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Questionnaire

Reply by the Constitutional Court of Ukraine

1. Challenges of Social Integration in a Globalised World

1.1. What challenges has your court encountered in the past, for example, in the field of asylum law, taxation law or social security law?

While ensuring within the framework of its powers and authorities the supremacy of the Constitution of Ukraine, the Court acts as a participant of social and integration processes going on in the society. In its practice, it encountered challenges in the sphere of social protection characterised by a high degree of public involvement and severity, the resolution of which was directly related to the financial resources of the state.

Ukraine has repeatedly experienced the situation when the legislator restricted the amounts of social payments or benefits provided for by law when passing the annual law on the State Budget. Such practice was recognised as unconstitutional taking into consideration the constitutional prohibition to cancel the constitutional rights and freedoms, to narrow the contents and the scope of the existing rights when passing new laws or amending the applicable legislation (Decisions №№ 5-rp/2002, 7-rp/2004, 20-rp/2004, 8-rp/2005, 6-rp/2007, 10-rp/2008, 22-rp/2010).

The issues pertaining to pension provision are not less relevant. For instance, pursuant to the Ukrainian legislation, pensions were not paid to the citizens for the period of the pensioner's residence abroad if otherwise was not provided for by an international treaty of Ukraine (except for the persons receiving pensions as a result of a labour injury or a professional disease). The Court recognised such provisions of the Law "On Mandatory State Pension Insurance" to be unconstitutional motivating it by inadmissibility of restriction of the constitutional rights and freedoms, equality of citizens' constitutional rights regardless of the place of their residence, guarantee of the right to social protection in older age for the Ukrainian citizens staying abroad (Decision № 25-rp/2009).

Several cases considered by the Court deal with health care issues. For instance, in its Decision № 10-rp/2002 on the case concerning free medical assistance the Court ruled that such assistance guaranteed by the Constitution of Ukraine, is to be provided to all citizens in full scope, i.e. it should meet the human need for health preservation or rehabilitation. It pointed out that payment may not be charged from the citizens for medical assistance by state and municipal health care institutions in any form, and it furthermore ruled out the suggestions of some state bodies concerning introduction of limits to free medical assistance in the form of its guaranteed level, provision of such assistance only to citizens with low

incomes or “within the framework provided for by law” pointing out that they run contrary to the Constitution of Ukraine.

Based on the powers and authorities of the Constitutional Court of Ukraine related to examination of constitutionality of laws and other normative acts, the Court mentions inaccuracies (gaps) in the applicable legislation thus ensuring the constitutional protection of human and citizen’s fundamental social rights and freedoms.

1.2. How were issues of social integration or conflict transformed into legal issues?

Constitutional justice is an important institution guaranteeing social rights. Infringement of rights and freedoms in the social sphere may be caused not only by illegal action or omission of state bodies and their officials but they may also follow from non-conformity of laws to the constitutional principles.

The Constitutional Court in its decisions identifies the limits and creates opportunities for the legislator thus facilitating the consistent development of social legislation aimed at harmonising citizens’ interests with public interests to avoid arbitrary and ungrounded refusals to ensure social protection measures at the same time taking into consideration the economic and financial opportunities of the state.

Powers and authorities of the Constitutional Court related to recognising the unconstitutionality of normative acts and providing official interpretation of the norms regulating certain social relations create a necessary and adequate foundation for transforming the issues it considered into legal phenomena or their acquiring the necessary legal regulation. At the same time, while in some cases it would suffice that the Court decision is simply implemented, in other cases the lawmaker has to introduce a new legal regulation instead of that recognised unconstitutional.

For instance, when considering the case on free-of-charge use of school textbooks (Decision № 18-rp/2002), the Court (on the basis of the constitutional right of everyone to education and a mandatory nature of mandatory complete secondary education) maintained that a school textbook is a traditional integrating and organising tool for conveying knowledge to students, and the state’s ensuring free of charge provision of school textbooks to the students is a guarantee of mandatory complete secondary education, its accessibility and free-of-charge nature in the state and municipal educational institutions. In view of recognising unconstitutionality of the provisions of the governmental resolutions introducing payment for the use of school textbooks, the respective provisions lost their effect on the day of promulgation of the Court Decision. In this case, no new/additional legal regulation was necessary.

1.3. Is there a trend towards an increase in cases on legal issues relating to social integration? If so, what were the dominant questions before your Court in the past and what are they at present?

A trend towards an increase in such cases can be discussed on the basis of comparison of the Court’s practice before 2006 and since 2007 till today. The first period saw a development of a scope of legal issues in this sphere, including medical insurance and medical assistance; benefits, compensations and guarantees for certain categories of citizens; provision of housing; right to labour; accessibility, compulsory and free of charge nature of education; exclusions from the universal principle of equality of rights and freedoms of citizens and their equality before the law; introduction of age limits for some categories of citizens.

