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Mechanisms of Constitutional Control in the Field of Defense and Mobilization: A Comparative Legal Analysis

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ABSTRACT

The relevance of the study is due to the need to ensure a balanced combination of defense management efficiency and compliance with constitutional guarantees in a period of large-scale security threats. The aim of the article is to find out how national mechanisms of constitutional control can ensure the proper balance between mobilization needs and the requirements of the rule of law, as well as what foreign practices can be useful for improving the Ukrainian model. The methodological basis of the study is comparative legal analysis, formal legal method, structural-functional approach and elements of the theory of constitutional control, which allowed for a comprehensive assessment of both regulatory and practical aspects of oversight in the defense sector. The study identified the strengths and weaknesses of the national model, revealed the specifics of the interaction between political and judicial control mechanisms, analyzed the impact of executive decisions on the state of constitutional guarantees, and outlined promising areas of reform using the experience of EU countries, NATO and states with developed crisis management systems. The results obtained demonstrate the need to modernize constitutional control procedures, increase the transparency of mobilization decisions, and strengthen the institutional capacity of bodies responsible for protecting rights and freedoms in wartime. The practical significance lies in the fact that the formulated conclusions and recommendations can be used by the legislator to update defense and constitutional legislation, in particular when improving mobilization procedures and parliamentary oversight. The results have practical significance for executive bodies that carry out defense planning and implement mobilization policy decisions. The proposed approaches can serve as the basis for developing new standards of openness, accountability, and proportionality in the field of national security.

KEYWORDS

security environment, power, executive bodies, public administration, political culture.

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СОЦІАЛЬНИЙ РОЗВИТОК: економіко-правові проблеми

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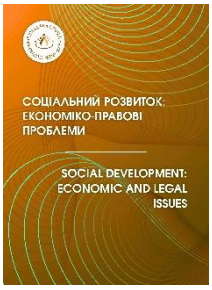

Механізми конституційного контролю у сфері оборони та мобілізації: порівняльно-правовий аналіз

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СТАТТЯ

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АНОТАЦІЯ

Актуальність дослідження полягає з одного боку у необхідності досягнути збалансованого поєднання ефективності управління оборонним комплексом, а з іншого – у забезпеченні дотримання гарантованих державою прав в умовах безпекових викликів. Мета статті – з'ясувати, яким чином національні механізми конституційного контролю можуть забезпечувати належний баланс між потребами мобілізації та вимогами верховенства права. Методологічну основу дослідження становили порівняльно-правовий аналіз та формально-юридичний метод. У ході дослідження визначено сильні та слабкі сторони національної моделі. Виявлено специфіку взаємодії між політичними та судовими механізмами контролю. Проаналізовано вплив рішень виконавчої влади на стан конституційних гарантій, а також окреслено перспективні напрями реформ із використанням досвіду країн ЄС, НАТО та держав з розвиненими системами кризового управління. Отримані результати вказують на необхідність модернізації процедур конституційного контролю. Необхідно забезпечити підвищення прозорості мобілізаційних рішень і зміцнення інституційної спроможності органів, відповідальних за захист прав і свобод у воєнний час. Практична значимість дослідження полягає в тому, що сформульовані висновки можуть бути використані законодавцем для оновлення законодавства у сфері оборони та мобілізації. Зокрема у процесі вдосконалення процедур парламентського нагляду. Також результати мають прикладне значення для органів виконавчої влади, які здійснюють оборонне планування та реалізують рішення з мобілізаційної політики.

КЛЮЧОВІ СЛОВА

безпекове середовище, владні повноваження, виконавчі органи, публічне управління, політична культура.

1. Introduction

The issue of constitutional control in the field of defense and mobilization has become important in the last decade. External threats, which have become a familiar element of the security environment of many states, have forced to rethinking of traditional approaches to the organization of defense institutions. Ukraine is no exception. Rapid changes in legislation under the pressure of military circumstances create situations in which compliance with constitutional principles is sometimes at risk. That is why the issue of the adequacy of control mechanisms and their ability to protect the state from mistakes looks practically significant.

At the same time, constitutional control in the field of defense has another feature. It concerns ensuring the safety of the population and guaranteeing its rights and freedoms. This creates a difficult research situation: it is necessary to simultaneously assess the effectiveness of legal remedies and not forget about the human dimension of these decisions. On the other hand, there is still a certain fragmentation of approaches in the scientific literature. Some of the authors focus on the procedural aspects of the work of constitutional courts. Others are exploring individual elements of mobilization policy. But the relationship between these two dimensions – control and defense-mobilization – remains insufficiently meaningful.

