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КОНСТИТУЦІЙНЕ ПРАВО

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INTERACTION OF THE COURTS OF UKRAINE AND THE CONSTITUTIONAL COURT IN THE APPLICATION OF THE CONSTITUTION OF UKRAINE AS AN ACT OF DIRECT EFFECT

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The article examines the peculiarities of the interaction between the ordinary courts and the Constitutional Court of Ukraine since the adoption of the Constitution of Ukraine. The author tries to establish the characteristic features of this interaction during different periods.

The specificity of the constitutional transformations over the past almost 30 years allowed us to divide the development of relations between these subjects into two periods. The first – since the adoption of the Constitution of Ukraine in 1996, which for the first time in Ukraine enshrined the principle of direct effect of the Constitution and established a new system of organisation of state power on the basis of its division into legislative, executive and judicial in accordance with the principles of the rule of law, respect for human rights and constitutional democracy. This period lasted until September 30, 2016, when the reform of justice began in Ukraine, which continues to these days.

Based on the results of the research, the author proposes the ways to improve the mechanism of the interaction between the ordinary courts and the Constitutional Court, which aim to ensure the effective application of the Constitution of Ukraine as an act of direct effect.

Keywords: direct effect of the Constitution of Ukraine, courts of general jurisdiction, courts of the judicial system, incidental constitutional control, advisory opinions.

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One of the principles of the Constitution of Ukraine (hereinafter referred to as the Constitution or Basic Law) is the principle of its direct effect. The national formula of direct effect of the Constitution is revealed through the provision that its norms shall be norms of direct effect, and an appeal to the court in defence of the constitutional human rights and freedoms directly on the grounds of the Basic Law shall be guaranteed [11]. This principle allowed to consider the Constitution as a real active source of law, which not only declares constitutional values, but is also able to protect them. In this regard, the Constitutional Court of Ukraine (hereinafter the Constitutional Court) noted the following:

«The direct effect of the norms of the Constitution means that these norms are applied directly. Laws of Ukraine and other normative legal acts can only develop constitutional norms without changing their essence. Laws of Ukraine and other normative legal acts are applied only to the extent that is not contrary to the Constitution of Ukraine» [19].

Ordinary courts are obliged to apply the Basic Law as an act of direct effect in all «necessary cases» for the implementation of this principle. The effectiveness of the fulfilling such an obligation depends on various factors, one of which is the effectiveness of the organisation and interaction between the ordinary courts and the Constitutional Court. Therefore, it is no coincidence that interaction and dialogue between courts and the body of constitutional jurisdiction play a leading role in the process of «constitutionalisation» of all branches of law [4, p. 171]. Among the scholars who studied the peculiarities of the interaction between the courts and the body of constitutional jurisdiction, there can be mentioned: A. Yezerov, A. Lankevych, D. Terletskyi, L. Letnianchyn, O. Vodiannikov, S. Riznyk and others.

S. Riznyk points out, that the constructive interaction of the Constitutional Court and the Supreme Court between themselves as well as with judges of courts of different specialisations and instances will help to form an effective system of the ensuring of the supremacy and direct effect of the Constitution in Ukraine [16, p. 227]. Therefore, **the purpose of this article is** to examine the peculiarities of the interaction between the ordinary courts and the Constitutional Court since the adoption of the Constitution, to establish the features of this interaction during different periods. According to the results of the conducted research, the author proposes ways to improve the mechanism of the interaction between the ordinary courts and the Constitutional Court.

Interaction of the ordinary courts and the Constitutional Court during 1996–2016 in the application of the Constitution of Ukraine as an act of direct effect.

The principles of the interaction between the ordinary courts and the Constitutional Court have undergone significant changes since the adoption of the Constitution in 1996. An understanding of these constitutional transformations is necessary for the correct solution of modern problems related to the ineffectiveness of such interaction. Therefore, taking into account the dynamics of changes that have taken place in Ukraine for more than a quarter of a century, I propose dividing them into two periods. The first one began with the adoption of the Basic Law and is characterised by the development of a new system of organisation of state power on the basis of its division into legislative, executive and judicial in accordance with the principles of the rule of law, respect for human rights and constitutional democracy. A considerable role in this system is dedicated to the ordinary courts, which were named as courts of general jurisdiction by the Constitution prior to 2016. At that time, the Constitutional Court was recognised as the sole body of constitutional jurisdiction and together with the ordinary courts formed the system of judicial power.