Groups of similar legal issues related to the social sphere received the quantitative contents during the second period; at the same time, personal and political rights gained

weight in the social integration process (the right to vote, the right to family and private life, the right to freedom and personal inviolability, use of languages). Yet, the dominating place in this growth dynamics was taken by legal issues related to social welfare and social protection, which is obviously most typical for transition economies.

However, the frequency of the Court's dealing with this problem at present has decreased, including as a result of adoption of several conceptual decisions by the Court. For instance, in the past the majority of disputed matters were related to restriction of social payments by the law on the State Budget, year after year (Decisions №№ 5-rp/2002, 7-rp/2004, 20-rp/2004, 8-rp/2005, 6-rp/2007, 10-rp/2008). The Court ruled on unconstitutionality of the restriction of the allowance and/or volume of certain social rights referring to the impossibility to amend or suspend by the law on the State Budget the effect of other laws of Ukraine. At the same time, the Parliament continued its unlawful practices even after the Court adopted the Decision defining the subject matter and contents of the law on the State Budget (Decisions №№ 10-rp/2008, 22-rp/2010).

In the case on the balanced nature of the budget (Decision № 26-rp/2008) the Court combined the responsibilities related to ensuring social welfare of citizens with the state's desire when identifying incomes and expenses in the law on the State Budget (also when adopting laws and other normative legal acts that can influence the incomes and expenses of the Budget) to preserve their equilibrium, and its obligation based on a fair and unbiased distribution of public wealth among the citizens and territorial communities to guarantee human rights and freedoms as well as decent living conditions.

Later, the Court stated that the social and economic rights envisaged by law are not absolute (Decision №20-rp/2011). The mechanism of implementation of these rights can be changed by the state, more specifically because of the impossibility of their financing by means of proportional re-distribution of the funds to preserve the balance of the interests of the entire society. However, changing the mechanism of calculation of certain types of social payments and assistance is constitutionally admissible to a degree, beyond which the meaning of the contents of the right to social protection becomes questionable.

In recent years, the socially-oriented appeals considered by the Court shifted towards protection of labour (salaries) and housing rights of the citizens.

2. International Standards for Social Integration

2.1 What are the international influences on the Constitution regarding issues of social integration/social issues?

Provisions of international treaties in the field of social rights were implemented in the norms of the Constitution, in particular in Chapter II "The Rights, Freedoms, and Duties of Individuals and Citizens" of the Constitution of Ukraine, which stipulates social rights (right to rest - Article 45, right to social protection - Article 46, right to housing - Article 47, right to an adequate standard of living - Article 48, right to medical care and medical insurance - Article 49, etc.).

Analysis of Chapter II of the Constitution of Ukraine indicates that almost all articles in this chapter proclaiming social rights, reflect in this or that way the content of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. These international instruments have become the foundation for the domestic lawmaking in the social human rights.

The Constitution also includes the catalogue of social human rights analogous to the European Convention on Human Rights, though it is not limited by it (at the same time there could happen individual terminological differences between conventional and constitutional

provisions). Accordingly, there exists double protection of fundamental rights and freedoms in Ukraine enshrined in the European Convention on Human Rights and in the Constitution of Ukraine: it is carried out at the constitutional and conventional levels. These rights and freedoms have the single meaning which is established in the process of their application and also interpretation of the conventional and the constitutional norms.

2.2. Does your Court apply specific provisions on social integration that have an international source or background?

International and legal sources of provisions on social integration have been repeatedly applied by the Court in its jurisprudence on the ground of Article 9 of the Constitution of Ukraine.

The Court referred to the provisions of international legal instruments adopted within the UN, UN specialised agencies and regional international organisations as such sources.

One of the fundamental documents in the sphere of protection of human rights is the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948. Although the above Declaration has recommendatory nature, the Court often referred to its provisions; for example, it concerned issues related to ensuring the right to social security (Decisions №№ 20-rp/2011, 3-rp/2012, 1-rp/2005), right to an adequate standard of living, including the right to housing (Decision № 15-rp/2010), right to education (Decision №5-rp/2004).

The Court also referred to the International Covenant on Economic, Social and Cultural Rights of 1966, namely to the issues related to the principles of social state (Decisions №№1-rp/2005, 6-rp/2007, 20-rp/2008), right to housing (Decision №15-rp/2010), right to education (Decisions №№ 18-rp/2002, 5-rp/2004). The Court applied the provision of the above Covenant referring to the state's obligation to ensure the child care and protection (Decision №3-rp/2009), as well as in cases related to freedom of association, in particular the establishment and membership in trade unions (Decision №11-rp/2000) and the general obligation of the state on graduate and complete implementation of the rights recognised in the Covenant by all appropriate means (Decision №3-rp/2012).