2. Literature Review

In the world discussion about emergency powers and constitutional control around them, the study of T. Ginsburg and M. Versteeg is especially noticeable [5]. The authors showed that in times of crisis, the executive branch tends to "expand" to limits that seemed incredible yesterday, but the nature and duration of such expansion significantly depend on built-in institutional safeguards. They record a key cause-and-effect relationship: where clear rules of proportionality, parliamentary oversight and judicial "stop-stops" work, the wave of emergency powers quickly descends to the constitutional "norm".

A kind of "map of the area" for the European continent is the comparative work of A. Horváth [6]. The researcher systematizes models of the constitutional regime of states of emergency in European countries and highlights the tendency towards institutional hybridization: formally rigid procedures are often combined with flexible political practices. An important result is the identification of "zones of uncertainty", where the constitutional text does not answer key issues of proportionality, and therefore, decisions are actually transferred to post-crisis judicial review.

In the supranational dimension of the EU, C. Cinnirella offers a significant fulcrum [2]. The author shows that the real architecture of emergency powers in the European Union is built not so much by the text of the founding treaties as by their interpretation in times of crisis and the interaction of institutions. The conclusion is disappointing for supporters of "hard" law: the lack of a clear, unified model entails the risk of fragmented application of restrictions on rights and provokes competition between jurisdictions. Therefore, for the Member States (and for Ukraine as a potential member), not only the national, but also the integration dimension of constitutional control is important.

From the Ukrainian perspective, the study of K. Trykhlib [19] is directly important. The author notes that in wartime, the tension between the "speed" of state decisions and the "quality" of constitutional guarantees increases exponentially, and the practical balance is often achieved not by the norm, but by the practice of post-facto judicial review. The key conclusion is the need for procedural tools capable of providing control in a near-real-time dimension.

V. Kovalchuk also works on a similar topic [7], but with an emphasis on the value framework of Ukrainian constitutionalism during the war. The author shows that the protection of statehood and the protection of rights are not mutually exclusive goals: in the context of institutional reform, they are mutually reinforcing. The result obtained is a conceptual model of "double loyalty" of law: to security and to human dignity. This optics allows you to evaluate mobilization decisions in a new way: not only in form, but also in terms of their ability to maintain the trust of citizens.

Outside the European borders, a valuable comparative corpus is formed by C. M. Fombad and L. A. Abdulrauf [4]. Based on the material of African countries, the author demonstrates that the formal presence of emergency regimes without clearly defined "safety valves" naturally leads to a drift towards

executive dominance. A fundamental conclusion: the effectiveness of control is ensured not by declarations, but by procedural trifles – term limits, independent review mechanisms, requirements for justification of restrictions on rights.

A broader political picture of the consequences of emergency regimes is given by A. Lührmann and B. Rooney [14]. Researchers establish a stable correlation between frequent or prolonged states of emergency and a decline in the quality of democracy, with the key channel of this influence being "decree governance". The conclusion is rigid: without institutional counterweights, emergency powers tend to "freeze" and turn into a norm of governance.

The internal Ukrainian dimension of constitutional security is addressed by O. M. Svitlyk [17]. At the center of its analysis is the real ability of the Constitutional Court to play the role of an institutional "watchdog" in times of crisis. The main conclusion is functional asymmetry: the Court is strong in retrospective control, but weak in quick response, which creates the risk of approving practices that are only later recognized as unconstitutional.

Finally, two works – J. Bellenghi [1] and K. Kreuder-Sonnen [8] clarify the fundamental definitions. The first proves that "extraordinariness" in European law is marked by the instability of the definition: from vague criteria at the entrance to unpredictable consequences at the exit. The second raises a provocative question: does Europe need a "constitution of emergency", and the answer is actually "yes, but with clear limits" to avoid the normalization of the exception. Together, these findings send another signal to Ukraine: without conceptual clarity on the thresholds and limits of emergency solutions, institutional practice will inevitably fluctuate.

3. Problem Statement

The purpose of the article is to identify and substantiate how the mechanisms of constitutional control can ensure a balance between the needs of defense management and the observance of citizens' rights.

4. Methods and Materials

The research methodology was based on a combination of several complementary approaches. The comparative legal analysis was the leading one, which made it possible to compare Ukrainian control mechanisms with the models of different states and identify those institutional decisions that may be relevant for reforming the national system. An auxiliary, but important role was played by the formal-legal method, which ensured the exact reproduction of the content of legal norms and made it possible to outline the logic of their internal coordination or conflict.

