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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

UKRAINE

DRAFT OPINION

**ON THE DRAFT LAW
ON THE CONSTITUTIONAL COURT**

on the basis of comments by

Mr Osman Can (Member, Turkey)
Mr Christoph Grabenwarter (Member, Austria)
Mr Wolfgang Hoffmann-Riem (Member, Germany)
Ms Hanna Suchocka (Honorary President)

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Contents

I.	Introduction	3
II.	Analysis.....	3
A.	Composition of the Constitutional Court.....	3
1.	Competitive selection – screening committees	4
2.	Time limits for appointment.....	6
3.	Majority for the election of judges by the Verkhovna Rada	6
4.	Dismissal of judges	7
5.	Political activities of judges.....	7
B.	The constitutional complaint	8
1.	Full constitutional complaint vs. normative constitutional complaint.....	8
2.	Implementation and extension in the draft law	9
C.	Time limits for proceedings.....	10
D.	Attendance quorum	11
E.	Other issues	11
III.	Conclusion	14

I. Introduction

1. During a visit of the President of the Venice Commission, Mr Gianni Buquicchio, to Kyiv on 7 October 2016, the President of Ukraine, Mr Petro Poroshenko, requested an opinion on the draft Law on the Constitutional Court (CDL-REF(2016)066, hereinafter the “draft Law”). The draft Law is prepared on the basis of constitutional amendments on the judiciary adopted in June 2016.
2. The Commission invited Mr Osman Can, Mr Christoph Grabenwarter, Mr Wolfgang Hoffmann-Riem and Ms Hanna Suchocka to act as rapporteurs on this issue.
3. On 16 November 2016, a delegation of the Commission, composed of Mr Can, Mr Hoffmann-Riem and Ms Suchocka, accompanied by Mr Dürr from the Secretariat, visited Kyiv and met with (in chronological order) NGOs, the working group on the draft Law on the Constitutional Court, established under the Judiciary Reform Council, the Judges of the Constitutional Court of Ukraine and Ms Valentyna Symonenko, Chairperson of the Council of Judges.
4. The present opinion was prepared on the basis of contributions by the rapporteurs and on the basis of an unofficial translation of the draft Law. Inaccuracies may occur in this opinion as a result of incorrect translations.
5. *This opinion was adopted by the Venice Commission at its ... Plenary Session (Venice, ...).*

II. Analysis

6. *The draft Law on the Constitutional Court has been prepared as a result of amendments to the Constitution of Ukraine adopted in June 2016. Several Opinions of the Venice Commission contained recommendations relating to the Constitutional Court, some of which remain relevant.¹*
7. The draft Law is situated within the framework of the amended Constitution, which creates limitations for the legislator in some respects.

A. Composition of the Constitutional Court

8. According to Article 148 of the Ukrainian Constitution, the Constitutional Court is composed of eighteen judges (para. 1). The President of Ukraine, the *Verkhovna Rada* and the Congress of Judges each shall appoint six judges to the Constitutional Court (para. 2). The constitutional amendments of June 2016 introduced the principle that the selection of judges of the

¹ CDL-AD(2015)043 Secretariat Memorandum on the compatibility of the Draft Law of Ukraine on amending the Constitution of Ukraine as to Justice as submitted by the President to the Verkhovna Rada on 25 November 2015 (CDL-REF(2015)047) with the Venice Commission's Opinion on the proposed amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015 (CDL-AD(2015)027); CDL-AD(2015)027 Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015); CDL-PI(2015)016 Preliminary Opinion on the proposed constitutional amendments regarding the judiciary of Ukraine; CDL-AD(2013)034 Opinion on proposals amending the Draft Law on the amendments to the Constitution to strengthen the independence of Judges of Ukraine; CDL-AD(2013)014 Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine; CDL-AD(2006)016, Opinion on possible Constitutional and Legislative Improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine.

Constitutional Court shall be conducted on a competitive² basis, but the definition of the procedure for this competitive selection is delegated to the law (para. 3). Paragraph 4 sets out the criteria for being a judge (citizen, command of state language, at least 40 years of age, higher legal education and at least 15 years of professional legal experience and being a lawyer of recognised competence and high moral values). The judges shall not belong to political parties, trade unions, take part in any political activity, hold a representative mandate, occupy any other paid office, or perform other remunerated work, except scholarly, teaching or creative activities (para. 5). The judges have a mandate of nine years and cannot be reappointed (para. 6). A judge's mandate starts with the taking of the oath at a plenary sitting of the Court (para. 7). The Court elects its own Chairman by secret ballot for a term of three years (para. 8).