The provisions of the Convention on the Rights of the Child of 1989 found their reflection in consideration of the issues on the right to education (Decision №18-rp/2002). Moreover, consideration of the case related to the state's obligation to ensure child care and protection, resulted in the Court's referral to the provisions of the above Convention and the Declaration of the Rights of the Child of 1959 (Decision №3-rp/2009).

In considering cases on citizen's labour rights, the Court made reference to the provisions of the Conventions of the International Labour Organisation. For instance, taking into account the provisions of the Convention №111 on Discrimination (Employment and Occupation) of 1958, the Court resolved the issue of the age limit for employment to certain positions (Decision №8-rp/2007). In addition, the Court found appropriate the restriction of the sphere of application of the contract by the law in view of the necessity to fulfill the requirements of the ILO Termination of Employment Convention N158 of 1982 (Decision №12-rp/1998).

It was not a rare occasion that the Court when deciding on the issues of social integration referred to the international acts of the Council of Europe, first of all to the provisions of the European Social Charter (revised) of 1996, for example, when interpreting the concept "medical aid" (Decision № 10-rp/2002), as well as in the issue which concerned the citizen's right to housing (Decision № 5-rp/2012). The Court's reference to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 concerning citizen's social and labour rights is also worth mentioning (Decisions №№11-rp/2000, 6-rp/2007, 20-rp/2008).

The Council of Europe and EU acts may be the examples of the application of the provisions of the documents of recommendatory nature by the Court. For instance, examining the possibility of introduction of specific age limits on some kinds of labour activities the Court in its Decision №8-rp/2007 took into account the provisions of the EU Council's Directive 2000/78/EU of 27 November 2000 on the general framework for equal treatment in employment and in labour activity.

2.3. Does your Court directly apply

International instruments in the field of social integration?

In accordance with Article 9 of the Constitution of Ukraine, international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine.

The Court as a body of state power shall apply the international instruments, which were ratified properly and are a part of the legislation of Ukraine.

Besides, Article 9 of the Law of Ukraine "On International Treaties" envisages the order of the ratification of international treaty, namely by adopting a respective law on ratification, the text of the international treaty being the integral part of it.

2.4. Does your Court implicitly take account of international instruments or expressly refer to them in the application of constitutional law?

The Constitutional Court of Ukraine applies both approaches in its jurisprudence: it takes account as well as directly refers to the international instruments in the sphere of social integration in its decisions.

For instance, the Court directly referred to the provisions of the International Covenant on Economic, Social and Cultural Rights of 1966 and the Convention on the Rights of the Child of 1989 (Decision № 3-rp/2009 on age difference between an adoptive parent and a child).

The Court also indirectly refers to the international instruments of recommendatory nature. In the Decision on the protection of consumers of credit rights (Decision № 15-rp/2011) the Court took into consideration the provisions of the international acts, namely the UN General Assembly Resolution № 39/248 "Guidelines for Consumer Protection" dated April 9, 1985, Charter on Consumer Protection (Approved by the Resolution of the Consultative Assembly of the Council of Europe № 543 dated 17 May 1973), Directive 2005/29/EU of the European Parliament and the Council of 11 May 2005 on unfair business-to-consumer commercial practices, Directive 2008/48/EU of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers.

Moreover, the Court repeatedly made references to the judgments of the European Court on Human Rights in the sphere of social integration (for instance, Decisions №№3-rp/2009, 20-rp/2011, 3-rp/2012).

2.5. Has your Court ever encountered conflicts between the standards applicable on the national and on the international level? If so, how were these conflicts solved?

The Court's jurisprudence knows very few cases of conflict between national and international standards, in particular in view of the fact that the Constitution of Ukraine has high level of compliance with the latter.

One of the examples of such conflict is the case of K. Ustymenko (Decision № 5-zp/1997). Personal data given in the official interpretation of the provisions of the Law of Ukraine "On Information" are referred to confidential information, the Court also emphasised the importance of the constitutional right to direct appeal to the Court regarding the

complaints concerning unlawful deeds in this sphere, disclosed the scope of regulation of operations with medical information. In its motivational part of the Decision special attention is given to the fact that “Ukrainian legislation has not yet been harmonised with the European standards in the sphere of protection of personal data in view of Ukraine’s accession to the Council of Europe” concerning legal protection of those individuals who suffer from mental illness. Further on the Court noted that a lot of valid normative acts in this sphere had been adopted in the period of Soviet Union, are departmental and contradict “generally recognised principles of the recommendatory character”. The issue on the merits was decided by the Court on the grounds of the provisions of the Constitution of Ukraine and generally recognised principles of law.