The Supreme Court of Ukraine was the highest judicial body in the system of general jurisdiction. In accordance with the law, there were courts of appeal and local courts, and the corresponding higher courts were the higher judicial bodies of specialised courts [10] (for example, the High Specialised Court for Civil and Criminal Cases). Therefore, the concepts of «courts of general jurisdiction» and «(sole) body of constitutional jurisdiction» have been used in science and in practice for a long time to denote bodies that are different in nature, order of formation and powers, which conduct legal proceedings.

Characterising this period, D. Terletskyi noted that the constitutionally defined status of the Constitutional Court and courts of general jurisdiction with the Supreme Court of Ukraine as components of a unified judicial system objectively defines their close functional-purpose connection and interaction in the exercise of the granted powers [20, p. 285–286]. However, when we talk about the interaction between the Constitutional Court and the system of courts of general jurisdiction, in fact, the only body from this

system that could directly interact with the Constitutional Court was the Supreme Court of Ukraine. Because the latter was the only subject of a constitutional petition among the judicial authorities.

The procedural codes adopted and amended after the adoption of the Constitution did not improve this situation. In cases of doubt or dispute regarding the compliance of a legal act with the Constitution, the courts had to stop the administration of justice until the Constitutional Court made a decision on its constitutionality [1, p. 42]. Therefore, in case of doubt or dispute regarding the compliance of a legal act with the Constitution, courts appealed to the Supreme Court of Ukraine, which decided on the issue of forwarding a constitutional petition to the Constitutional Court. In this way during 1996-2016, the legal principles of the implementation of incidental constitutional control, which arose on the basis of the constitutional petition of the highest judicial body, were regulated. The rest of the courts had only indirect access to the interaction with the constitutional jurisdiction through the Supreme Court of Ukraine. Therefore, the role of most judicial bodies in this process was extremely limited and, as the following practice has shown, ineffective.

The Constitutional Court considered 23 cases based on constitutional petitions of the Supreme Court of Ukraine regarding the constitutionality of laws of Ukraine from January 1, 1997, to July 15, 2020. The vast majority of them were not directly related to the challenging of the constitutionality of acts that were subject to application during the administration of justice [2, p. 181]. Such statistics confirms the conclusion about the ineffectiveness of the described model of the interaction between the ordinary courts and the Constitutional Court. Therefore, this model required a reform, which began after the entry into force of the Law of Ukraine «On the Amendments to the Constitution of Ukraine (Regarding Justice)» on September 30, 2016 [6]. The second period of development of constitutional and legal principles of the interaction between the ordinary courts and the Constitutional Court, which is lasting to these days, is connected exactly with that.

The impact of the constitutional reform of justice in 2016 on the interaction of the judicial authorities and the Constitutional Court in the application of the Constitution as an act of direct effect.

After the Law of Ukraine «On the Amendments to the Constitution of Ukraine (Regarding Justice)» entered into force, the mention of courts of general jurisdiction and the Constitutional Court as a sole body of constitutional jurisdiction, which ceased to be a part of the judicial system, was removed from the Constitution. Therefore, when determining the legal status of the Constitutional Court, I would like to agree with S. Riznyk, who considers it as a specialised judicial body of a constitutional jurisdiction, which is the main, but not the only, subject of a judicial constitutional control in Ukraine [17, p. 16]. This approach was also supported by the legislator, who in the new edition of the profile Law of Ukraine «On the Constitutional Court of Ukraine» mentioned the Constitutional Court as a body of constitutional jurisdiction [7].

The judicial system replaced the general jurisdiction in the Constitution. It consists of the courts of Ukraine (local courts, courts of appeal, the Supreme Court, as well as high specialised courts created to hear certain categories of cases as courts of the first instance and courts of appeals) [8]. That is why this article uses the doctrinal concept of «ordinary courts», which means both courts of general jurisdiction (1996-2016) and courts of the judicial system of Ukraine (from 2016 to today).

