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THE CONSTITUTIONAL COURT OF UKRAINE

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"INDIVIDUAL CONSTITUTIONAL COMPLAINT TO THE CONSTITUTIONAL COURT OF UKRAINE"

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REPORT

"OPINION OF THE VENICE COMMISSION ON THE DRAFT LAW ON THE CONSTITUTIONAL COURT OF UKRAINE"

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Constitutional complaint.

The Venice Commission has been involved many times in the work on a reform on judiciary since Ukraine began to be a member of the Venice Commission. The representatives of the Venice Commission participated also in the work of the Constitutional Commission to propose the last amendments to the Constitution on Judiciary, adopted in 2016. Many opinions of the Venice Commission contained recommendations relating to the whole judiciary but some of them were directed to the Constitutional Court. One of the issues concerning the competences of the Constitutional Court was an issue of a constitutional complaint.

On June 2, 2016, the Parliament of Ukraine finally adopted amendments to the Constitution of Ukraine in the sphere of justice and jurisprudence. Among them there were also amendments on the Constitutional Court. Important was regulation of art. 55 which states that "Everyone shall be guaranteed the right to apply with a constitutional complaint to the Constitutional Court of Ukraine on grounds defined in this Constitution and under the procedure prescribed by law." By this formulation new institution ie. Constitutional complaint has been introduced to the Ukrainian system. Individual access to the Constitutional Court before 2016 was very limited. The system did not provide the individual complaints. Article 147 of the Constitution stated that "The Constitutional Court of Ukraine is the sole body of constitutional jurisdiction in Ukraine. The Constitutional Court of Ukraine decides on issues of conformity of laws and other legal acts with the Constitution of Ukraine and **provides the official interpretation** of the Constitution of Ukraine and the laws of Ukraine".

The constitution however was silent on who could request interpretations. It was regulated in very general way by law on the CC where it was stated that the individuals can request an interpretation by way of constitutional appeal (Article 42).[1]

The "placement" of the new provision of art. 55 in the chapter on human rights clearly shows that constitutional complaint has been seen by constitutional legislator as an important guaranty of human rights.

As a consequence of this article, new Article 151[1] have been introduced to the Constitution in the chapter on competences of the Constitutional Court, which contains more detailed regulations on the constitutional complain, saying that: "*The Constitutional Court of Ukraine shall decide on compliance with the Constitution of Ukraine (constitutionality) of a law of Ukraine upon constitutional complaint of a person alleging that the law of Ukraine applied to render a final court decision in his or her case contravenes the Constitution of Ukraine. A constitutional complaint may be lodged after exhaustion of all other domestic legal remedies. A person can complain that in a final ordinary court decision an unconstitutional law was applied."*

Three important problems were regulated by new provisions in the Constitution: 1) the Constitutional Court will no longer be entitled to provide for official interpretation of parliamentary laws. Its interpretational authority will be limited to the Constitution. 2) the Court's jurisdiction will encompass the constitutionality of questions put on referendum and 3) individuals shall have the right to lodge a constitutional complaint with the Constitutional Court.

In its Study on Individual Access to Constitutional Justice, the Venice Commission distinguishes between two types of complaints: "normative constitutional complaints" and "full constitutional

[1] Article 42 regulated the **Constitutional Appeal** and stated that it shall be a written application to the Constitutional Court of Ukraine on the necessity of official interpretation of the Constitution of Ukraine and laws of Ukraine in order to ensure implementation or protection of the constitutional human and citizen's rights and freedoms as well as the rights of a legal entity.

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. [2]

The drafters of the amendments to the Constitution tried to take into account the general guidelines of the Venice Commission concerning the position of the Constitutional Court in a political system of a state, as well as the VC "jurisprudence" on the constitutional complaint. The first question just which should be then answered by Ukrainian constitutional legislator was question concerning **full or limited constitutional complaint.** As 151[1] quoted above clearly states, the drafters of these amendments did not introduce the institution of "full complaint" as it is known, for example in Germany. The Ukrainian drafters decided to introduce the normative constitutional complaint, i.e. limited complaint like it is for example in Poland since 1997. The Polish Constitution from 1997 states in art. 79. 1 that "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."

As a consequence of these constitutional amendments the Draft law on the Constitutional Court was drafted and the Venice Commission has been requested to make opinion on this draft. The draft regulated several important issues like composition of the Constitutional Court (competitive selection of judges, appointment and dismissal of judges, political activities). Relevant part of the draft law was devoted to the idea of constitutional complaint.

My role today is to make presentation mainly on this issue raised in the draft opinion. CDL-AD (2016)034.

The draft Law regulates the constitutional complaint on the basis as it has been defined by Article 151.1 of the Constitution and therefore could not introduce a full constitutional complaint. The difference between full and limited complaint relates to the fact that the complainant cannot allege a special act that infringes his or her rights due to an unconstitutional interpretation and application of a law if it 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 his or her rights. This new institution corresponds to the solution existing in some European countries providing for a constitutional complaint as the last resort of individuals to protect their rights. The drafter tried to make its scope as broad as possible in a given conditions to be in line with recommendation of the Venice Commission.