9. Regarding the lack of detailed constitutional provisions, the Venice Commission stated that "[u]nder Venice Commission standards, there is no requirement as such that the procedure for appointments to the judiciary be described in detail in the Constitution itself."³ However, the Venice Commission also stated – with regard to the Constitution of Finland – that "[s]ince the appointment of judges is of vital importance for guaranteeing their independence and impartiality, it is recommended to regulate the procedure of appointment in more detail in the Constitution."⁴

10. The criterion of recognised legal competence for that selection might be difficult to ascertain with precision in practice, but it can be accepted. The aim of this formula is to point out that the judges of the Constitutional Court should have a special "higher" legal knowledge. Similar provisions also exist in other countries.⁵

1. Competitive selection – screening committees

11. The choice for a competitive selection procedure for judges is to be welcomed and corresponds to the best European and international practices for the judiciary.⁶ The most remarkable provision concerning the selection of Constitutional Court judges is Article 12 of the draft Law which states that the competitive selection of candidates shall be carried out by three screening committees established by the President, the *Verkhovna Rada*, and the Congress of Judges of Ukraine "in the manner set forth by this Law." The idea to create one single screening committee was discussed, but not accepted by the drafters. The delegation of the Venice Commission was informed that three separate committees were chosen to allow the Congress of Judges to benefit from its own committee, composed of judges without any influence from the two other – political – powers.

12. Article 12 provides general rules for all three screening committees: at least half of the members of each committee shall be lawyers "with a recognised level of competence, such as doctors of sciences or professors in the field of law who do not participate in the competitive selection for the position of a Constitutional Court Judge." (para. 4).

² This was welcomed by the Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015 (CDL-AD(2015)027), para 24.

³ CDL-AD(2013)010, Opinion on the Draft New Constitution of Iceland, § 135.

⁴ CDL-AD(2008)010, Opinion on the Constitution of Finland, § 112.

⁵ E.g. Albania: "lawyers with high qualifications" (Article 125 of the Constitution); Croatia: "outstanding jurists, especially judges, public prosecutors, lawyers and university professors of law" (Article 122); Poland: "persons distinguished by their knowledge of the law" (Article 194 of the Constitution); Romania: "graduated law, and have high professional competence and at least eighteen years experience in juristic or academic activities in law" (Article 143 of the Constitution); Slovenia "expert in the law" (Article 163 of the Constitution).

⁶ CDL-AD(2013)014 Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, paragraph 27.

13. Surprisingly, there are no requirements dealing with the total number of members of the committees and there are no criteria laid down for the selection of the other half of the members. There is a risk that people may be chosen who are guided by considerations other than the professional competence of a judge. There are also no rules on whether these committees are permanent or established *ad hoc* for each open vacancy at the Court. The draft Law should include clear rules on the qualification of the second half of the members and on how the committees are set up in order to avoid any abuse.

14. According to Article 12.3 of the draft Law, the screening committee of the *Rada* "shall include at least one representative from a parliamentary faction". The delegation of the Commission was informed that this translation was incorrect and that the Ukrainian version read that "every" faction shall at least send one representative. This is to be welcomed. However - also depending on the size of the committee - there is no guarantee that this will lead to a balanced composition where all political forces in the *Rada* are represented proportionally. In order to secure a balanced composition of the committee, it is recommended that the factions of the *Rada* be represented proportionally in the committee.

15. "Following the review of the information about candidates and interviews with them, the screening committees shall compile a list of candidates, indicating the recommended ones" (Article 12.5). The number of candidates in the list shall be at least three times the number of vacancies. However, the provisions concerning the appointments by the three appointing powers (Articles 13 to 15) do not refer to these lists. It is therefore unclear whether the President of Ukraine, the *Verkhovna Rada* and the Congress of Judges are bound by the list of candidates (which shall indicate the recommended candidates) compiled by their respective screening committee. The relevant provisions only state that these state organs shall appoint the Constitutional Court judge "[f]ollowing the competitive selection".

16. However, the absence of any link between the result of the selection process and the appointment can make all these arrangements meaningless. The list has to comprise at least three candidates for each vacancy and it is among these candidates that the screening committee can make its recommendations. The role of the screening committee is therefore double, first, to eliminate candidates who do not fulfil the requirements and, second, to provide a ranking among the remaining candidates. The President, the *Rada* and the Congress of Judges necessarily retain a real choice within this list and can choose a candidate who did not achieve a high ranking (recommendation). There may, of course, be public pressure to appoint one of the higher-ranked candidates, but the decision remains with the appointing authority. In order to avoid that candidates, who have not passed the selective competition, are appointed / elected it should be made explicit in the draft Law that only candidates from the list prepared by the screening committees can be appointed / elected.