The implementation of the mentioned judicial reform created the preconditions for a new attempt to organise the effective interaction between courts and a specialised judicial

body of constitutional jurisdiction. However, changes regarding the exclusion of the provision on the Constitutional Court as the sole body of constitutional jurisdiction in Ukraine from the Constitution did not receive general support. Thus, the Justice of the Constitutional Court M. Melnyk noted the following:

«Such an unexpected and scientifically unfounded deprivation of the Constitutional Court of Ukraine of the status of the sole body of constitutional jurisdiction in Ukraine, in combination with other amendments to the Basic Law of Ukraine, creates the preconditions for the replacement of the exclusive powers of the Constitutional Court of Ukraine by the courts of general jurisdiction, and therefore a reduction of the level of protection of constitutional human rights and freedoms, which contradicts Article 157 of the Constitution» [14].

The conclusion concerning the suddenness and scientific groundlessness of such amendments causes a certain critique regarding the painful experience of the first decades of the latest Ukrainian state formation, which, on the contrary, proves their demand. After all, the real achievement of the goal enshrined in the Constitution which is that an ensuring of the constitutionality of legal acts is possible only if the widest possible range of active participants is fully involved in the case. Therefore, the position expressed by M. Melnyk does not take into account that although the Constitutional Court is the only centre, it is not the only subject of the system of ensuring the constitutionality of normative acts [18, p. 165].

I can assume that such considerations of the judge are caused by not taking into account the paradox of the continental model of constitutional control, according to which constitutional rights are recognised as legal and subject to real judicial protection, without recognising, albeit with certain caveats and limitations, of the function of constitutional control of general courts. This paradox consists in the fact that, having determined the centralisation of the system of constitutional control according to Kelsen's concept of the constitutional court and its exclusive authority of the «negative legislator», this model cannot ensure an effective observance of the dogmas of postmodern constitutionalism, which arose after the Second World War. It is all about the following:

(1) transformation of fundamental rights declared by the constitution into legal rights that are the subject to real judicial protection;

(2) limitation, regulation and separation of powers, and not only within the framework of the principle of separation of powers, but also limitation and regulation of the secondary constituent power regarding amendments to the constitution; and

(3) the doctrine of «military democracy» [4, p. 144, 148].

The improvement of an incidental constitutional control as a form of the interaction between judicial authorities and the Constitutional Court in the application of the Constitution as an act of direct effect.

Until 2016, the incidental constitutional control of courts of general jurisdiction in Ukraine was limited to the fact that in case of a dispute in the judicial process regarding the constitutionality of the law applied by the court, the proceedings in the case were stopped, and the court appealed to the Supreme Court of Ukraine to decide on the issue of forwarding a constitutional petition to the Constitutional Court.

Even before the beginning of the judicial reform in 2016 the issue of the ineffectiveness of such a mechanism of incidental constitutional control was actively discussed in the scientific discourse. The opinion that the low intensity of such constitutional control was primarily due to its overly bureaucratized nature was widespread, because only the Supreme Court had the right to appeal to the Constitutional

Court with a constitutional petition [12, p. 123]. Therefore, it is important to understand whether the situation has improved after the constitutional transformations of 2016–2017.

The other mechanism of incidental constitutional control, which is carried out by the courts of the judicial system, is established in the new editions of the Code of Commercial Procedure of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Procedure of Ukraine:

«If the court concludes that a law or other legal act contradicts the Constitution of Ukraine, the court shall not apply such law or other legal act, but shall apply the norms of the Constitution of Ukraine as norms of direct effect.

In this case, after approval of the case judgment, the court appeals to the Supreme Court to resolve an issue of submitting to the Constitutional Court of Ukraine a petition concerning the constitutionality of a law or other legal act, the resolve of an issue concerning constitutionality of which falls within the jurisdiction of the Constitutional Court» [5].

In this manner, after rendering a decision in the case, in which the norms of the Constitution are applied as norms of direct effect, the court appeals to the Supreme Court to decide on the issue of making a petition to the Constitutional Court on the constitutionality of a law or other legal act that appertains to the jurisdiction of the Constitutional Court. The Supreme Court received 33 such appeals during the period from December 2017 to November 2022. The Plenum of the Supreme Court considered 15 courts' appeals at the time of November 2022. According to the results of the review, regarding four of them, it was decided to apply to the Constitutional Court with constitutional petitions, none of which has been considered by the Constitutional Court yet [3].

