Strasbourg, 21 June 1997

Restricted
CDL (97) 18 rev.

Opinion N° 028 / 96

Or.Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

O P I N I O N

ON THE LAW ON THE CONSTITUTIONAL COURT OF UKRAINE

Adopted at the 31st Plenary Meeting of the Commission (Venice, 20-21 June 1997)

on the basis of contributions by Mr S. Bartole (Italy) and Mr J. Klučka (Slovakia)

Draft opinion on the Law of the Constitutional Court of Ukraine

I. Introduction

1. The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly has asked the European Commission for Democracy through Law to give an opinion on the Law on the Constitutional Court of Ukraine. The Commission cannot but welcome this request since, as this opinion will show, the Law raises important issues for the constitutional order of Ukraine, and the Constitutional Court is destined, on the basis of this Law, to play an important role in the protection of human rights in Ukraine.

2. The present opinion is based on written contributions by Mr Bartole (Italy) and Mr Klu_ka (Slovakia). It also takes into account the discussions at the 30th plenary meeting of the Commission, in particular the important contribution by Mr Holovaty, Minister of Justice of Ukraine and Ukrainian member of the Commission, and at the 31st meeting of the Commission, in the presence of the Vice-President of the Constitutional Court of Ukraine, Mr Rozenko, and a Judge of the Court, Mr Tykhy.

II. The Constitutional Framework

3. According to the Constitution of Ukraine, the Constitutional Court of Ukraine has the following tasks:

- it decides, on the basis of appeals by the President of Ukraine, no less than 45 national deputies, the Supreme Court, the authorised human rights representative of the Verkhovna Rada and the Verkhovna Rada of the Autonomous Republic of Crimea, issues of conformity with the Constitution of Ukraine of laws and other legal acts of the Verkhovna Rada of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine and legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea (Article 150 no. 1);

- it gives an official interpretation of the Constitution of Ukraine and the laws of Ukraine (Article 150 no. 2);

- it gives opinions on the conformity of international treaties with the Constitution (Article 151 section 1);

- it gives opinions in the framework of the impeachment procedure concerning the President (Articles 111 and 151 section 2).

4. The Commission noted already in its opinion on the Constitution of Ukraine (document CDL-INF(97)2) that several procedures which could play an important role for the consolidation of constitutionalism in Ukraine were not specifically mentioned in the text of the Constitution:

- constitutional complaints by individuals concerning violation of their human rights;

- concrete norm control by means of the referral of a law or other normative act by an ordinary court to the Constitutional Court;

- a provision on conflicts of competence between State organs.

In its opinion, the Commission noted that the Law on the Constitutional Court seeks to remedy these gaps by using the procedures mentioned in the Constitution in a way producing effects similar to the missing procedures.

5. In fact, Article 13 of the Law on the Constitutional Court enumerates the four procedures specifically mentioned in the Constitution as being within the authority of the Constitutional Court. Two of these procedures, the procedure to examine the constitutionality of laws and other legal acts and the procedure for giving an official interpretation of the Constitution, are, however, further developed in a way that gives them more importance than would be expected at first sight.

III. The Procedure for the Examination of the Constitutionality of Laws and Other Legal Acts

6. The Law on the Constitutional Court distinguishes between two ways of seising the Constitutional Court:

- State bodies may seise the Constitutional Court by way of a constitutional petition;

- individuals and legal persons may seise the Constitutional Court by way of a constitutional appeal.

In the framework of the procedure for examining the constitutionality of laws and other legal acts, the Law, in accordance with the text of the Constitution, provides for a constitutional petition only by the State bodies enumerated in the Constitution (cf. Articles 40 and 71 of the Law).

7. The Law then distinguishes (Articles 75-85) four particular procedures which are considered as being part of the general procedure. This approach is not without problems. There is a danger that there may be cases falling under the general provision which cannot be included in one of the particular procedures and are thereby left without explicit legislative coverage.

For example, Article 71 of the Law and Article 151 of the Constitution do not specify on which grounds the unconstitutionality of a law or legal act must be based. By contrast, the four specific procedures concern only specific grounds for unconstitutionality. Article 75 deals with the unconstitutionality of legal acts which conflict with the rules concerning the authority of the mentioned organs, Article 78 concerns elections and referendums and Articles 84 and 86 the violation of constitutional rights and freedoms. The Constitutional Court will have to be very attentive in dealing with this kind of problem and will have to avoid this division of the Court's functions diminishing the protection provided by the Constitution. It would appear unnecessary to have divided what the Constitution keeps united.