17. Following the general provisions of Article 12, the draft Law establishes specific procedures for the appointment / election of the judges by the President of Ukraine (Article 13), by the *Verkhovna Rada* (Article 14) and by the Congress of Judges (Article 15).

18. Concerning the appointment by the *Verkhovna Rada*, the draft Law provides in Article 14.2 for a special procedure if the *Rada* fails to elect a Constitutional Court judge. Then, there will be a second ballot for the two candidates with the highest number of votes in the first ballot. It is recommended to provide that the second ballot takes place shortly after the first ballot.

19. Article 16.2 of the draft Law provides that a judge shall remain in office until the appointment of a new judge - but for a maximum period of three months - if the termination of

his or her mandate would bring the number of remaining judges below the quorum. This provision attempts to remedy a problem which in 2005 led to a constitutional crisis. Already then, the *Rada* was competent to elect one-third of the judges of the Court, but it was also competent to accept the oath of all judges, including those appointed or elected by the other two powers. The *Rada* not only failed to elect judges under its own quota, but also refused to accept the oath of judges who had been appointed or elected by the other two powers. As a consequence, due to the retirements of judges, the number of remaining judges fell below the quorum and the Court could not sit for a year and a half.⁷

20. In its opinion following this crisis⁸, the Commission recommended that there should be a default mechanism for taking the oath. The Commission warmly welcomes that this problem is now settled by the acceptance of the oath before the Court itself.⁹ The same opinion also recommended that retiring judges should stay in office until their successor takes office. The latter recommendation remains fully valid. The solution of Article 16.2 of the draft Law is too limited. It only applies when the number of remaining judges already equals the quorum. If now another judge were to be too ill to work as a judge or were to die, the Court would no longer be able to sit. Judges should remain in office until their successor takes office, even if the three-month period has expired. This solution might require a constitutional amendment.

2. Time limits for appointment

21. Following the end of the mandate of a judge, the draft Law provides for an obligation to appoint a successor within two months (Articles 13.2, 14.3 and 15.3). In the light of the experience of 2005, this narrow time frame probably should ensure that there will be no vacancies for a longer period. This is to be welcomed since it aims at preventing the possibility that appointments of new judges will be delayed for tactical reasons, for instance in order to influence the majority in the Grand Chamber, the Senates or the boards.

22. However, there is no rule on what happens after these two months. One solution would be to provide that the person with the highest ranking by the selection committee could take the oath at the Court. An alternative might be that the – political organs – the President and the *Rada* lose the right to appoint a new judge once the two-months period has expired. Then the Congress of Judges of Ukraine – as a non-political body – could be entitled to elect a judge instead of the President or the *Rada*. Admittedly, this solution cannot work if it is the Congress of Judges that did not elect a judge, but this might be less likely. These solutions might require a constitutional amendment.

3. Majority for the election of judges by the Verkhovna Rada

23. With respect to the election of judges by the *Verkhovna Rada*, there is another issue. According to Article 14.2 of the draft Law, the *Verkhovna Rada* elects the judges by a simple majority. This leads to the risk that all elected judges could be seen as being close to the majority in Parliament. If in addition the majority's views are also close to the political views of the President of Ukraine, there is a risk of having an unbalanced composition of the Court.

⁷ The Venice Commission and the Lithuanian Presidency of the Conference of European Constitutional Courts made a joint declaration calling upon Parliament to end this situation:

http://www.venice.coe.int/files/2005_12_17_ukr_declaration_appointment_cc_judsituation.

⁸ CDL-AD(2006)016, Opinion on possible Constitutional and Legislative Improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine adopted by the Venice Commission at its 67th Plenary Session (Venice, 9-10 June 2006).

⁹ See also CDL-AD(2016)001, para 108.

24. The Venice Commission recommended the introduction of a qualified majority for the election of judges to the Constitutional Court by Parliament. However, this proposal was not followed by the Ukrainian authorities in the process of amending the Constitution in June 2016 and the system of simple majority remained.¹⁰ The Venice Commission maintains this recommendation for a future amendment of the Constitution of Ukraine.

4. Dismissal of judges

25. The Venice Commission welcomes the new provision that the President, the Parliament and the Congress of Judges respectively have no right to dismiss judges of the Constitutional Court. This removes a danger of pressure on the judge. A judge can be dismissed only by a decision of at least two-thirds of the judges of the Constitutional Court itself.

26. Another welcome solution, which reflects one of the positive amendments to the Constitution, is that one of the strongly criticised grounds for the dismissal of judges was removed, namely, the “breach of oath”, which had been misused – notably in the ordinary judiciary – to remove judges who did not prove their loyalty to public officials. According to Article 21 of the draft Law, a judge of the Constitutional Court can be dismissed because of a substantial disciplinary offence, gross or systematic negligence of his or her official duties, which is incompatible with his or her status as a judge or proves his or her professional inadequacy. This formula provides better protection than the “breach of oath”.