The stated number of constitutional petitions, and, moreover, the state of their consideration indicates the insufficient effectiveness of the implemented mechanism of the interaction between a specialised body of constitutional jurisdiction and judicial authorities. One of the reasons is that the renamed Supreme Court (before the changes of 2016–2017 it was called the Supreme Court of Ukraine) continues to be the only court in the judicial system that has the authority to interact with the constitutional jurisdiction. Therefore, it should be stated that neither the amendments to the Constitution regarding justice, nor the new editions of the procedural codes, which entered into force at the end of 2017, did not solve the problem of inefficiency of incidental constitutional control discovered during 1996–2016.

On the one hand, the situation is not as critical as it was before. Courts have the opportunity to independently make decisions on the application of the norms of the Constitution as norms of direct effect in economic, civil processes and in administrative proceedings now. Therefore, they do not need to stop the proceedings and wait for the outcome of the Supreme Court's appeal to the Constitutional Court and the consideration of the constitutionality of the legal act. On the other hand, other forms of judicial proceedings do not provide such a possibility. Moreover, the consolidation of the powers of judicial authorities to determine a contradiction of a legal act with the Constitution as a ground for the direct application of the Basic Law demands high levels of competence and time resources from judges for solving complex constitutionally-legal issues. In this regard, it is necessary to take into account the concern of certain specialists about the quality of the judicial corps and the ability of the «average» judge to implement legal principles (the direct effect of the norms of the Constitution of Ukraine, the rule of law) in daily work [13, p. 123].

The above shows the relevance of finding ways to improve an incidental constitutional control, which have been actively discussed in the legal community for a long time. Thus, even before the constitutional transformations in 2016, A. Lankevych proposed to provide for the provision that the court considering the case and the public prosecutor participating in the hearing of the case can apply to the Constitutional Court [12, p. 125]. Proposals regarding the expansion of subjects of appeal to the Constitutional Court were also expressed in the works of V. Skoromokha, S. Riznyk [17, p. 145] and other authoritative experts in the field of constitutional law.

As it was already mentioned, the majority of procedural codes explicitly established for the courts the ability to independently decide on the application of the norms of the Constitution as norms of direct effect based on the conclusion that the legal act contradicts the Basic Law. I propose to introduce the possibility for the courts of the judicial system, which are hearing the particular cases, to request the Constitutional Court relating to the fundamental issues, which concern the application or interpretation of the Constitution. As a result of the consideration of such cases, the Constitutional Court will provide advisory opinions. The introduction of such a mechanism is complicated because it requires amendments to the Constitution. The Constitution provides an exclusive list of subjects of initiating of the opening of proceedings in the Constitutional Court. However, such changes will allow the courts to improve the direct interaction with constitutional jurisdiction. This will contribute to the affirmation of the Constitution as an act of direct effect in the administration of justice.

The idea of «advisory opinions» is not new for the practice. This possibility is already introduced for higher judicial institutions at the level of such an international organisation as the Council of Europe. Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms establishes that the Grand Chamber of the European Court of Human Rights provides advisory opinions on principled issues related to the interpretation or application the rights and freedoms defined by the Convention or its Protocols [15].

This proposal does not involve adding the courts of the judicial system as new subjects of the constitutional petition. The implementation of this proposal in this way can reasonably paralyse the work of the Grand Chamber of the Constitutional Court, which considers all constitutional petitions and includes all Justices. This is caused by the number of potential subjects of appeal – judicial authorities, the number of which is about five thousand in Ukraine. This number is very large in comparison with the number of «higher judicial institutions» of states that have ratified Protocol No. 16. As of September 2023, Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms entered into force for 21 member states of the Council of Europe [21].

Therefore, in order to provide such opinions, I propose to authorise the panels of the Constitutional Court, which currently decide only on the issue of opening constitutional proceedings. Considering the fact that the Constitutional Court consists of six panels the review of such cases must not significantly affect the workload of the Court. Strict filters can become an additional mechanism that will prevent the work of the Constitutional Court from being blocked. For example, refusal to provide recommendations in case of the absence of a fundamental problem, significant public interest, exceptional importance for the practice of application of the Constitution, etc. In order to ensure the unity of the practice of interpretation and application of the Constitution by the Constitutional Court, it is possible to establish the impossibility of panels to express, change or retreat from the existing ones or to express new legal positions on essential issues regarding the

interpretation of the Constitution, and in the case of the necessity of such actions, to transfer such case to the Senate or the Grand Chamber of the Constitutional Court.