8. Within the framework of the procedure for examining the unconstitutionality of laws,

Article 83 of the Law is of particular importance. According to this Article, an ordinary court shall stay the proceedings if a dispute develops concerning the constitutionality of norms of a law to be applied by the court and the case shall be considered by the Constitutional Court of Ukraine immediately. This provision fills an important gap in the Constitution but has weaknesses. In particular, no details are given on the way in which the case is referred to the Constitutional Court, and there is no provision on the involvement of the parties to the original dispute in the procedure before the Constitutional Court. Are they allowed to submit briefs and to participate in the oral proceedings? These are questions which can hardly be left to the discretion of the court or to the procedural regulations of the court but that should be settled by law. This difficulty may be partly explained by the fact that ordinary courts are not among the subjects enumerated in the Constitutions which may seise the Constitutional Court under this procedure. It would therefore remain desirable to provide in the Constitution for an express provision on concrete norm control.

IV. The Procedure for the Official Interpretation of the Constitution

9. The law gives the right to request an official interpretation of the Constitution both to State bodies via petition (Article 41) in cases of practical necessity (Article 93) and to individuals and legal entities (Article 43) by way of constitutional appeal in case of inappropriate application of provisions of the Constitution or the laws that may lead or have led to a violation of the constitutional rights and freedoms of the appellant (Article 94).

10. It is unusual to give the right to seek an interpretation of the Constitution from the Constitutional Court also to individuals and private bodies. However, the solution is certainly favourable to the realisation of fundamental rights in Ukraine and therefore has to be welcomed. It may also partly replace the constitutional complaints procedure missing in the Constitution, in particular since according to Article 95 the Constitutional Court may decide the unconstitutionality of a law in this context.

It should however also be noted that this procedure provides less protection than a full fledged constitutional complaints procedure, as in Germany or Spain, since under it the Constitutional Court may not decide on the legality of acts of state bodies other than those (of mainly normative character) listed in Article 151 of the Constitution and Article 13 No. 1 of the Law (see in particular Article 14 of the Law).

11. In addition, another serious weakness of the procedure is the absence of any indication on the procedural rights of the private parties to the dispute. The law contains a provision on the introduction of the appeal (Article 42) and that the decision has to be sent to the appellant (Article 70). There is however no indication whether the individual has the right to submit additional briefs to the Constitutional Court and whether he, perhaps assisted or represented by a lawyer, can attend and take part in the session of the Court on his case. It seems indispensable that the individual who has brought a case should also have the right to intervene before the Court. The tendency of the European Court of Human Rights to apply Article 6 of the European Convention also to disputes before a Constitutional Court concerning individuals should be noted. The Court would therefore be well advised to adopt a liberal attitude but, in any case, it seems scarcely acceptable that such an important matter touching individual rights should be left to the internal regulations or the discretion of the Court and not be settled by law.

V. Problems Common to the Various Procedures Before the Constitutional Court

12. The lack of provisions on the procedural rights of the parties mentioned above with respect to individuals having launched a constitutional appeal also applies, to an only slightly lesser extent, to State bodies involved in a dispute. Article 54 treats State bodies as well as individuals as potential providers of information and more as objects than as subjects of the procedure. With respect to State bodies, Articles 72 and 80 of the Law require that certain State bodies particularly concerned by a dispute have to be involved by the Court. No details are given however, apart from the right to appoint three representatives (Article 71, paragraph 3). Article 76 does not contain the right of State bodies actively to take part in a case which may influence the scope of their authority but only gives them a right to submit a petition in such a case.

13. The inner working of the Court has received more attention in the law than the rights of the parties, although the very strict time limits contained in Article 57 of the Law will require the establishment of additional rules in the internal regulations of the Court. The Law provides for a preliminary procedure on admissibility, to be examined by a collegium of judges (Article 48). While a negative decision of the collegium on admissibility has to be confirmed, according to Article 50, by the full Court, it is not quite clear whether a positive decision on admissibility is final.

14. It seems ill-advised that Article 19 should give a single judge of the constitutional court the right to request information while Article 54 gives the same right to the collegium of judges and the plenary Court. There should be no individual initiatives of judges. This point might be clarified by the regulations of the Court.