5. Political activities of judges

27. According to Article 148.5 of the Constitution, a judge of the Constitutional Court of Ukraine shall *inter alia* not belong to a political party or take part in any political activity. In a joint opinion relating to Georgia, the Venice Commission and OSCE/ODHIR accepted that “[Judges] may not be members of political parties or participate in political activities.”¹¹ “Moreover, judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges.”¹²

28. In the Ukrainian context, judges were subordinated to the leading role of this party for about 70 years. For this reason, the principle of neutrality has been introduced and this justifies banning a member from a political party in order to remove judges from the political arena and to provide guarantees for the independence of the judges.

29. However, Article 11.3 of the draft Law extends the requirement of political abstention to activities three years before becoming a constitutional judge and excludes as a judge any person (a) who was a member or held a position in a political party or similar organisation, (b) was a candidate or was elected to a government or local government office or (c) participated in managing or financing a political campaign or other political activities.

30. While the Venice Commission welcomes the approach to ensure that the judges of the Constitutional Court are not influenced by political motivations, political activities of citizens belong to the core of a pluralistic democracy and, thus, should be promoted. This includes political activities within political parties, even for persons who may be qualified to become a constitutional judge in the future.

¹⁰ CDL-AD(2015)027, para. 25.

¹¹ CDL-AD(2005)003, Joint Opinion on a Proposal for a Constitutional Law on the Changes and Amendments to the Constitution of Georgia by Venice Commission and OSCE/ODIHR, § 104.

¹² CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, § 62.

31. The two important principles – the protection of judicial impartiality as a judge and the value of political commitment in a democracy – must be reconciled. In the view of the Venice Commission, notably simple party membership should not disqualify, but even the obligation to refrain from qualified political activities for a time-period of three years is too strict to balance these principles. The removal of this limitation should be considered.

B. The constitutional complaint

1. Full constitutional complaint vs. normative constitutional complaint

32. In its Study on Individual Access to Constitutional Justice, the Venice Commission distinguishes between “normative constitutional complaints” and “full constitutional complaints”; the former are directed against the application of unconstitutional normative acts (laws), whereas the latter are directed against unconstitutional individual acts, whether or not they are based on an unconstitutional normative act.¹³

33. In 2013, the Venice Commission recommended that Ukraine should introduce “a full constitutional complaint to the Constitutional Court - against all cases of violation of human rights through individual acts.”¹⁴ It added: “In Ukraine, individual complaints to the Constitutional Court can only be directed against unconstitutional legislation, but not against unconstitutional acts.”¹⁵ In 2015, the Preliminary Opinion on the Judiciary reminded the Ukrainian authorities of this recommendation and explained: “The constitutional complaint proposed under Article 151-1 goes further than the current possibility to request an official interpretation of the Constitution, insofar as it enables the Constitutional Court to annul the unconstitutional laws upon application by individuals. This is to be welcomed, even if it does not go as far as establishing a full constitutional complaint against individual acts as recommended by the Venice Commission”.¹⁶

34. The draft Law defines the constitutional complaint on the basis of Article 151¹ of the Constitution and therefore does not introduce a full constitutional complaint, as it exists in Germany (*Verfassungsbeschwerde*) or Spain (*amparo*), for instance.¹⁷ The difference relates to the fact that the complainant cannot allege that an individual act infringes his or her rights due to an unconstitutional interpretation and application of a law if the law is not challenged as being unconstitutional itself. The subject of the decision of the Court must be the constitutionality of the law itself, though the complainant must show that the application of the law – deemed as unconstitutional – has infringed the applicant’s rights.

¹³ CDL-AD(2010)039rev, Study on individual access to constitutional justice - Adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), paras 77 and 79.

¹⁴ CDL-AD(2013)034, Opinion on Proposals Amending the Draft Law on the Amendments to the Constitution to Strengthen the Independence of Judges of Ukraine, § 11.

¹⁵ CDL-AD(2013)034, Opinion on Proposals Amending the Draft Law on the Amendments to the Constitution to Strengthen the Independence of Judges of Ukraine, § 11 (with footnote in the original text).

¹⁶ CDL-PI(2015)016, Preliminary Opinion on the proposed constitutional amendments regarding the judiciary of Ukraine, para 52. Before the introduction of the constitutional complaint individuals could only request an “official interpretation” under Article 147 of the Constitution. The Constitution specified who could request a decision on an issue (constitutional ‘petition’ by official organs) but it remained silent on who could request interpretations. The Constitutional Court Law which is still in force built on this lacuna and allows also individuals to request an interpretation by way of constitutional appeal (Article 42 of the Law). According to Article 62 of the Law, if the during the examination of a petition (by the state bodies) or an interpretation the Court finds an unconstitutional provision, it can repeal that provision.