5. Results and Discussion

The understanding of constitutional control in the defense sector is heterogeneous. It largely depends on the historical experience of the state, political culture and the dominant model of public administration. That is why a modern researcher, considering this phenomenon, inevitably plunges into the interdisciplinary space. In it, constitutional law, the theory of the state, military law and even political philosophy interact. In this diversity, it is important to single out the basic conceptual approaches that form a general picture of what constitutional control in the field of defense is – and can be – (Table 1).

The first of these approaches can be conditionally called the model of the supremacy of the constitution. It is based on the idea of a rigid normative hierarchy, when any decisions related to mobilization, defense organization or the use of military force are thoroughly checked for compliance with the basic law. This approach originates in the continental legal tradition, primarily in Kelsen's vision of constitutional justice as a "pure" legal function [5]. Constitutional courts working within such a paradigm stand guard over the normative logic: it is important for them whether the procedure is followed, whether the powers have not been exceeded, and whether the restriction of rights fits into the constitutionally permissible framework. They almost do not take into account the political motives of decisions, since they believe that control should be primarily legal. Such formalism is sometimes

criticized, but it provides clarity and predictability in law enforcement, which is extremely important in situations of military danger.

Table 1. Comparative characteristics of conceptual approaches to constitutional control in the defense sector

Conceptual approach	Brief description	Key accents of control	Typical legal traditions / examples of states
Model of the supremacy of the constitution	It is based on a rigid normative hierarchy, where every defense or mobilization decision must comply with the letter of the Constitution	Formal verification of the procedure; strict adherence to competencies; minimizing political discretion	Continental Europe: Austria, Germany (partially), Czech Republic
Rights-oriented approach	Grew up as a reaction to the risks of state arbitrariness and restriction of rights under the guise of "security"	Proportionality analysis; priority of dignity and fundamental freedoms; Assessment of the excessiveness of restrictions during mobilization	Germany, Italy, Spain, post-war European democracies
Security Priority Doctrine	He prefers the efficiency of government actions in emergency conditions, sometimes with a decrease in "instantaneous" judicial control	Broad discretion of the executive branch; judicial control of a deferred nature; Flexibility of solutions	USA, Israel, France of the Fifth Republic period
Institutional balance approach (checks and balances)	Control is carried out not only by the courts, but also by the parliament, committees, and public institutions	Mutual supervision of different authorities; parliamentary and public control; less formalization of judicial intervention	Great Britain, Canada, Australia, USA (in terms of parliamentary oversight)
The Approach of Constitutional Moderation in Crisis States	Emphasizes the temporality and proportionality of emergency powers; emphasizes that the Constitution "does not remain silent" in times of crisis	Control over emergency regimes; prevention of the transformation of temporary solutions into permanent ones; parliamentary oversight	Latin America (Chile, Colombia), selected European countries

Source: Compiled by the author based on [5; 14; 19].

Another approach – focused on the protection of fundamental rights – grew out of the deep historical traumas of the twentieth century. After World War II, European constitutionalists realized that the threat to freedoms could come not only from an external enemy but also from their own state, which, under the guise of military necessity, was capable of violating basic standards of human dignity. Hence, the dominance of right-human-centered logic in the activities of the constitutional courts of Germany, Italy, and Spain [2, p. 636]. Within this approach, any military or mobilization decision must be not only "legal" but also "proportionate". Judges focus on whether the restriction of rights is becoming excessive, whether groups in need of special protection are being infringed, and whether there are less invasive alternatives.

Next to it, there is an approach based on the concept of institutional balance. It grew up primarily in common law countries and assumes that constitutional control is not only a court, but a complex system of checks and balances. Parliamentary committees, security commissioners, ombudsmen, special supervisory structures – all of them together form a network that keeps the defense sector within constitutional boundaries [19, p. 249]. In such systems, courts intervene less often, but their decisions carry significant weight because they usually relate to the most fundamental issues. The logic of this approach is that a wide range of control institutions provides different points of view and minimizes the risk of excessive concentration of power in one hand.

Despite the diversity of models, one fundamental idea is common: defense is not an "extra-constitutional" sphere. Even in the most difficult times, it must remain within the scope of the supreme law. The constitutions of different states have developed their own ways of ensuring this principle, and

it is their evolution that is important to take into account when analyzing modern mechanisms of constitutional control [7]. After all, without an understanding of history, it is difficult to explain why states today respond so differently to the same challenges – large-scale mobilization, the widespread use of emergency powers, or the expansion of the discretion of the military command.