15. According to Article 73, unconstitutional acts or their separate parts are declared null and void as of the day of adoption of the decision. According to Article 57, a decision has to be signed no later than 7 days after its adoption and is officially promulgated the next working day after its signature. Therefore the interested parties will be officially informed about the end of the effect of the act more than 7 days after the adoption of the decision and in the meantime they could find themselves in the position of thinking of having to stick to a law which is devoid of effects on the basis of a decision of the Constitutional Court which is not yet known to them. This should be carefully reconsidered.

16. According to Article 68, the Constitutional Court may resume consideration of a case upon the discovery of new circumstances concerning the case. Such a provision is highly unusual for a constitutional court and several questions should be clarified with respect to it, in particular who is entitled to initiate this kind of proceeding, what is the relationship with earlier decisions and what is the legal position of the laws the constitutional situation of which has changed in the meantime.

VI. The Status of Judges

17. According to Article 23, there are nine grounds for the termination of the office of a judge of the Constitutional Court, certain requiring a decision by the Constitutional Court itself and two by the Verkhovna Rada. Among the reasons for termination by the Constitutional Court appears the inability of a judge to perform his or her duties due to the state of his health. It would seem appropriate to set down in the law itself the time period of inability which would make such a decision of the Constitutional Court possible instead of leaving this issue to the discretionary practice of the Court.

18. It would also be desirable to require for decisions under Article 23 a qualified majority of judges, since these decisions are of particular importance for the work of the Court. According to Article 50, discussions of the Constitutional Court are legally binding, provided that 11 of the 18 judges were present and decisions are deemed adopted provided they received the votes or more than half of the judges who took part in the session. Applied to Article 23 this would mean that the office of a judge could be terminated by a vote of less than half of the members of the Court.

VII. The Hierarchy of Norms

19. The present law was adopted on the basis of Article 153 of the Constitution of Ukraine providing "the procedure for the organisation and operation of the Constitutional Court of Ukraine and the procedure for its review of cases, are determined by law". This provision may be interpreted either narrowly, ie. that the Parliamentary statute may not add new elements to the central features of the Court but only implement the provisions of the Constitution, or more widely by stating that the law may entrust additional functions to the Court if these are compatible with the main characteristics of the Court as designed by the Constitution.

20. With respect to the present law it can said that, on the one hand, it remains formally within the framework prescribed by the Constitution and tries at the same time to give in this framework the court as much room as possible for the realisation of its tasks of guaranteeing the constitutional order of Ukraine and securing human rights.

21. On the other hand, this constitutional provision also requires that the main aspects of the procedure for the organisation and operation of the Court should be determined by law. Accordingly, Article 3 of the Law states that the organisation, authority, and arrangement of activities of the Constitutional Court of Ukraine are established by the Constitution of Ukraine and this Law and gives to the Constitutional Court of Ukraine only the power to adopt acts which would regulate the organisation of its internal work in conformity with the Law. The notion of internal work is defined nowhere. However, the present opinion has shown that in many respects the rights of the parties involved in a dispute before the Constitutional Court are in no way defined by the Law and will therefore have to be clarified by the rules of procedure of the Court and its practice. This creates a risk that the Law itself is not in conformity with the constitution since it leaves to other normative sources matters which should be regulated by parliamentary statute.

VIII. Conclusions

22. In conclusion, the Commission therefore welcomes the Law as an important further step on Ukraine's way to becoming a full-fledged constitutional democracy and because of the great emphasis the Law puts on making fundamental rights and freedoms enforceable by the Constitutional Court. On the other hand, it has to be noted that the text of the Constitution places certain limits upon a more extensive role for the Court, and that the Law on the Constitutional Court itself in many respects does not contain all the rules, in particular concerning the rights of parties to a dispute, which should be set down by statute. According to the Commission, the principle of the rule of law requires that the status of the parties in the proceedings before the courts, their rights and the time limits to be complied with during the trial shall be established by the Law. Leaving these items to the internal rules of procedure of the Court does not comply with the mentioned principle.

23. The Commission therefore recommends completion of the text of the Law according to the indications given in this opinion and believes that it would not be inappropriate to reconsider, possibly on the basis of experience gained during the early period of the Court's activity, the relevant constitutional provisions with a view to ensuring that the Constitutional Court is able to fulfil all functions Ukrainian society wishes to confer upon it.