Considering that the opinions will be given by panels consisting of three Justices (that is, 1/6 of the composition of the Constitutional Court), they will not have the authority to check the legal act for constitutionality. The legal nature of the opinions given by them consists in the recommendation explanations on constitutionally-legal issues. Their function is to direct the judge of the ordinary court in deciding on the issues that arise during the direct application of the Constitution. At the same time, the advisory nature of these opinions will not understate their importance for judges, who will use these opinions as guides for resolving legal disputes or other cases, in the cases provided for by law. These clarifications may become the basis for the decision of the Senate or the Grand Chamber of the Constitutional Court in proceedings opened on the ground of a constitutional petition or a constitutional complaint, in the future.

Creation of the conditions, under which the ordinary courts will be able to use the mechanism of application of the Constitution, which is established in the procedural legislation, more intensively, will be an advantage of this mechanism. Because the Constitutional Court beyond doubt has much more possibilities and authority to correctly resolve issues in the sphere of constitutional law than courts specialising in civil, criminal, economic and other cases. Since the courts of the judicial system have their own specificity: they very often do not recognise the fundamental nature of constitutional rights and freedoms and so they apply only laws [9]. Therefore, the introduction of the advisory opinion procedure can improve the effectiveness of consideration of difficult issues related to the interpretation of the Constitution.

It is worth reminding that the courts formulate the constitutional issue that the Constitutional Court must resolve, and the latter must provide clear guidelines for constitutional analysis [4, p. 153]. Therefore, the proposed interaction mechanism will not replace the existing procedure of courts' appeals to the Supreme Court in cases in which the norms of the Constitution are applied as norms of direct effect, but it will complement the dialogue between the courts of the judicial system and the Constitutional Court. The combination of such interaction forms will make it possible to significantly improve communication between the judiciary and the body of constitutional jurisdiction in the sphere of affirming the Constitution as an act of direct effect.

In addition, after the application of the Constitution as an act of direct effect by the courts, the latter do not have to appeal to the Supreme Court in every case. There is no such an obligation in situations where the court refused to apply a legal act which is not subject to the constitutional control conducted by the Constitutional Court (for example, normative legal acts of ministries or other central executive bodies). Therefore, in such cases, in fact, the courts of the judicial system of Ukraine are the only subjects of constitutional control. It increases their responsibility for the decisions made, and it justifies the proposals of introduction of the institution of advisory opinions on fundamental issues of the application of the Constitution.

Conclusions.A characteristic feature of the first period (1996-2016) of the interaction between the ordinary courts and the Constitutional Court in the application of the Constitution as an act of direct effect was the affiliation of these subjects to the judicial system, in which the interaction occurred. An incidental constitutional control, conducted by the ordinary courts, was a limited authority of the Supreme Court of Ukraine to appeal to the body of constitutional jurisdiction. Therefore, due to the lack of possibilities of the absolute majority of courts for direct appeal to the Constitutional

Court, as well as the limitation of their powers in the direct application of the Constitution, such interaction turned out to be ineffective.

The second period, started together with the reform of justice in 2016, allowed to consider in a new way the issue of the interaction between the ordinary courts and the Constitutional Court in the application of the Constitution as an act of direct effect. The majority of procedural codes established for the courts of the judicial system the authority to determine the contradiction of legal acts of the Constitution as a ground for the direct application of the provisions of the Constitution. However, the Supreme Court remains the sole body in the judicial system that can directly interact with the Constitutional Court by filing a constitutional petition. Therefore, after determining of the contradiction of legal acts of the Constitution the ordinary courts must appeal to the Supreme Court to resolve the issue of filing a petition to the body of constitutional jurisdiction.