Also in the Decision № 11-rp/2000 in the case on freedom of establishment of trade unions the Constitutional Court stated that in the sphere of citizens’ right for freedom of association, the requirements of the International Covenant on Economic, Social and Cultural Rights and the Convention of the International Labour Organisation on the freedom of association and protection of right to their establishment of 1948 were not given a proper reflection in the individual provisions of the Law of Ukraine “On Trade Unions, Their Rights and Guarantees of Their Activities”. The Court declared these provisions as non-compliant with the Constitution of Ukraine.

3. Constitutional Instruments Enhancing/Dealing with/for Social Integration

3.1. What kind of constitutional law does your Court apply in cases of social integration – e.g. fundamental rights, principles of the Constitution (“social state”), “objective law”, *Staatszielbestimmungen*, ...?

When dealing with cases concerning social integration, the Constitutional Court of Ukraine mainly applies a totality of the constitutional law instruments, including:

- the principles provided for in the Constitution of Ukraine (such as social state, rule of law, equality of constitutional rights and freedoms, equality of citizens before the law), on which the absolute majority of decisions on this category of cases is based;
- *Staatszielbestimmungen* (namely, effort to ensure the balanced nature of the budget; support for consolidation and development of the Ukrainian nation, its historical identification, traditions and culture, development of ethnic, cultural, linguistic and religious uniqueness of all indigenous peoples and national minorities in Ukraine; promotion of environmental safety and support of environmental equilibrium in the territory of Ukraine, Chornobyl disaster cleanup);
- fundamental rights (such as the right to freedom of belief system and religion; the right to social protection; the right to health care, medical assistance and medical insurance; the right to education);
- official interpretation by the Court of the norms of the Constitution and laws of Ukraine forming part of their contents;
- “objective law” provided for in the legislation as well as objectively functioning in the society. Such an opportunity is justified by the Court Decision №18-rp/2004, which reads that following the contents of paragraph 1 Article 8 of the Constitution of Ukraine, an interest is protected not only by law but also by the objective law in general that is prevailing in the society, namely justice, since the interest in a narrow sense of this word is explained by the general contents of such law and forms a part thereof. One of the manifestations of the rule of law is the fact that law is not limited by legislation alone as one of its form but includes other social regulators such as moral norms, traditions, customs, etc. that are legitimised by the society

and explained by the historically achieved cultural level of the society. All these elements of law are united by the quality corresponding to the ideology of justice, the idea of law that to a large extent was reflected in the Constitution of Ukraine (Decision № 15-rp/2004).

3.2. In cases where there is access of individuals to the Constitutional Court: to what extent can the various types of constitutional law provisions be invoked by individuals?

Access of individuals as well as legal entities to the Constitutional Court of Ukraine is exercised by means of their submitting a constitutional appeal – a written application to the Court asking for official interpretation of the Constitution of Ukraine and/or laws of Ukraine to ensure implementation or protection of the constitutional human and citizen's rights and freedoms as well as the rights of a legal entity.

Legislation regulating activities of the Court does not impose any restrictions concerning the possibilities to refer to any constitutional law provisions. Furthermore, one of the requirements for admissibility of a constitutional appeal is the presence of the justification for the need for official interpretation of provisions of the Constitution and/or laws of Ukraine. Such justification implies the use of respective constitutional law provisions.

3.3. Does your Court have direct competence to deal with social groups in conflict (possibly mediated by individuals as claimants/applicants)?

Article 43 of the Law of Ukraine "On the Constitutional Court of Ukraine" sets forth an exhaustive list of persons having a right to file a constitutional appeal asking for official interpretation of the Constitution and laws of Ukraine that includes citizens of Ukraine, foreigners, stateless individuals and legal entities.

In turn, in the Court's practice the right to file a constitutional appeal was granted also to a group of individuals united by a common legal interest. More specifically, it considered constitutional appeals filed by pensioners residing in Krasnogvardeisk Raion of the Autonomous Republic of Crimea; pensioners – former civil servants; private notaries of Kharkiv City Notary District (Rulings №№14-u/1998, 5-u/2002, and 14-u/2002, respectively). The Court also examined constitutional appeals filed by legal entities that in fact are social groups, for instance, Greek Catholic Religious Community "Preobrazhenskaya" from Uzhgorod, Lawyers' Union "Sodeistvie", trade union of workers of metallurgical and mining industry of Ukraine, trade union of railway workers and transport constructors of Ukraine (Rulings №№52-z/1997, 6-u/1999, 25-u/1999, 43-u/2001 respectively).

