukraine, and not by the Verkhovna Rada of Ukraine as the duly authorized body.

The same judgment was taken with regard to the cases of judges Mikhail Kolos and Anatoly Golovin (Decision of the Supreme Court of Ukraine of 28 April 2015 No. 21-67a14[46] and Decision of the Supreme Court of Ukraine of 14 March 2018 No. P/800/120/14[47]). The Supreme Court has not announced the final judgment on the complaint of the judge Maria Markush yet (Decision of the Supreme Administrative Court of 26 June 2017 No. 800/162/14 was in her favor[48]). It is worth noting that judges Vyacheslav Ovcharenko and Mikhail Kolos filed lawsuits to the European Court of Human Rights, which transferred the same to the communication stage.[49]

It should be noted that the intervention of the Supreme Court in the position of the CCU, and evaluation of the decisions of the latter is unlikely to fall within the competence of the Supreme Court itself. Paradoxically since it interfered with the power of the CCU without having the right to appraise its decisions, the Supreme Court itself refers to the CCU exceeding its authority. The Supreme Court did not have the right to give such a judgment from the standpoint of correctness or incorrectness of the decisions of the CCU due to the fact that it (like all public authorities) is to act only on the basis, within the limits and in the manner provided by the Constitution and laws of Ukraine (Articles 6 and 19 of the Constitution of Ukraine). The powers of the Supreme Court do not contain the possibility to review and evaluate decisions of the CCU. Under the Constitution and the Law "On the Constitutional Court of Ukraine" its decisions are binding, final, and cannot be appealed. The Supreme Court can judge the legality of dismissal, but only on formal grounds. Here, the Supreme Court

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46 Available at http://reyestr.court.gov.ua/Review/44321854.

47 Available at http://reyestr.court.gov.ua/Review/73195164.

48 Available at http://reyestr.court.gov.ua/Review/67828732.

49 Applications Nos. 27276/15 and 33692/15 Vyacheslav Andriyovych Ovcharenko against Ukraine and Mykhaylo Ivanovych Kolos against Ukraine lodged on 20 May 2015 and 2 July 2015 respectively (Sep. 15, 2018), available at https://hudoc.echr.coe.int/eng#{"itemid":["001-161645"]}.

of Ukraine showed excessive activism which was not completely relevant (and likely unjustifiable). After all, it would have been possible to recognize the dismissal as legitimate and without getting into the substantive side of the decision of the CCU.

If the Supreme Court can call into question the legitimacy of any decision of the CCU, recognize the decision to be legal or illegal, why do we need any model for specialized constitutional control and the CCU as such? The question is rather rhetorical. As is rightly pointed out by Vsevolod Rechitsky:

> Not only investigators, prosecutors and judges of courts of general jurisdiction, but also the Ukrainian parliament, the Cabinet of Ministers, the President, local authorities and ordinary citizens of Ukraine can doubt (in the everyday sense of this word) the qualities of normative collegial decisions and conclusions of the Constitutional Court. All this, however, does not mean that they can ignore these decisions.[50]

It is worth noting that the Supreme Court of Ukraine affirmed the negative assessment of the Decision of the CCU of 30 September 2010 by the Verkhovna Rada of Ukraine. As for voting for other decisions (not related to the restoration of the text of the Constitution of Ukraine, in particular, No. 3-rp/2012 and No. 2-rp/2013), the Supreme Court of Ukraine had no claims against them. Judge Oleksandr Pasenyuk who was also dismissed by the Verkhovna Rada of Ukraine, but who did not take part in voting for the Decision of 30 September 2010 (Decree of the Supreme Court of Ukraine of 2 December 2014 No. 21-340a14[51]) was reinstated on protocolary grounds.

The fact of the matter is that one of the key problems of the dismissal of judges is a possible violation by the Verkhovna Rada of Ukraine of not just Ukrainian national legislation, but Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.