¹⁷ There are systems of constitutional justice (even old ones like the Austrian) that do not go as far as to provide for the annulment of judgments of (ordinary criminal or civil) courts which interpreted a law in an unconstitutional manner. In Austria, until 2014, there was not even the possibility challenging a court decision on grounds of the application of an unconstitutional law. Only in 2015, there is the possibility of introducing a complaint against the law applied by the court (not against the court decision itself), but only the court of first instance.

35. The Ukrainian constitutional complaint is directed at the control of the constitutionality of laws, even if the individual is the initiator of that control. If the application is successful, the applicant has a benefit as far as his or her individual case is reopened by the ordinary courts.

36. Similar normative constitutional complaints exist for instance in Armenia¹⁸, Poland¹⁹ or the Russian Federation²⁰. As compared to the previous system, its introduction in Ukraine can be seen as a first step in order to strengthen the system of protection of human rights. The constitutional complaint, in its essence links the private interest (concrete case of an individual) and the public interest (the protection of the Constitution by removing unconstitutional laws from the legal order).

37. In Germany for instance, the applicants most often challenge the unconstitutional application of a law that is constitutional. The Constitutional Court only applies the Constitution as the yardstick of control and does not decide on the correct application of the law in other aspects. Therefore, the Constitutional Court exercises a subsidiary, specific constitutional control and it does not act as a “4th instance”. As a consequence, all decisions on the correct application of ordinary law remain the domain of the ordinary courts. The only exception is that the Constitutional Court can interpret an ordinary law when this avoids annulling it if it can be interpreted in conformity of the Constitution (“*verfassungskonforme Auslegung*”).

38. The current constitutional situation does not fall short of European standards, as there are systems of constitutional justice (even old ones like the Austrian) that do not provide for the annulment of judgments of (ordinary criminal or civil) courts, which interpreted a law in an unconstitutional manner. However, a full constitutional complaint would have the positive effect that individuals have the possibility of protecting their fundamental rights effectively on the national level before Ukrainian courts without the need to resort to the European Court of Human Rights. The Venice Commission maintains the recommendation to introduce a full constitutional complaint in a future constitutional amendment.

2. Implementation and extension in the draft law

39. The constitutional complaint is regulated in Articles 54 and 55 of the draft Law. It allows a “person” to appeal to the Constitutional Court alleging that a law applied by an ordinary court in a final decision concerning their case contradicts the Constitution. The complaint can be lodged only in respect of a final court decision, not a decision of public administrative organs. It is only possible to lodge a complaint to the Constitutional Court after the exhaustion of all other domestic remedies, i.e. appealing to the highest possible court instance. The constitutional complaint covers all constitutional rights, including social rights.

¹⁸ Article 169 of the Constitution of Armenia:

“1. The following may apply to the Constitutional Court...

8) Everyone – in a concrete case when there is a final act of court, all judicial remedies have been exhausted, and the person challenges the constitutionality of a provision of a normative legal act applied in relation to him by such act of court, which has led to a violation of his fundamental rights and freedoms enshrined in Chapter 2 of the Constitution, taking into account also the construal of such provision in its practical legal application; ...”

¹⁹ Article 79 of the Constitution of Poland

“1. In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution. ...”

In Poland, about 80% are individual complaints.

²⁰ “Article 125 of the Constitution of the Russian Federation:

...

4. The Constitutional Court of the Russian Federation, upon complaints about violations of the constitutional rights and freedoms of citizens and upon requests of the courts, shall verify the conformity with the Constitution of any law which is applied or shall be applied in a concrete case in a way established by federal law. ...”

40. The “person” (applicant) who can bring a complaint, can be a plaintiff, defendant, or even a third party, being of the opinion that the law (or individual provisions thereof) applied in a final court judgment in his/her case contradicts the Constitution.

41. The applicant can also be a legal person (Article 55.3), which is a positive step. However, according to Article 55.1 of the draft Law, the word “person” does not cover public entities. This means that the constitutional complaint is not open to local self-government. The constitutional amendments on local self-government have not yet been adopted and this question should be settled in a separate procedure within that framework.

42. Draft Article 88.3 takes a welcome step to enhance the chance for an individual to get justice in a case where the law is not unconstitutional, but where the Constitutional Court has found that an ordinary court interpreted a legal norm in a manner that is not in compliance with the Constitution.

