SECTION 2

CONSTITUTIONALISM AS MODERN SCIENCE

UDC 347.91/.95:342.56
DOI https://doi.org/10.24144/2663-5399.2021.1.05

ISSUES OF IMPLEMENTATION OF EQUALITY OF ARMS PRINCIPLE IN CASE OF DECLARING THE APPLIED LAW UNCONSTITUTIONAL

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Summary

The Article considers the issue of ensuring the constitutional principle of equality of litigants before the law and the court during review of the judgement in view of the exceptional circumstances after consideration of the case by the Constitutional Court. Based on the study of legal nature of such consequences of nullity of the law as *pro futuro, ex nunc, ex tunc,* the risks of violation of the constitutional right of a person to judicial protection shall be established. The *aim* of the Article is to detect the objective demonstration of the constitutional principle of equality of litigants before the law and the court. The *methods of the study*: system, dialectical, integrative, interdisciplinary and scientific methods applied to detect the interrelation between the constitutional principle of equality of arms and its practical demonstration in litigation process. The *main results of the study*. Two components affecting the efficiency of protection of such right have been established: future ef-

fect of the judgement of the Constitutional Court of Ukraine and impossibility to consider the application in view of exceptional circumstances if before appeal to the Constitutional Court of Ukraine a person's claim was dismissed in full under the applicable laws and was further declared unconstitutional by the Constitutional Court. The erroneous legal position of the supreme court in the system of the judiciary of Ukraine was proved in terms of the impossibility of initiating proceeding in exceptional circumstances after delivery of the judgement of the Constitutional Court of Ukraine due to the fact that the person's claim had previously been dismissed and such a judgement does not provide for its enforcement. This conclusion deprives a person of the right to a final trial at the national level in accordance with the procedure of applying to the court (Articles 8, 24, 55, paragraph 1 Part 2 of Article 129 of the Constitution of Ukraine). It is proposed to develop a special law establishing the grounds and procedure for compensation by the state of moral and financial damages caused by the law recognized as the unconstitutional one.

Key words: judicial proceedings, legal dispute, equality of arms, unconstitutionality of the law, exceptional circumstances.

1. Introduction

In our days every democratic state has an active demand of society to ensure effective protection of violated, unrecognized or disputed rights, freedoms or interests of individuals, rights and interests of legal entities, interests of the state (Bumcnan, 1987).

For example, due to the 2016 constitutional changes related to the justice (section III of the Constitution) in Ukraine, the novelties happened in the section which enshrines the fundamental rights, freedoms and responsibilities of a man and citizen (section III of the Fundamental Law). Namely: the right of everyone to file a constitutional complaint with the Constitutional Court of Ukraine (hereinafter referred to as the "CCU") on the grounds established by the Constitution of Ukraine and in the manner prescribed thereby (Part 4 of Article 55). In its turn, Article 151-1 of the Constitution of Ukraine stipulates that the CCU shall resolve the issue on compliance of the Constitution of Ukraine (constitutionality) with the law of Ukraine upon the constitutional complaint of a person who considers *that the law of Ukraine applied in the final court judgment in his/her case contradicts the Constitution of Ukraine*. A constitutional complaint may be filed if all other domestic remedies have been exhausted. At the same time, Article 129 of the Fundamental Law of Ukraine (Section VIII) establishes that a judge administering justice is independent and guided by the rule of law, as well as enshrines a number of constitutional principles of court proceeding.

For the purposes of this article, the scientific interest is the constitutional principle of judicial proceeding – the equality of all litigants before the law and the court (cl. 1, Part 2 of Article 129 of the Constitution of Ukraine). This principle is important for revealing the issue of ensuring the effectiveness of judicial protection of a person at the national level in whose favour the judgment of the CCU was made, in case of his/her further application to the court in connection with the review of the court judgement in view of exceptional circumstances.

It comes to two key components of the effectiveness of protection of such a right: 1) whether the judgment of the CCU shall be applied *ex tunc* (retroactive effect) to the moment when the law applicable to the case has begun to violate the fundamental rights of a person; 2) and the issue of protection of a plaintiff's rights, if he/she applied to the CCU after the supreme court (or a court of appeal that makes the final judgment in the case) dismissed the claim. The second component requires additional clarifications regarding Ukraine, as the procedural codes of our state enshrine the rule that one of the grounds for review of court judgments in view of exceptional circumstances is the "established by the CCU unconstitutionality (constitutionality) of a law, another legal act or their separate provisions applied (not applied) by the court while considering the case, *if the court judgment has not yet been enforced*" (cl. 1 of Part 4 of Article 361 of the Code of Administrative Judicial Procedure of Ukraine; cl. 1 of Part 3 of Article 423 of the Civil

Procedure Code of Ukraine; cl. 1 of Part 3 of Article 320 of the Commercial Procedure Code of Ukraine). However, if the claim is dismissed, the court judgement is not enforceable in principle.