The national model of constitutional control in Ukraine in the field of defense and mobilization was formed under the influence of difficult historical circumstances, and in the last decade, under the pressure of real military threats. Therefore, it has a character that can hardly be called established: rather, it is a flexible, often reactive system that adapts to the conditions of the security crisis. At the same time, its architecture is not chaotic [4]. On the contrary, it consists of a whole set of institutional mechanisms, each of which performs its share of control functions. The Ukrainian model combines the features of classical judicial constitutional supervision with elements of political control, as well as with a wide range of distributed, "local" forms of protection of rights that arise in the process of mobilization. It is this layering that creates both its strengths and problematic sides.

First of all, it is worth outlining the main elements of the system. The Constitutional Court of Ukraine, which checks laws and individual acts of the supreme authorities, is traditionally placed at the top of control. The Verkhovna Rada of Ukraine operates nearby, which approves decrees on martial law and mobilization, as well as resolves the issue of the defense budget and supervises the activities of the executive branch through relevant committees. The President of Ukraine plays a significant role, because it is he who makes decisions that actually launch mobilization mechanisms and shape defense policy. The functional center for the implementation of these decisions is concentrated in the Cabinet of Ministers, the Ministry of Defense and the General Staff, and at the level of individual citizens, in the work of territorial recruitment and social support centers (TR and SSC), which make practical mobilization decisions. The courts of general jurisdiction, which consider thousands of individual disputes in this area, as well as the Verkhovna Rada Commissioner for Human Rights, who acts as an institutional "watchman" for compliance with humanitarian and social standards, cannot be ignored.

The constitutional principles of mobilization and defense decisions are outlined quite clearly [3]. The Basic Law defines the competence of the President to manage the security and defense sector, the parliament to legitimize and control such decisions, and the government to implement defense policy. At the same time, the Constitution contains a number of significant restrictions: a ban on changing it under martial law, the definition of rights that cannot be restricted, and a strict procedure for introducing and approving special legal regimes. That is, formally, the Ukrainian model provides for a rather strict system of checks and balances. It makes it possible to coordinate the efficiency of decisions with the requirements of constitutional stability – at least at the regulatory level.

Let's start with the Constitutional Court [12]. Its mission in this area is fundamental, but at the same time not easy. The court may declare unconstitutional laws or decrees regulating mobilization, the procedure for military service or the application of emergency restrictions. However, this mechanism has an obvious limitation: it is slow. Decisions are made for months, and often years. In a situation where defense management requires quick decisions, such temporality can neutralize the effectiveness of control. Therefore, the Constitutional Court actually plays the role of retrospective supervision, which corrects legal errors "after the fact", and does not prevent them at the time of their occurrence.

Another plane of control is provided by the parliament. The Verkhovna Rada formally has enough leverage of influence: it approves presidential decrees, controls the activities of the government, adopts legal acts on defense policy, and can create temporary investigative commissions. In peacetime, this system works as an effective balance between the executive and legislative branches [10]. In wartime, the situation changes. Parliamentary procedures are reduced, discussions are decreasing, and control often becomes more declarative. This is not evidence of negligence; Rather, it is a forced reaction to circumstances.

An additional dimension of control is provided by the Verkhovna Rada Commissioner for Human Rights. The Ombudsman can respond to systemic violations, monitor the activities of TRs and SSCs, and appeal to the authorities with a demand to eliminate shortcomings [11]. The significance of this institution is especially noticeable in aspects that go beyond formal law – in humanitarian, social and ethical issues of mobilization practice [14, p. 628].

All these mechanisms form a fairly complex system in which it is possible to identify strengths (Table 2). First, the constitutional architecture of Ukraine provides for a clear delimitation of powers,

which reduces the risk of institutional conflicts in the field of defense. Secondly, the parliament remains an important balance-forming element: it does not lose control even in wartime.