43. Article 88.3 provides that, when within the framework of a constitutional complaint the Constitutional Court comes to the conclusion that the challenged law is constitutional, but it had been interpreted in an unconstitutional manner by an ordinary court, the Constitutional Court shall “indicate that fact in the operative part of its judgment.” This will then be the basis for reopening the final judicial judgment by the ordinary courts. Indeed the Final Provision 8, items 3 to 6, of the draft Law also amends the various procedure codes in order to oblige the ordinary courts to reopen the cases concerned, not only when an “unconstitutionality of the law or of any other act (or individual provisions thereof) [is] found by the Constitutional Court of Ukraine” but also when the “official interpretation of the provisions of the Constitution of Ukraine delivered by the Constitutional Court of Ukraine [...] is different from that applied by the court in its judgment”.²¹

44. Art 88.3 of the draft Law of Ukraine on the Constitutional Court is a step in the right direction, allowing a further examination of the constitutionality of acts, even though it cannot introduce a full constitutional complaint. The delegation of the Venice Commission was informed that this solution was hotly debated within the working group on the draft Law.

45. In practice, what could happen is that an individual challenges a legal provision, fully knowing that this provision is constitutional, only in order to allow the Constitutional Court to identify an unconstitutional application of the law. This problem can be dealt with by the Court during the examination of the admissibility of the case. When the board comes to the conclusion that the complaint does not really challenge the constitutionality of the law, but only its application, it can reject it under Article 76.4 of the draft Law as “manifestly ill-founded”. Such a control should not excessively burden the Constitutional Court.

C. Time limits for proceedings

46. The draft Law provides for time limits for proceedings. As of the date of the ruling on the initiation of proceedings, the term of constitutional proceedings may not exceed six months (Article 74.2). In special cases, Article 74.3 provides for a term of one month, notably (a) when the Constitutional Court gives an opinion on whether a draft amendment to the Constitution is in conformity with Articles 157 and 158 of the Constitution, (b) applications of the President challenging the unconstitutionality of government acts, suspended by the President (Article

²¹ The provisions in this sense amended are: Article 361 of the Civil Procedural Code of Ukraine (The Official Bulletin of the Verkhovna Rada of Ukraine, 2004, Nos. 40–42, p. 492); Article 245 of the Code of Administrative Procedure of Ukraine; Article 112 of the Economic Procedural Code of Ukraine (Official Bulletin of the Verkhovna Rada of Ukraine, 1992, No. 6, p. 56); Article 459 of the Criminal Procedure Code of Ukraine (Official Bulletin of the Verkhovna Rada of Ukraine, 2013, Nos. 9–13, p. 88).

106.1.15 of the Constitution), (c) when a Senate or the Grand Chamber regard constitutional proceedings as urgent.

47. For individual complaints, draft Article 60.4 provides that a ruling to initiate or reject proceedings has to be adopted by a board within one month from the assignment of the case to a judge rapporteur. However, this term may be extended by the Grand Chamber upon a request by the judge rapporteur or the chairperson of a senate. If the draft Law opts for such a deadline, it should also be introduced for petitions and appeals introduced by state institutions.

48. In principle, the Venice Commission welcomes that the draft Law addresses “the serious problem of dilatory or vexatious proceedings and thus protects the right to a fair trial”²², notably because with the introduction of the normative individual complaint, the rights of individuals are directly concerned. With regard to Articles 6 and 13 ECHR, “the Contracting States have great freedom to choose how they fulfil their commitments in this regard”²³. However, a predefined limited term of judicial proceedings comprises the danger of a loss of legal quality of those cases which are complicated and need time to be considered carefully, or in situations of many pending proceedings before the Constitutional Court of Ukraine. Six months respectively one month may in many cases not be sufficient to ensure the required examination of (difficult) legal questions. The Commission recommends that the Grand Chamber should be able to extend these deadlines in exceptional cases.

D. Attendance quorum

49. Legal questions concerning the attendance quorum in constitutional courts have been addressed by the Venice Commission recently. The Venice Commission has pointed out that inappropriate provisions on the necessary quorum for decisions carry the risk of blocking the decision-making process of a judicial body and rendering it ineffective.²⁴ In this case, a constitutional court could not exercise its key task of ensuring the constitutionality of legislation.²⁵

50. The Venice Commission has pointed out that, from a comparative perspective, two-thirds attendance quorums within a constitutional court seem to be the most common in European countries.²⁶ Therefore, Articles 9, 65.2 and 66.2 of the draft Law are in line with these European standards. Nevertheless, it is remarkable that the attendance quorum with regard to the Grand Chamber is described in absolute numbers (attendance of 12 out of 18 judges) while the attendance quorum with regard to the senates is defined by a percentage rate (two-thirds of the judges who comprise the Senate). While both methods are possible from a European-standard perspective, the draft Law should be consistent in this respect, unless there are reasons for that. A regulation referring to percentages could help avoid problems like the one in 2005 in Ukraine.