2. Constitutional Principle of Equality of Arms

Equality of all not only before the law (Article 24 of the Constitution of Ukraine) as a constitutional principle but also equality of all as litigants (a derivative manifestation of the comprehensive principle of equality) have been repeatedly considered by the CCU. Since within the framework of this article we consider the practical manifestation of the constitutional principle of equality of litigants before the law and the court, we shall focus on the official constitutional doctrine regarding the stated issue.

In particular, while considering cases the CCU repeatedly concluded that "equality and inadmissibility of discrimination against a person are not only constitutional principles of the national legal system of Ukraine but also fundamental values of the world community, as emphasized in international legal acts on rights and freedoms of a man and citizen, in particular in the International Covenant on Civil and Political Rights of 1966 (Articles 14, 26), the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (Articles 14), Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (Article 1) and the Universal Declaration of Human Rights of 1948 (Articles 1, 2, 7). The equality of all people in their rights and freedoms guaranteed by the Constitution of Ukraine means the need to provide them with equal legal opportunities of both material and procedural nature for realization of the rights and freedoms being the same in context and scope. In a state governed by the rule of law, applying to a court is a universal mechanism for protecting the rights, freedoms and legitimate interests of individuals and legal entities. The main principles of court proceeding are, in particular, legality, equality of all litigants before the law and the court, adversarial parties and freedom to provide a court with evidence and to prove their strength (cl. 1, 2, 4 of Part 3 of Article 129 of the Fundamental Law of Ukraine). Nobody may be restricted in the right of access to justice which includes the ability of a person to initiate court proceeding and participate directly in the proceedings or be deprived of such a right (pp. 4–7 of cl. 2.2 of the substantiate part of Judgment of the Constitutional Court dated 12 April 2012 No. 9- рп/2012 (Judgment No. 9-рп/2012, 2012).

In another judgement, the CCU emphasized that "the principle of equality of all litigants before the law and the court provides guarantees of access to justice and the exercise of the right to judicial protection enshrined in Part 1 of Article 55 of the Constitution of Ukraine. This principle arose from the general principle of equality of citizens before the law as defined by Part 1 of Article 24 of the Fundamental Law of Ukraine and concerns, in particular, the field of court proceeding. Equality of all litigants before the law and the court provides for a single legal regime that ensures the exercise of their procedural rights. Justice in commercial courts is administered on the principles of equality of all litigants before the law and the court; court proceeding in commercial courts is conducted on the adversarial principles according to which the commercial court must create equal conditions and opportunities for the parties and other persons involved in the case to exercise their rights (Judgment No. 11- рп/2012, 2012). These citations are the most complete illustration of the CCU's vision of the importance of the studied principle of court proceeding.

We state that this constitutional principle has continued its legislative enshrinement in all the procedural codes of Ukraine since the adoption of the Constitution of Ukraine (since 1996): cl. 7.2 of Article 2 of the Code of Administrative Judicial Procedure of Ukraine, Article 7 of the Commercial Procedure Code of Ukraine, Article 6 of the Civil Procedure Code of Ukraine.

At the same time, a modern novelty of the procedural codes became the review of judgements on the basis of exceptional circumstances after the CCU checked the compliance of the legislative rule with the Fundamental Law of Ukraine. We remind that a constitutional complaint is currently the most common claim filing with the CCU, and therefore it is not just legislative but a deeply doctrinal issue of effectively ensuring the constitutional principle of equality before the law and court that appeared for the first time in Ukraine, and it has currently declar-

ative nature in special cases which we shall review below.