In its judgment of 9 January 2013 in the case of *Oleksandr Volkov v. Ukraine*,[52] the European Court of Human Rights (ECHR) criticized the procedure of bringing judges to disciplinary responsibility by the parliament at parliamentary committees and plenary sessions, noting that the plenary session was not a proper place for consideration of the facts and law, the assessment of evidence and the theory. The ECHR criticized the role of politicians in the parliament which were not required to

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50 *Речицький В.В.* Чи можна довіряти конституційним суддям? // Українська Гельсінська спілка з прав людини. 08.03.2017 [Vsevolod V. Rechitsky, *Can I Trust the Constitutional Judges?*, Ukrainian Helsinki Human Rights Union, 8 March 2017] (Sep. 15, 2018), available at https://helsinki.org.ua/chy-mozhna-doviryaty-konstytutsijnym-suddyam-v-rechytskyj/.

51 Available at http://reyestr.court.gov.ua/Review/42246614.

52 *Oleksandr Volkov v. Ukraine*, Judgment, No. 21722/11, 9 January 2013 (Sep. 15, 2018), available at https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-115871%22]}.

have any legal or judicial experience to establish complex issues of fact and law in this case.

It is noteworthy that the Supreme Court tried to dismiss the applicability of this position of the ECHR with regard to the dismissal of judge Anatoly Golovin, emphasizing the political nature of the formation of a constitutional jurisdiction body and corresponding summary dismissal judgment of such judges.

In this case, however, it is not entirely clear why the summary dismissal procedure was not kept in accordance with the Ukrainian constitutional reform of justice in 2016. On the contrary, political subjects were deprived of the right to dismiss judges of the CCU before the scheduled date and this right was transferred to the CCU itself. In any case, all these arguments will be evaluated in the cases of the judges who appealed to the ECHR.

If, however, one were to ignore the argument about the amendment of the constitutional system and to try to appraise the constitutionality of the Law of 21 February 2014 without being bound by the reasons and arguments for such a restoration, as well as the position of the Supreme Court, then, from the formal point of view, it can be assumed that this Law was unduly adopted by the Verkhovna Rada of Ukraine, or rather, in the absence of the appropriate legal procedure. "The restoration of certain provisions of the Constitution" is not provided for in the procedures related to the amendments of the Constitution of Ukraine, which are set out in Section XIII of the Constitution of Ukraine, or in other legislative procedures. The Constitution of Ukraine does not provide for any amendments to the Constitution of Ukraine in the form of restoration of certain provisions of the Constitution, which were amended or declared as unconstitutional, or the corresponding powers in the Verkhovna Rada. In legal science, the existence of such a phenomenon as the restoration of the text of the constitution by the parliament is almost unknown, and there have not been any relevant theoretical developments in this regard.

According to Viktor Kolisnyk, the process of restoration of the Constitution of Ukraine which took place in February 2014, was dubious (as it did not comply with the procedure for making constitutional amendments provided for in Section XIII of the Constitution of Ukraine). The Basic Law of Ukraine does not provide the parliament with such powers, even by way of a one-off vote. The attempt to restore the constitutional system in a non-constitutional way, that is, in violation of the procedure for making constitutional amendments and going beyond parliamentary powers, cannot be justified or substantiated (including by "political" expediency, hard times, and reference to "good" or "noble" intentions).[53] As Serhii Riznyk states, the formal requirement, i.e. the necessity to follow the procedure for amending the

[53] *Колісник В.* Відновлення дії Конституції України та зміна форми правління як засіб поновлення конституційного ладу // Вісник Конституційного Суду України. 2015. No. 4. С. 104–105 [Viktor Kolisnyk, *Restoration of the Constitution of Ukraine and Change of the Form of Government as a Means of Restoration of Constitutional Order*, 4 Bulletin of the Constitutional Court of Ukraine 103, 104–105 (2015)].

Constitution of Ukraine, was substantially flouted when restoring the constitutional reform of 2004 because of the revolution in 2014.[54] This inclines us to recognize the primary constitutive power (according to Jean-Paul Jacqué) or the sovereign dictatorship (according to Carl Schmitt) in 2014.

Consequently, on the one hand, there are formal arguments in favor of the provision of non-compliance with the Law of 21 February 2014 and the Resolution of 22 February 2014 of the Constitution of Ukraine for procedural reasons. On the other hand, these acts are considered a manifestation of the constituent power of the people and are acknowledged as legitimate.