E. Other issues

51. Article 8.3.2 excludes from the competence of the Constitutional Court “issues referred to the competence of courts”. This may prove to be too vague to delimit the competences of the

²² CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, § 87.

²³ CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, § 91.

²⁴ CDL-AD(2016)001, para 67 seq.

²⁵ In this context, it has to be taken into account that the draft law doesn't provide for substitute members of the Constitutional Court. In Austria, the aim of safeguarding the proper functioning of the Constitutional Court is achieved by using a system of six substitutes of the judges of the Court. This, however, is not a common European model, one finds it in the ECtHR, however, in a different institutional setting.

²⁶ CDL-AD(2016)001, para 69.

Constitutional Court and the ordinary courts. It might be useful to give the Constitutional Court the competence to decide these matters (competence).

52. Article 18.4 on the Status of a Constitutional Court Judge provides that the judge has a right to request documents from State bodies. This point – which is of course important to regulate - should be dealt with under the procedural provisions of the law; it is not directly linked to the status of judges.

53. Article 18.6 of the draft Law clearly aims at preventing that the independence of Constitutional Court judges is questioned, because he or she cannot accept any awards – even only in symbolic form – by other state organs. This is to be assessed positively with regard to the visible independence of Constitutional Court judges.

54. In Article 29, the draft Law chooses a model under which the academic advisers are under the exclusive authority of the judge only and they are not part of a secretariat structure. It might be advisable to provide for some links between the academic adviser and the Court as such. In addition to the academic advisers, Article 40 of the draft Law establishes a Scientific Advisory Board. The relationship between the judges' academic advisers (Article 29), the Scientific Advisory Board and the Secretariat (Article 43.2) is not clear, notably as concerns the preparation of draft judgments.

55. Article 34.3 attributes to the Grand Chamber the exclusive competence of “resolving ... any procedural issues”. This could imply that the senates and boards would have to refer all procedural issues to the Grand Chamber. This may prove inefficient. Minor procedural issues should be decided directly by the senates and boards themselves.

56. The boards of three judges decide on the initiation of proceedings (admissibility). For constitutional complaints, under draft Article 36.5 a unanimous rejection by the board is final and the case is terminated. For cases brought by state institutions – called constitutional petitions or constitutional appeals – even a unanimous rejection by the board does not terminate the case, which is nonetheless referred to the Grand Chamber for decision (Articles 36.4 and 60 of the draft Law). The delegation of the Commission was informed that this rule was introduced out of respect for the institutions that bring the case. Even a unanimous rejection by the board of three judges should not terminate a case. However, if this is so, then any decision of the board – accepting or rejecting the case - is superfluous and a waste of time of three judges. All these cases should be referred directly to the Grand Chamber and be initiated by an act of the Secretary General of the Court.

57. Draft Article 41 provides for wide public access to court files, including on pending cases. While public access is positive there should be some exceptions, e.g. for draft judgments being deliberated or if the privacy of applicants in constitutional complaint cases is affected.

58. In order to safeguard its material independence, the Court should be able to defend its draft budget before the *Rada* (Article 47).

59. In draft Articles 50 to 53, the distinction between constitutional petitions and appeals seems artificial. Notably the constitutional appeal covers very different procedures. The Constitution only refers to “petitions” in Article 150. It might be clearer to give a specific title to each type of proceeding and not to group them under the terms petition and appeal.

60. The delegation of the Venice Commission was informed that draft Article 57 provides for an automatic distribution of cases to the boards (“alternately”). It seems that one of the three judges of the board becomes the judge rapporteur of the case. According to draft Article 58.1, the case is allocated to one of the judges by a decision of the board itself. It is positive that the assignment of the case to a judge rapporteur is not a decision of the Court's chairperson.

Nonetheless, there should be rules on how the case is assigned among the three judges. What happens if each of them or none of them wants to be rapporteur judge? An automatic allocation might solve this issue.

61. According to Articles 60.1.1.2, 60.2.2, 65.6 and 83 of the draft Law, the distribution of types of proceedings between the Grand Chamber and the Senates depends on whether the case was brought by an institution (constitutional petition and constitutional appeal) or an individual (constitutional complaint). This logic seems to relate to the likely higher number of individual complaints, but not to the importance of the cases. The annulment of a law on the basis of an individual complaint can be as important as that on the basis of a request from an institution (petition / appeal). The problem with deciding in parallel senates (there seems to be no distribution by substance matter in Germany) may be the coherence between their case-law. A procedure should be established whereby the Grand Chamber would be in charge of resolving any conflicts between the Senates.