3. Void and Null Law: (*pro futuro*), (*ex nunc*) or (*ex tunc*)

Social relations always need to be arranged, in spite of their development and simultaneously constant changeability (Kolomiitcev, 2020). Such arrangement requires lawful conduct of litigants based on the law and constitutional legitimacy. The constitutional order is the core of the system of justice (Wet, 2006) and is a result of realization of constitutional legitimacy. In general, it comes to realization by all legal persons of the right under the rules of the Constitution, fulfilment by them of actions upon its grounds and for its implementation (Basiev, 2007; Narutto, 2018). As noted by Yu. V. Tkachenko, the stability of legislation and practice of its application has its expression in the steadiness of legal regulation of essentially important social relations, in the absence of fluctuation in the practice of considering and making decisions by authorised bodies in legal cases. The stability reveals itself as the steadiness of the current legislation, absence of sharp fluctuations in law-making policy, unchangeability that provides for the unity in understanding and applying legal rules (Tkachenko, 2010; Kolomiitcev, 2020).

We state that for properly implementing laws there are presumption of the Constitutional Law as one of significant components of presumption of the truth of law. Traditionally, the truth of legal act means true reflection by the act of real conditions, relations which require legal effect and correct legal assessment of such assessments. The presumption of the truth of a legal act includes presumption of constitutionality, presumption of legitimacy and validity of statute (a kind of synonymic categories), as well as presumption of legitimacy and good faith of the activity of participants of legal relations (Babaev, 1974).

All these elements are in organic interconnection between each other and, of course, shown themselves in industry-specific legislation. The presumption of constitutionality of a legal act (first, law) indirectly arises from the provisions of the Constitution and shown itself in substantive and legal procedural aspects. The specificity of the constitutional substance is that only the body of the constitutional jurisdiction is the main means of both establishment and rebutment of the presumption of the constitutionality of the law. This is the Constitutional Court that is authorised to declare unconstitutionality of a legal act, and law is deemed constitutional until other is enshrined in a judgement of the Constitutional Court (Berestova and other, 2020).

In light of it, protection of the rights and freedoms of a man and citizen requires special form if a person in judicial proceeding for protection of the right emphasized that law applied in the case contradicted the Constitution. At the same time, the courts of different instances systematically applied it, in particular with mark that a court did not have any doubts about contradiction of that law to the Constitution until the Constitutional Court indicated the opposite in its decision. We'd like to axiomatically remind the thesis that the very court judgement but not arguments of Parties is the legal fact which impact on rights and obligations of a man and citizen in a certain disputable situation.

Recognition of the separate provisions or the whole law unconstitutional creates a number of legal consequences in addition to the fact of disqualification of a rule. And this again brings us back to the question: how to restore a violated right of a person who noted since the time of proceedings in the first court instance that the content of the law is constitutionally defective. In such a case, it should investigate the issue of regular or exceptional possibility of application of a judgement of the Constitutional Court of Ukraine back in time – until the moment of the beginning of violating such a right.

"For example, if the Federal Constitutional Court of Germany established unconstitutionality of a certain law, thus, it recognizes such a law void and null (see sentence 1 of § 78 of Law on Federal Constitutional Court of Germany)", Dr Lars Brocker, the president of the Federal Constitutional Court of Germany, notes (Digest of Articles, 2020). "Void and null legal rule" means "general invalidity of a legal rule" from the outset (*ex tunc*). Therefore, law is usually unconstitutional from the moment of its promulgation. However, the Federal Constitutional Court is powered to define invalidity of law with its effect in the future (*pro futuro*) or since the moment of promul-

gation of its invalidity (*ex nunc*). As a rule, things are done in such a way so that "worse unconstitutional condition" will not occur in case of validity of a judgement *ex tunc* or in the event that due to it other persons can be deprived of legal position that is worthy of protection (for example, in the sphere of rendering social services). Under such an approach, a law-maker also get the possibility independently (of course, in the nearest future) and in compliance with determinations in the relevant judgement of the Federal Constitutional Court to adjust improprieties of the Constitution by adopting a new law. In other words, if recognition of law void and null is *pro futuro* або *ex nunc*, the relevant judgement of the Federal Constitutional Court will not contradict a judgement of competent judges who were governed the relevant law and judgements of whom already came into effort and force (Digest of articles, 2020).

In spite of the fact that Ukraine predominantly copied the model of German constitutional claim (it is only normative in Ukraine), the Constitution of Ukraine strictly stipulates that "laws, other acts or their separate provisions declared unconstitutional shall cease to be valid from the date of the CCU's judgement on their unconstitutionality, unless otherwise established by the judgement itself, but not earlier than the date of its taking" (part 2 of Article 152 of the Constitution of Ukraine) (Constitution, 1996). This is the substantive legal component of the presumption of the constitutionality of a normative act in Ukraine: *ex nunc*, as a rule, (unless the CCU has postponed the loss of validity of the law) and *pro futuro*.