The provisions adopted in the Ukrainian legal system means that the complaint can be directed against the legal norm (nonconformity of law with the constitution), not against the judgement of the court. The substance of this solution as a "normative complaint", is a control of laws on their constitutionality – by using the individual as an initiator for such an examination. The essence of a procedure of a constitutional complaint lies in the direct interlink between this procedure and the protection of human rights. By this institution, the individual (person) has a direct access to the CC.

The constitutional complaint is regulated in Articles 55 and 56 of the draft Law. There are listed conditions for making possible to lodge a constitutional complaint. They are as follows:

a) A person can appeal to the CC with an allegation, that a Ukrainian law applied by an

[2] CDL-AD(2010)039rev, Study on individual access to constitutional justice;

ordinary court in a final decision concerning their case (personal interest) is in contradiction with the Constitution;
b) It is a right of a "person" to make a complaint;
c) The complaint can be lodged only as concerns the final court decision, not a decision of public administrative organs;
d) It is only possible to lodge a complaint to the CC after the exhaustion of all other domestic remedies;
e) As a result of such a complaint the CC may declare such law unconstitutional.
The draft law in art. 56 describes more precisely the general (used in the Constitution) word "person" that is entitled to constitutional complaints:
-This person can be a plaintiff, defendant, or even a third party, being of the opinion that the law (or individual provisions thereof) applied in the final court judgment in his/her case contradicts the Constitution of Ukraine.
-It could also be a legal person (art. 56.3).
-The word "person" does not cover public entities (art. 56.1).

As the Venice Commission pointed out the last provision could cause some doubts as concerns the right of local self-government. In the Ukrainian case however, the whole part on the amendment to the Constitution on local self-government has not been adopted, so perhaps the problem is not so crucial at this moment. But in the future, when the real local self-government would be introduced to the political system of Ukraine, (which should be done) the right to constitutional complaint should also be guaranteed to the local self-government.

So the institution of constitutional complaint, in its essence, creates a strict connection between the private interest (concrete case of an individual) and the public interest (the protection of the Constitution by claiming unconstitutional law).

Important is that the new provisions of the Ukrainian Constitution do not limit the category of constitutional rights of individuals that could be claimed. One may suppose that claiming unconstitutionality of parliamentary law can cover all rights political, personal as well as social rights. Despite the "narrower" concept of the complaint as compared to the idea of a full complaint, this solution should be seen as a positive step in the right direction for almost two reasons:

- It is new important guaranty of human rights which has been introduced to the constitutional system;

- Limited (normative) constitutional complaint will open way for full complaint in the future, without imposing too strong burdens for the Court in a short period of time,

In the Polish system which will be wider described by prof. Granat, the institution of constitutional complaint (even limited) in substantive matters has changed the role of the Constitutional Tribunal[3]. By this provision the CT has been seen no longer only a court of law but also an important organ of the protection of human rights.[4]

In the opinion of the Venice Commission the new Ukrainian institution has been judged as an important step in the right direction but this positive opinion has been expressed with a certain hesitation because of the previous opinions of the VC. Just in 2013 the Venice Commission recommended to Ukraine an introduction of "a full constitutional complaint to

[3] In the Polish system, out of approximately 500 cases sent every year to the Constitutional Tribunal 400 are individual complaints.
[4] Skarga Konstytucyjna. Zagadnienia teorii i praktyki, red. K. Urbaniak, Poznań 2015;

the Constitutional Court - against all cases of violation of human rights through individual acts"[5]. So the introduction of normative complaint has been judged as an important step but as a kind of a "half a way solution." The solution can be seen as a kind of compromise between the need to strengthen the system of protection of human rights and constitutionality and concerns regarding effective functioning of the CC.

For that reason the Venice Commission pointed out positively a very specific solution of a new draft law, which is regulated in art. 89. 3 which saying that when the CC "considers the case of a constitutional complaint, found that the law of Ukraine is in conformity with the Constitution of Ukraine, but also discovers that a court in a civil, economic, administrative, criminal case, or in a case of administrative offence had applied the law of Ukraine by interpreting it in a manner that is not compliant with the Constitution of Ukraine, the Court shall indicate that fact in the operative part of its judgment. This legal stance of the Court shall provide a basis for a review of a final judicial judgment in the manner provided by law." It is a possibility to give a 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 had interpreted a legal norm in a manner that is not in compliance with the Constitution. The aim of this solution is to better guarantee the rights of the individual, but also better guarantee the non-existence in the legal system of unconstitutional laws. Such an extension of a constitutional complaint would have the positive side effect that the people have a chance to sufficiently protect their fundamental rights before Ukrainian courts.

This provision from art. 89 which gives to the CC the possibility to judge not only the law being a basis for the decision, but also the decision of the court by mode of interpretation of law is an important widening of the idea of limited constitutional complaint. The decision of CC will then be the basis for reopening the final judicial judgment by the ordinary courts. The Final Provision 8, items 2 and 4 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 of Ukraine 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". Art 89.3 of the draft Law of Ukraine on the Constitutional Court allows a further examination of the constitutionality of acts, even though it cannot introduce a full constitutional complaint. 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 77.4 of the draft Law as "manifestly ill-founded".