With regard to disputes among the conflicting social groups, the Court has no jurisdiction; such cases are dealt with by courts of general jurisdiction of Ukraine.

3.4. How does your Court settle social conflicts, when such cases are brought before it (e.g. by annulling legal provisions or by not applying them when they contradict the principle of equality and non-discrimination)?

The Constitutional Court of Ukraine solves social conflicts emerging in the society through implementation of its constitutional authorities.

For instance, the Court has the authority to recognise unconstitutional in whole or in part the laws and other legal acts if they are not in conformity with the Constitution of Ukraine or if there is a violation of the procedure for their consideration, adoption or entry into force established by the Constitution of Ukraine. Acts (provisions thereof) declared unconstitutional lose their legal force from the date of the adoption of the decision of the Constitutional Court of Ukraine on their unconstitutionality. For instance, based on the Decision of the Court №20-rp/2004 the provisions, suspending or limiting specific social benefits, lost their legal force.

Moreover, official interpretation of the provisions of the Constitution and laws of Ukraine by the Court is an effective means of social conflict settlement. Illustrative examples are, in particular, Court's Decisions №10-rp/2002 on free-of-charge medical aid, №5-rp/2004 on accessibility and free-of-charge education.

3.5. Can your Court act preventively to avoid social conflict, e.g. by providing a specific interpretation, which has to be applied by all state bodies?

Court's official interpretation of the provisions of the Constitution and laws of Ukraine may facilitate not only to the settlement and restraint (non-proliferation) of any social conflict, but its prevention. It is stipulated by the fact that interpretation of a legal norm, given by the Court, takes over compulsory nature for all subjects of its law-application.

The possibility of the Court to act preventively is directly concluded in its constitutional authority on implementation of preliminary review of draft laws amending the Constitution of Ukraine regarding their conformity with the requirements of Articles 157 and 158. Revealing such conformity, the Court, in particular, is guided by the prescription that the Constitution of Ukraine may not be amended, if such amendments foresee abolition or restriction of human and citizen's rights and freedoms or if they are directed towards the liquidation of independence or violation of territorial integrity of Ukraine.

For the period of its activity (as of January 2014), the Constitutional Court of Ukraine provided 25 Opinions in exercising the above authority. Among them there were the Opinions which declared respective draft-laws running contrary to the requirements of Articles 157 and 158 of the Constitution of Ukraine which resulted in the impossibility of the Verkhovna Rada of Ukraine to further consider them, thus excluding the adoption of their norms as the provisions of the Fundamental Law of Ukraine. For example, the Court has repeatedly declared inconsistent with the mentioned requirements the provisions of draft-laws amending Article 105 of the Constitution of Ukraine on the exclusion of its first paragraph, according to which the President enjoys the right of immunity for the period of exercise of the powers (Opinions №1-v/2010, №1-v/2012).

3.6. Has your Court ever encountered difficulties in applying these tools?

Considering the cases concerning the protection of social rights in the conditions where economic opportunities did not allow to provide them in full, the Court faced the difficulties of simultaneous application and guarantee of the implementation of the principles enshrined in the Constitution of Ukraine (social state, social orientation of economy, inadmissibility of narrowing the contents and scope of existing rights and freedoms) and "state tasks" (aspiring to a balanced nature of the budget). In a series of its decisions (№№20-rp/2008, 20-rp/2011, 3-rp/2012), the Court, seeking to overcome such difficulties, formulated basic legal positions, according to which:

- one of the features of Ukraine as a social state is ensuring public needs in the field of social protection at the expense of the State Budget of Ukraine on the basis of the financial capacity of the state, which is obliged to fairly and impartially distribute social wealth between citizens and territorial communities and strive to balance the budget of Ukraine;
- social and economic rights provided by laws are not absolute; mechanism for the implementation of these rights can be changed by the state, in particular, in view of the impossibility of their financial security by proportional redistribution of funds in order to maintain balance of interests of the whole society;
- change of the mechanism of calculation of social payments and benefits should be performed in accordance with the criteria of proportionality and fairness and is constitutionally admissible to the extent where the essence of the right to social protection is questioned.

3.7. Are there limitations in the access to your Court (for example only by state powers), which prevent it from settling social conflicts?

Legislation regulating the activities of the Constitutional Court of Ukraine does not provide for any restriction concerning the list of subjects having a right to file a petition to the Court asking it to initiate constitutional proceedings, including those related to resolution of social integration problems.