In this context, we cite the opinion of M.V. Savchin who points to the existence of another situation with the legal force of the judgements of the Constitutional Court to consider constitutional complaints inter partes what is related to the restoration of the violated right. There is ongoing legal relations since the moment of violation of human rights, due to which the court has an obligation to restore the violated subjective public right. In this situation, the force of the *ex tunc* decision imposes on the state a positive obligation to restore the subjective public right from the moment of its violation with the payment of fair compensation. If to say about something else in this case, it will be a denial of the essential content of the right – the idea of a constitutional complaint as a means of protecting violated constitutional rights loses its significance. However, the main obstacle here is the wording of Article 152.2 of the Constitution (Digest of articles, 2020).

Thus, the presumption of the constitutionality of the law, the effect of the judgements of the CCU *ex nunc* and *pro futuro* under Part 2 of Article 152 of the Constitution of Ukraine is evidence that persons whose rights were violated by application of the law in the final court judgement, which was later declared unconstitutional, cannot expect fair satisfaction due to the application of the CCU's judgement to them, because their right was violated before the CCU judgement. In this regard, the Supreme Court has already formed a legal position:

"analysis of the rules of Section XII of the Constitution of Ukraine ("the Constitutional Court of Ukraine") and the Law of Ukraine dated 13 July 2017 No. 2136-VIII "On the Constitutional Court of Ukraine" gives grounds to conclude that the CCU's judgement has direct (prospective) effect in time and applies to those legal relations that continue or arose after its taking. If the legal relations are long-lasting and arose before the CCU's judgement but continues to exist after its taking so they are subject to such a judgement of the CCU. That is, the CCU judgement applies to legal relations that arose after its taking, as well as to legal relations that arose before its taking but continue to exist (continue) after that. At the same time, the current legislation stipulates that the Constitutional Court of Ukraine may establish the procedure and terms of execution of the taken judgement directly in the text of its judgement. The established unconstitutionality (constitutionality) by the CCU of the law, other legal act or their separate provision applied (not applied) by a court in resolving a case is important, first of all, as a general decision which determines the legal position for resolving subsequent cases, and not as grounds for reconsideration of the case with retrospective application of the new legal position and thus change in the state of legal certainty already established by the final court judgement (p. 9.9 of the Commercial Court of Cassation within the Supreme Court dated 29 October 2019 in case No. 922/1391/18) (Judgment No. 4819/49/19, 2020)

Concluding the above, the Supreme Court observes Part 2 of Article 152 of the Fundamental Law of Ukraine, however, avoids the issue of providing the constitutional guarantee of judicial protection of constitutional rights and freedoms of a man and citizen directly on the ground of the Constitution of Ukraine (Part 3 of Article 8) which is enshrined in the legal rule of the power of the rule of law what belongs to general principals. Since the persons who have justified the violation of their right by applying to them a constitutionally defective law and what was subsequently established by the CCU remain without any protection of the law. And also, in general, the significance of the constitutional complaint as a new legal instrument of protection of the constitutional right of the person is reduced.

4. Review based on Exceptional Circumstances in Case of Claim Dismissal

The clause *"if the court judgement has not yet been executed"* in cl. 1 of Part 4 of Article 361 of the Code of Administrative Judicial Procedure of Ukraine; cl. 1 of Part 3 of Article 423 of the Civil Procedure Code Ukraine; cl. 1 of Part 3 of Article 320 of the

Commercial Procedure Code of Ukraine is inherited from the previous Ukrainian procedural legislation if this condition was first enshrined and the unconstitutionality of the law established by the CCU was considered a newly discovered circumstance: cl. 5 of Part 2 of Article 245 of the Code of Administrative Judicial Procedure of Ukraine; cl. 5 of Part 2 of Article 112 of the Commercial Procedure Code of Ukraine; cl. 4 of Part 2 of Article 361 of the Civil Procedure Code of Ukraine; cl. 4 of Part 2 of Article 459 of the Criminal Procedure Code of Ukraine (procedural codes as amended until 2017).