Table 2. Strengths and weaknesses of the national model of constitutional control in the field of mobilization and defense management

Category	Contents
Strengths	
1. Clear constitutional separation of powers	The Constitution of Ukraine quite accurately defines the competence of the President, the Parliament and the Government in matters of defense and mobilization, which reduces the risk of institutional conflicts
2. Parliamentary scrutiny of key defense decisions	The Verkhovna Rada approves decrees on mobilization and martial law, as well as exercises supervision through relevant committees, which ensures political restraint of the executive branch
3. Developed system of individual judicial protection	Administrative courts consider a large number of disputes regarding mobilization, which actually forms an effective tool for protecting the rights of persons liable for military service
4. Availability of humanitarian and human rights control mechanisms	The Ombudsman's institution and public monitoring initiatives complement judicial and political oversight, focusing on the social and humanitarian aspects of mobilization policies
Weaknesses	
1. Slowness and limited efficiency of the Constitutional Court	The Constitutional Court of Ukraine has been making decisions for a long time, which does not allow for an effective response to legal problems during the war. Control is mostly retrospective in nature
2. Excessive concentration of powers in the executive branch during the war	Presidential decrees and decisions of the National Security and Defense Council, implemented by the government, are adopted quickly, sometimes without proper parliamentary discussion, which increases the risks of power imbalance
3. Insufficient control over the activities of TR and SSC	In practice, these bodies make the most sensitive decisions on mobilization, but they are not directly covered by the system of constitutional oversight, and their activities are often non-transparent
4. Formalized nature of parliamentary control in wartime	The need for quick decisions reduces the depth and content of parliamentary discussions, which actually narrows the possibilities of real political control
5. Limited openness of defense procedures	A significant number of acts have a restricted access stamp, which complicates public control, and sometimes the activities of courts in cases related to mobilization
6. Indirect controllability of NSDC decisions	Decisions of the National Security and Defense Council are enacted by decrees of the President and cannot be the subject of direct constitutional verification, which creates a "gray zone" in the sphere of control

Source: Compiled by the author based on [9; 10; 11; 13].

However, along with these advantages, there are also problematic elements. They not only describe the weaknesses of the system, but also explain why certain decisions in the field of defense become conflictual.

First of all, it should be recognized that the Constitutional Court of Ukraine does not perform the functions of operational supervision. Its decisions cannot affect the course of mobilization measures in real time. This means that even in the presence of serious constitutional doubts, certain acts can be valid for a long time, creating legal uncertainty.

The second problem concerns TR and SSC. It is these bodies that make decisions that directly affect people's lives, but the mechanisms of control over their activities are fragmentary [15, p. 114]. The work of the TR and SSC is not subject to direct constitutional supervision, and administrative courts often face a lack of information or a vague regulatory framework. Added to this is another weakness – the limited openness of defense procedures. A large part of the acts has limited access, which complicates both public control and scientific analysis in this area. The transparency of decisions decreases, which is natural in times of war, but at the same time creates a noticeable deficit of trust between citizens and the state.

All this determines the relevance of an in-depth analysis and further improvement of the system, in particular by strengthening parliamentary oversight, increasing the transparency of defense

procedures and modernizing the powers of the Constitutional Court [18, p. 3]. The strategic direction of modernization is to increase the efficiency and effectiveness of constitutional control. The experience of democratic states shows that control over acts adopted under states of emergency or martial law requires a special procedural regime. For example, Germany and Spain use "priority consideration" – a mechanism that allows constitutional courts to consider urgent cases out of turn [16, p. 41]. In Ukraine, there is no such tool: decisions of the Constitutional Court are made slowly, as a result of which control becomes purely retrospective. The introduction of an accelerated procedure for consideration of acts related to mobilization, legal regimes and restriction of rights could significantly strengthen the preventive potential of constitutional control.

6. Conclusions

The study of the mechanisms of constitutional control in the field of defense and mobilization showed that this area of legal regulation is one of the most sensitive. Ukraine actually functions in conditions of constant testing of the endurance of its constitutional institutions. That is why the interaction between the needs of defense and the requirements of the constitutional order acquires not only theoretical, but also strategic importance.

The analysis showed that the national model of constitutional supervision is mixed. It relies on judicial and political control mechanisms, complemented by individual judicial protection and human rights institutions. Such a multi-level nature is its strength, as it provides different channels for responding to potential violations. At the same time, this same feature also reveals the weaknesses of the system – first of all, the slowness of constitutional jurisdiction, excessive concentration of powers in the executive branch, insufficiently structured control over the activities of TR and SSC, as well as limited transparency of defense decisions. These problems are not accidental. They reflect the deep tension between the need of the state to act quickly and the duty to act within the framework of the Constitution.

Comparative legal analysis allowed us to notice that democratic institutions in other countries also face similar challenges, but have developed different formulas for overcoming them. Some states apply models of accelerated constitutional control, others strengthen parliamentary oversight, and still others create special institutions to assess the proportionality of restrictions on rights. This experience proves that an effective defense system does not contradict an effective system of constitutional control. On the contrary, they mutually reinforce each other if they are built harmoniously.

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