62. Draft Article 68.4 provides that the Court can consider *amicus curiae* (briefs) at its discretion. The draft Law should provide that the Court could also actively request *amicus curiae* briefs. According to its Statute, the Venice Commission, for instance, cannot provide *amicus curiae* briefs unless it is requested to do so by a Court.

63. Draft Article 77.3 attributes the competence to take interim measures in constitutional complaint cases to the Senate “concurrently with the initiation of constitutional proceedings”. These measures are by definition urgent. The decision to initiate proceedings is taken by the board. Therefore, the board should also be competent to issue the interim order. Conversely, draft Article 77.5 ends the interim measure when the judgment of the Court is approved. However, when the Constitutional Court finds an unconstitutionality, this will be too early because in a constitutional complaint case, the ordinary courts have to reopen the case and decide anew. The Court should be competent to prolong the interim measures in its judgment until the ordinary court has rendered a decision on the re-opened case.

64. The possibility for the Constitutional Court to postpone the invalidity of the act found unconstitutional is positive (Article 90.2). This avoids the creation of legal gaps following the annulment of legal provisions and gives time to the *Verkhovna Rada* to adopt new legislation.

65. Article 91.2 relates to the question of whether the Court is bound by its own precedents. In Ukraine, it may be useful to state explicitly that this is the case. The possibility to vary its position subject to written substantiation should provide some leeway for the Court. The senates should be bound by judgments of the Grand Chamber. In case of different interpretation between the senates, the Grand Chamber should be competent to resolve this issue (see also above). In any case, all judgments should come with sufficient written substantiation.

66. Article 93 provides that the judgment has to be published right after its announcement. This avoids problems in drafting judgments after they have already been announced. This unfortunately happened in other countries.

67. The delegation of the Venice Commission was informed by the Constitutional Court that it strongly rejects Transitional Provision 3, which provides for the institute of an International Advisor – a retired judge from a foreign constitutional court or a representative of an international organisation – to provide expert assistance in cases of constitutional complaints until 1 January 2020. The Court is of the opinion that it has the necessary expertise to deal with the constitutional complaints.

III. Conclusion

68. The revised Chapter XII of the Constitution of Ukraine and the Law of Ukraine on the Constitutional Court of Ukraine (draft as of 1 November 2016) improve the position of the Constitutional Court of Ukraine as compared to the previous provisions.

69. The draft Law implementing the constitutional amendments is a clear step forward in line with the European legal standards concerning constitutional justice. The Venice Commission welcomes notably the competitive selection of judges; the acceptance of the oath before the Court itself; time limits for the appointment and election of the judges; the dismissal of the judges only by the Court itself; the removal of the dismissal for the "breach of oath"; the introduction of a constitutional complaint and the rule in draft Article 88.3, even if it is limited; time limits for proceedings; automatic assignment of cases to boards and the possibility for the Court to postpone the invalidity of the law found unconstitutional.

70. Nonetheless, this opinion makes a number of recommendations in order to improve the draft Law. The most important recommendations are:

1. The procedure for the composition of the screening committees should be clearly set out in the draft Law and the resulting list of candidates should be mandatory for the selection of judges; in the screening committee of the *Rada*, the factions should be presented proportionally.
2. The Senates should be bound by judgments of the Grand Chamber and a procedure should be established whereby the Grand Chamber would be in charge of resolving any conflicts between the Senates.
3. The removal of the limitation of previous political activities of judges to be elected this limitation should be considered.

71. Furthermore, the Commission also recommends:

1. The Grand Chamber should be able to extend procedural deadlines in exceptional cases.
2. A deadline to initiate proceedings should be introduced also for constitutional petitions and constitutional appeals from State institutions.
3. The quorum for the Grand Chamber should be expressed as a percentage.
4. The Constitutional Court should be able to defend its draft budget before the *Rada*.
5. Some exceptions should be foreseen for the wide public access to the files of the Court (e.g. for draft judgments, or when the privacy of applicants is at stake).
6. There should be rules on the assignment of cases to a rapporteur judge within the board.
7. The Constitutional Court should be able to actively request *amicus curiae* briefs.

72. In addition, the Commission makes the following recommendations, which should be taken up with future constitutional amendments:

1. Retiring judges should stay in the Court until their successor takes up office.
2. The *Verkhovna Rada* should elect the judges under its quota with a qualified majority.
3. A full constitutional complaint against all final judgments of ordinary courts, whether or not an unconstitutional law was applied, should be introduced.
4. Local self-government units should be able to appeal to the Constitutional Court.

73. The Venice Commission remains at the disposal of the Ukrainian authorities for further assistance in this matter.