The issue of admissibility of an application based on exceptional circumstances if the decision was not enforceable is related to legislative regulation. Therefore, it necessarily arises in the process of judicial interpretation else at the stage of initiating proceedings on exceptional grounds and now belongs to the functions of the Supreme Court but not to the CCU. Thus, the issue of accepting an application for consideration on exceptional grounds in a case concerning a decision that was not enforceable was first identified in the Supreme Court as an exceptional legal problem (Court order No. 808/1628/18, 2020; Court order No. 808/1628/18, 2020). The Supreme Court finally formulated a legal opinion which in fact established discrimination against the person and on the grounds of lack of enforcement of the decision.

"The Panel uf Judges notes that the provisions of clause 1 of Part 5 of Article 361 of the Code of Administrative Judicial Procedure of Ukraine contain an imperative provision that the unconstitutionality (constitutionality), established by the Constitutional Court of Ukraine, of a law, other legal act or their separate provision applied (not applied) by the court in resolving cases may be the ground for review of the decision on the basis of exceptional circumstances ***only if such a court judgement has not yet been executed****.*

It should be noted that the phrase "not yet fulfilled" which is used in clause 1 of Part 5 of Article 361 of the Code of Administrative Judicial Procedure of Ukraine does not provide for its multiple interpretation or multiple understanding, as well as "extended interpretation"... The said procedural rule has imperative nature, is clear and cannot be applied otherwise than provided by procedural law.

...

According to Part 2 of Article 152 of the Constitution of Ukraine, laws, other acts or their separate provisions that are declared unconstitutional shall cease to be valid from the date of the Constitutional Court's judgement on their unconstitutionality, unless otherwise established by the judgement itself, but not earlier than the date of its taking. Similar provisions are contained in Article 91 of the Law of Ukraine "On the Constitutional Court of Ukraine" dated 13 July 2017 No. 2136-VIII.

According to the operative part of the Judgment of the Constitutional Court of Ukraine No. 1-p(II)/2019 dated 25 April 2019 in the case No. 3-14/2019 (402/19, 1737/19), the phrase "valid term"... contained in provisions of Part 3 of Article 59 of the Law of Ukraine "On the Status and Social Protection of Citizens Affected by the Chornobyl Accident" dated 28 February 1991 No. 796-XII declared unconstitutional and expired on 25 April 2019, as established by Article 91 of the Law

of Ukraine "On Constitutional Court of Ukraine", i.e. from the date of taking the Judgement by the Constitutional Court of Ukraine in the case No. 3-14/2019 (402/19, 1737/19) which is also directly established by this judgement.

The existence of the Judgement of the Constitutional Court of Ukraine No. 1- p(II)/2019 dated 25 April 2019 in the case No. 3-14/2019 (402/19, 1737/19) does not change the legal regulation of the disputed legal relationship and does not prove the fact that the court made the mistake in resolving the dispute, besides the provisions of this rule were in force and subject to application at the time of occurring the disputed legal relations and taking the decision by the court of first instance.

Taking into account the above provisions of the current legislation, as well as the dismissal of the claim by the decision of the Zaporizhzhia District Administrative Court dated 6 July 2018 (upheld by the Order of the Third Administrative Court of Appeal dated 7 November 2018) in the case No. 808/1628/18, concerning the review of which based on exceptional circumstances with the corresponding application of PERSON_1, the panel of judges notes that the court judgement that came into force and by which the claim was dismissed cannot be considered unfulfilled according to the provisions of paragraph 1 of Part 5 of Article 361 of the Code of Administrative Judicial Procedure of Ukraine, ***because such a decision does not provide for its enforcement****"*(- Judgment No. 808/1628/18, 2021).

We declare that by such an interpretation of the phrase "if the decision has not yet been executed", in fact the Supreme Court deprived a person of the right to review the judgment on exceptional grounds and, as a result, deprived of the right to a final trial at the national level as the party to the litigation. We believe that the clause in cl. 1 of Part 4 of Article 361 of the Code of Administrative Judicial Procedure of Ukraine (similarly as in other procedural codes) that the decision is subject to review based on exceptional circumstances which *"has not yet been executed",* concerns not decisions on dismissal of the claim, *but those decisions that were enforceable and gave grounds for issuing writ of execution, the opening of enforcement proceedings, but the enforcement of the decision was not carried out for one or another reason.*

Another interpretation *narrows* the content of cl. 1 of Part 4 of Article 361 of the Code of Administrative Judicial Procedure of Ukraine (and similar provisions of any other procedural code) and, as a consequence, – the content of *the constitutional right* of a person to review

a court judgement on the grounds of the unconstitutionality of the law applied in the final court judgement taken in the case of that person whose claim was rejected. This legal conclusion of the Supreme Court violates the constitutional principle of judicial proceedings – the equality of all litigants before the law and the court (cl. 1 of Part 2 of Article 129 of the Constitution of Ukraine).