In practice, there were few such appeals to the Supreme Court, and the number of constitutional petitions based on them was generally small. As a result, the lack of the constructive interaction between the judiciary and constitutional jurisdiction has a negative effect on the affirming of the Constitution as an act of direct effect. Because courts mostly formulate a constitutional issue to be resolved by the Constitutional Court. Therefore, without expanding the mechanisms of the interaction between the Constitutional Court and the courts of the judicial system, the achieving of this goal remains a challenging task.

In order to solve this problem, I propose to introduce an institute of advisory opinions, which will provide the following:

– granting to the courts of the judicial system the right to appeal to the Constitutional Court in order to obtain advisory opinions on fundamental issues related to the application or interpretation of the Constitution;

– granting powers to the panels of the Constitutional Court to consider such appeals and provide advisory opinions, which will have the nature of recommendation explanations on constitutionally-legal issues;

– strict filters to prevent «unimportant» cases from being considered (for example, refusing to provide conclusions in the case of absence of a fundamental legal problem, significant public interest, etc.).

This mechanism is to complement, not replace, the existing model of the interaction between the Supreme Court and the Constitutional Court, which takes place on the basis of a constitutional petition. The combination of these forms of the interaction will significantly improve communication between the judiciary and the body of constitutional jurisdiction in the sphere of affirming the Constitution as an act of direct effect.

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ВЗАЄМОДІЯ ОРДИНАРНИХ СУДІВ ТА КОНСТИТУЦІЙНОГО СУДУ У ЗАСТОСУВАННІ КОНСТИТУЦІЇ УКРАЇНИ ЯК АКТА ПРЯМОЇ ДІЇ

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Розглянуто особливості взаємодії між ординарними судами, під якими розуміються і суди загальної юрисдикції (1996–2016), і суди системи судоустрою України (з 2016 року і до сьогодні), та Конституційним Судом України з часу прийняття Конституції України. Автор робить спробу встановити притаманні цій взаємодії риси протягом різних періодів. Специфіка конституційних трансформацій за останні майже 30 років допомогла поділити розвиток взаємовідносин цих суб'єктів на два періоди.

Перший – з часу прийняття Конституції України в 1996 році, в якій уперше в Україні закріплено принцип прямої дії Конституції та встановлено нову систему організації державної влади на засадах її поділу на законодавчу, виконавчу та судову відповідно до принципів верховенства права, поваги до прав людини та конституційної демократії. Характерною рисою першого періоду була належність ординарних судів та Конституційного Суду України до судової системи, всередині якої відбувалася взаємодія. Інцидентний конституційний контроль, який здійснювали ординарні суди, був обмеженим повноваженням Верховного Суду України звертатися до органу конституційної юрисдикції. Цей період тривав до 30 вересня 2016 року, коли в Україні розпочалася реформа правосуддя, яка триває донині.

Незважаючи на проведену конституційну реформу, Верховний Суд залишився єдиним органом у судовій системі, який може безпосередньо взаємодіяти із Конституційним

Судом шляхом направлення конституційного подання. Тому після встановлення суперечності правових актів Конституції ординарні суди повинні звертатися до Верховного Суду для вирішення питання про направлення подання до органу конституційної юрисдикції. На практиці таких звернень до Верховного Суду виявилося небагато, а кількість конституційних подань на їх підставі взагалі мізерна. Як наслідок, брак конструктивної взаємодії між судовою владою та конституційною юрисдикцією негативно впливає на утвердження Конституції як акта прямої дії. Адже саме суди найчастіше формулюють конституційне питання, яке має вирішити Конституційний Суд.

Обґрунтовано, що без розширення механізмів взаємодії між Конституційним Судом України та судами системи судоустрою досягнення цієї мети залишається утрудненим завданням. Тому за результатами проведеного дослідження подано способи удосконалення механізму взаємодії між ординарними судами та Конституційним Судом України, кінцевою метою яких є забезпечення ефективного застосування Конституції України як акта прямої дії. Для досягнення цієї мети запропоновано запровадити інститут консультативних висновків, який передбачатиме надання судам системи судоустрою права звертатися до Конституційного Суду України з метою отримання консультативних висновків із принципових питань, які стосуються застосування чи тлумачення Конституції.

Ключові слова: пряма дія Конституції України, суди загальної юрисдикції, суди системи судоустрою, інцидентний конституційний контроль, консультативні висновки.

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