If we follow the formal approach, then, in the case of bringing the matter before the CCU, it would be logical to hold unconstitutional the revival of the text of the constitution by the parliament in 2014 and its revival (the new abolition of the 2004 reform) under the CCU decision. At the same time, this raises the same issues that arose in connection with Decision No. 20-rp/2010 that have already been cited in this article. The CCU will have to appraise the consequences of non-compliance with the legal procedure if it determines such legal procedure was violated when the text of the Constitution of Ukraine was restored by the Verkhovna Rada of Ukraine in 2014 and, as a result, to revive the effect of its1996 wording in a rather ambiguous way. This would logically follow from Decision No. 20-rp/2010.

Another solution is the acknowledgement of the legitimacy and constitutionality of the transformations in February 2014. Under this approach, the withdrawal of the CCU (by way of referring to the doctrine of the political issue) and refusal to start the proceedings in case of a relevant submission to it is also possible. However, the second approach can still be considered rather conditional. This is because the acknowledgement of the constitutionality of the transformations in 2014 or the corresponding withdrawal of the CCU unfortunately will not be able to completely sever the Gordian Knot of constitutional problems that currently exists.

Conclusion

In summarizing the research on constituent power in Ukraine, we can make a series of strategic conclusions.

Firstly, the very doctrine of constituent power in Ukraine should be based on the corresponding concepts, which are due to the emergence of constitutionalism in the world as such and revolutionary events, especially in France in the eighteenth century. We believe that the Ukrainian concept of constituent power should be based on the fundamental developments by Carl Schmitt, Jean-Paul Jacqué, Andrew

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[54] *Різник С.* Про нез'ясоване питання конституційності актів парламенту, прийнятих в умовах Революції Гідності // Вісник Конституційного Суду України. 2015. No. 6. С. 58–66 [Serhii Riznyk, *On the Issue of the Constitutionality of the Parliament Acts, Adopted Under the Revolution of Dignity Conditions*, 6 Bulletin of the Constitutional Court of Ukraine 58 (2015)].

Arato, András Sajó and other scholars and should be associated with the process of adopting the Constitution and making amendments to it. At the same time, the constituent government is simultaneously a scientific concept that explains and in some way legitimates corresponding public events. It is a question of division of the primary and institutional constituent power of the people. The primary constituent power is conceptually close to the sovereign dictatorship (according to Carl Schmitt). A broad understanding of constituent power and its mixtion with popular sovereignty appears to be insufficiently substantiated; but it should be referred exclusively to the adoption of the constitution and amendments to it.

Secondly, in practice, the doctrine of constituent power strongly influences the modern constitutional paradigm of Ukraine. It can be clearly stated that the legal doctrine in science, as well as the doctrine developed by the CCU, perceives the concept of constituent power. At the same time, there is a question regarding the actual implementation of the concept of constituent power in Ukraine, as opposed to its formal existence. It is a question of the nature of the Constitution itself as an act of constituent power, but it is still unclear what constituent power the Verkhovna Rada of Ukraine implemented – primary or institutional – and it adopted the Constitution. Similarly, the mechanisms of implementation of constituent power themselves in the Constitution of 1996 remain imperfect. We mean the relation between Article 5 of the Constitution and its Section XIII. There is absolutely no mechanism to implement the constituent power in the part of the adoption of the new Constitution. As for the introduction of amendments, there are some questions about the role of the people in this mechanism, as well as its improvement as a whole.

Thirdly, the practice of amending the Constitution of Ukraine has shown inconsistency in the interpretation of the primary and institutional constituent power. Here the constitutional reform of 2004, the interference with this reform by the CCU in 2010 and its return by the parliament in 2014 is meant. In 2004, critics noticed, in particular, the usurpation of the constituent power by parliament, by the CCU in 2010 and by parliament again in 2014. All three times it happened contrary to the procedures established for the implementation of the institutional constituent power. As you can see, in order to avoid such cases in the future, further doctrinal studies of constituent power are extremely necessary.

Fourthly, a new constitutional reform, conducted in compliance with the existing procedure, would be an acceptable solution in Ukraine; it would provide a clean slate and eliminate the trail of events of 2004, 2010 and 2014 from the text of the constitution. In the future, establishing the means of institutional constituent power implementation in the text of the reformed Constitution, namely, clear mechanisms for amending the Constitution of Ukraine and the adoption of a new Constitution, which would necessarily include procedures for popular legitimacy, would also be an important process.

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