Refusal to review a court judgement based on exceptional circumstances on the grounds that the Order of the Supreme Court in the case was not enforceable due to dismissal of a person`s claim – puts this person in a different (discriminatory) condition compared to a defendant (if he/she lost case but the decision was not executed) what violates the specified *constitutional* principle of court proceedings (cl. 2 of Part 2 of Article 129), will contradict Article 55 of the Fundamental Law of Ukraine which enshrines *the constitutional right of everyone to judicial protection,* as well as the general *constitutional right of equality of all before the law* (part 1 of Article 24 of the Constitution of Ukraine). In addition, the refusal of review directly violates *the binding nature* of the CCU's decision: *"Decisions and conclusions made by the Constitutional Court of Ukraine are binding, final and cannot be appealed"* (Article 151-2 of the Constitution of Ukraine). It is in connection with the dismissal of a claim of a person, the constitutional right to judicial protection at the national level are usually exercised *in full* through applying to the Constitutional Court of Ukraine (part 4 of Article 55, Article 151 of the Constitution of Ukraine).

And if the CCU concludes that the law is unconstitutional, it enshrines it in the operative part of its judgement, thus the CCU promotes protection of the applicants' rights at the national level. The practical realization of such a constitutional right to judicial protection at the national level is in the only possible actions of the complainant with a constitutional complaint (former plaintiff) – in his/her further going to the Supreme Court based on exceptional circum-

stances within the term defined by the Code of Administrative Judicial of Ukraine. Filing such an application is a conscientious exercise of the rights and obligations of a litigant and the active exercise of the right to a fair trial as guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "Convention").

This arises from the fact that the decision in such cases was not enforceable after its review by the Court of Cassation, and therefore contradictions to the constitutional rule concerning the binding nature of the court judgement to be enforceable stipulated by part 1 of Article 129-1 of the Fundamental Law of Ukraine *does not appeared*.

Moreover, the actions of these persons do not create grounds for violation of the constitutional order, for example, suspension of a court judgement during its execution, etc. Another interpretation of cl. 1 of Part 4 of Article 361 of the Code of Administrative Judicial of Ukraine (as well as similar provisions in other procedural codes) violates the constitutional right of a person to judicial protection, which remains illusory, despite the binding nature of the decision of the Constitutional Court of Ukraine, and contradicts Articles 6 and 13 of the Convention.

As prospects not for restoration, but for compensation for the violated constitutional right of a person, we can see development and adoption of a special law for the legislative development of the constitutional provision of Part 3 of Article 152 of the Constitution of Ukraine. According to this rule, "material or moral damage caused to individuals or legal entities by acts and actions declared unconstitutional shall be reimbursed by the state in accordance with the procedure established by law" (Constitution, 1996). This rule is unchanged and is effective from the date of entry into force of the Constitution of Ukraine – since 28 June 1996. However, unfortunately, all this time it does not work in practice, because after almost 14 years the state of Ukraine has not been able to pass a special law that would establish a procedure for compensation, in particular to plaintiffs in the cases illustrated above, for material and moral damages caused by the rules of laws that are declared unconstitutional. We declare the importance of a special law in this direction, because the compensation will be at the expense of the state. Therefore, it is necessary to keep in mind the allocation of such funds to the State budget for the relevant calendar year, the order of undisputed write-off of funds for individuals and entities, the possibility of other options for fair satisfaction, etc.

5. Conclusion

Analysing the criteria and ways to protect the subjective rights and freedoms of a man and citizen which are actively requested by civil society, we have proved that the constitutional principle of equality of litigants before the law and the court is the key one. The implementation of this principle ensures effective judicial protection of everyone at the national level, in particular for a person in whose favour (or who is in an identical legal relations) the judgement of the Constitutional Court has been taken, if he/she further applies to the court in connection with the review of the court judgement on the grounds of exceptional circumstances. We have revealed two components affecting the effectiveness of the protection of this right: 1) the prospects or retroactivity of the effect of the CCU's judgement; 2) the possibility of considering the application based on exceptional circumstances if, before applying to the CCU, the person's claim was dismissed in full under the applicable law which was subsequently declared unconstitutional by the CCU.