This problem was expressed also in previous opinions of the Venice Commission. In 2015, in the Preliminary Opinion on the Judiciary the Venice Commission explained that "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".[6]

[5] 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.
[6] CDL-PI(2015)016, Preliminary Opinion on the proposed constitutional amendments regarding the judiciary of Ukraine,

As it has been pointed by one of rapporteurs Rainer Hoffmann- Riem [7] in his opinion: This provision shows that the Ukrainian legislation is not prevented by Art 55 par. 4 of the Constitution to go further than just allowing a normative complaint in a restrictive sense.
The question arises, whether this provision is in line with a general idea concerning constitutional regulation of the constitutional complaint in its "limited form". The answer on this issue should be given by the Constitutional Court itself.

As concerns the question full constitutional complaint vs. normative constitutional complaint the VC maintained its opinion on necessity to introduce full constitutional complaint expressed clearly (p. 39) that "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. (CDL-AD(2016)034)

Some provisions of a new draft law concerned the time limits for proceedings. Respect for time limits is important issue in the light of art. 6 and 13 of the ECHR. For individual complaints, draft Article 61.4 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. In principle, the Venice Commission welcomes that the draft Law addresses this problem and thus protects the right to a fair trial.
Seeing it as a positive solution, the Venice Commission pointed out in the opinion that "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.

II Other issues taken by the Venice Commission

1. Appointment of judges. The system of appointment of judges to the CC was always crucial and sensitive issue for the VC. A just system of appointments should guarantee the pluralistic composition of the CC, its credibility and independence. The Venice Commission was of the opinion that there is no requirement (no legal standards) that the procedure for appointments to the judiciary be described in detail in the Constitution. Taken however into account the practice in different countries VC in its opinion on Ukrainian draft law expressed its view that it is recommended to regulate the procedure of appointment in more detail in the Constitution. It was also in favour of formula (despite the difficulties with precision) that the judges of the CC should have a special "higher" legal knowledge.

Also the competitive selection procedure were welcomed by VC as being in line with European best practice for the judiciary.

[7] W. Hoffmann Riem was a strong supporter of the full constitutional complaint. He said clearly: It would be more consistent with the aim to ensure the constitutionality of acts of Ukrainian authorities to allow a person to directly raise a constitutional complaint in a case of an allegation of an infringement by an unconstitutional act like a court decision or an administrative act – as the Venice Commission has already recommended in 2013

The main points of the Venice Commission concerning the appointment of judges to CC were:

- Contest as the best method to select the candidates for the positions of judges.[8]
- The inclusion of a broad political spectrum in the nominating procedure.[9] Involving of different state organs and political forces into the appointment process is important to guarantee that the judges are seen as being more than the instrument of one or the other political force.[10]
- Qualified majority for the appointment of the judges by Parliament with a mechanism against deadlocks,[11]
- Clear and transparent procedure before the election in order to ensure a high professional level of the judges. Transparent procedure is of great importance especially in a situation where parliament elects judges with simple majority.

New draft law in many points followed the proposals of Venice Commission. Some suggestions however have not been taken into account. The Venice Commission in many opinions proposed the introduction to the Ukrainian constitution of the system of qualified majority as a rule in the election of judges to the CC by parliament. This proposal however, was not accepted by the Ukrainian parliament in the process of amending the Constitution in June 2016. The system of simple majority remained.

2. Political activity of judges. 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. One should take into account that 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 and ban to be a member of a political party introduced as a general rule, is of great importance for the position of judges in the political game in the country and thus one of the guarantees of the independence of judges.
3. The procedure of taken oath. The Venice Commission positively judged a new solution for taking the oath (art. 17). The judges would make an oath before the formal meeting of all the judges of the CC. Before it was possible to block the taking of the oath by parliament. Art. 17 states that “A Judge shall become empowered upon taking the following oath at a special plenary session of the Court”. This formula is more precise. The wording of this article is clear. It means that a person becomes judge from the moment of appointment. By taking the oath he/she is empowered to act as judge. It is a positive solution.
4. possibility to postpone the invalidity of the act found unconstitutional. This new institution is also positively judged by the Venice Commission. As it has been positively expressed in the opinion This avoids the creation of legal gaps following the annulment of legal provisions and gives time to the *Verkhovna Rada* to adopt new legislation.
5. The Venice Commission in its opinion has analysed also other important issues introduced to the new draft law on the CC like: amicus curiae briefs, automatic assignment of cases to boards. It is not a time for detailed presentation.

[8] CDL-AD(2013)014 Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, paragraph 27.

[9] CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court), paragraphs 18-19.

[10] CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 19.

[11] CDL-AD(2011)040 Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, paragraph 24. as well as: CDL-AD(2007)047, §§ 122,123; CDL-AD(2012)024, § 35;

Concluding – the main issue of today conference is an issue of constitutional complaint but we have to agree that without real guarantees for independent of judges and non-political Constitutional Court, the institution of constitutional complaint could become illusory.