We have demonstrated that the equality of all as litigants (a derivative manifestation of the comprehensive principle of equality) has been repeatedly considered by the CCU. Its legal position notes that no one has to be restricted in the right of access to justice which includes the ability of a person to initiate legal proceedings and participate directly in legal proceedings, or *deprived of such a right*. This constitutional principle has continued its legislative enshrinement in all procedural codes of Ukraine since the adoption of the Constitution of Ukraine (1996): cl. 7.2 of Article 2 of t the Code of Administrative Judicial of Ukraine, Article 7 of the Commercial Procedure Code of Ukraine, Article 6 of the Code of Civil Procedure of Ukraine, as well as in the legal opinions of the Supreme Court.

The legal conclusion of the Supreme Court, according to which a court judgement cannot

be deemed an unexercised court judgement that came into force and by which the claim is dismissed because such a decision does not provide for its enforcement, and therefore the commencement of proceedings on the basis of exceptional circumstances is impossible, cannot be considered unenforced, in fact deprives a person of the right to a final trial at the national level as a litigant.

This legal conclusion of the Supreme Court violates the constitutional principle of judicial proceedings – the equality of all litigants before the law and the court. We have proved that the clause *"if the decision has not yet been exercised"* concerns not decisions on dismissing the claim, but those decisions that were enforceable and gave grounds for issuing a writ of execution, commencement of enforcement proceedings but the decision has not been executed for one or another reason. Another interpretation narrows the content of a person's constitutional right to review a court judgement on the basis of unconstitutionality of the law applied in the final judgment in that person's case if the claim was dismissed.

Refusal to review the court judgement based on exceptional circumstances on the grounds that the judgement of the Supreme Court in the case was not enforceable in connection with dismissal of a person`s claim – puts this person in a different (discriminatory) condition compared to a defendant (if the latter lost case but the decision did not be executed) what violates the specified *constitutional* principle of court proceeding (cl. 2 of Part 2 of Article 129). This contradicts Article 55 of the Fundamental Law of Ukraine which enshrines *the constitutional right of everyone to judicial protection*, as well as the general constitutional *right of equality of all before the law* (Part 1 of Article 24 of the Constitution of Ukraine). Cumulatively, this also *contradicts Articles 6 and 13 of the Convention*.

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ПРОБЛЕМИ РЕАЛІЗАЦІЇ ПРИНЦИПУ РІВНОСТІ СТОРІН СУДОВОГО СПОРУ У РАЗІ ВИЗНАННЯ ЗАСТОСОВАНОГО ЗАКОНУ НЕКОНСТИТУЦІЙНИМ

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Анотація

У статті розглядається проблема забезпечення конституційної засади рівності сторін перед законом і судом під час перегляду судового рішення за виключними обставинами після розгляду справи Конституційним Судом. На підставі дослідження правової природи застосування наслідків нікчемності закону: (pro futuro), (ex nunc), (ex tunc), встановлюються ризики порушення конституційного права особи на судовий захист. Метою статті є розкриття об'єктивного прояву конституційної засади рівності сторін судового спору перед законом і судом. Методи дослідження: системний метод, діалектичний, інтегративний, міжгалузевий методи нау-

ковий методи використані для розкриття взаємозв'язку між конституційною засадою рівності сторін судової справи та її практичним проявом у судовому процесі. Основні результати дослідження. Розкрито два компоненти, що впливають на ефективність захисту такого права: перспективність дії рішення Конституційного Суду України та неможливість розгляду заяви за виключними обставинами у разі, якщо особі до звернення до Конституційного Суду України у позові було відмовлено у позовному обсязі застосованим законом, який у подальшому Конституційного Суду України визнав неконституційним. Доведено помилковість правової позиції найвищого суду в системі судоустрою України в частині неможливості відкриття провадження за виключними обставинами після рішення Конституційного Суду України у зв'язку з тим, що особі до цього було відмовлено в задоволенні у позові, а таке рішення не передбачає примусового його виконання. Констатовано позбавлення цим висновком права особи на остаточний судовий розгляд на національному рівні за ознакою порядку звернення до суду (ст. 8, 24, 55, п. 1 ч. 2 ст. 129 Конституції України. Запропоновано розробити спеціальний закон, яким встановлюються підстави і порядок компенсації державою завданої моральної і матеріальної шкоди законом, що визнаний неконституційним.

Ключові слова*: судочинство, судовий спір, рівність сторін спору, суд, неконституційність закону, виключні обставини*