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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**POSSIBLE CONSTITUTIONAL AND LEGISLATIVE IMPROVEMENTS  
TO ENSURE THE UNINTERRUPTED FUNCTIONING  
OF THE CONSTITUTIONAL COURT OF UKRAINE**

**Comments by**

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## **Uninterrupted Functioning of a Constitutional Court after the Expiry of a Term for Constitutional Judges**

### **Introduction**

The Constitution of Ukraine (the Constitution), adopted by the Verkhovna Rada on 28 June 1996, established the Constitutional Court as an integral part of the judicial branch in Ukraine. The Constitutional Court derives its powers from Chapter XII of the Constitution, which explicitly designates the Constitutional Court as “the sole body of constitutional jurisdiction in Ukraine.” While Chapter XII provides the basic framework for the Constitutional Court, describing its role, structure, and authority, the principles contained within the Constitution pertaining to the Constitutional Court are for the most part reiterated and elaborated upon in the Law on the Constitutional Court, which was enacted on 16 October 1996.

The Constitutional Court is comprised of eighteen judges. The President of Ukraine, the Verkhovna Rada, and the Council of Judges each appointing or electing six. The Constitution requires candidates to the Constitutional Court to:

- (1) be at least forty years old at the time of his/her appointment;
- (2) possess a higher legal education and at least ten years of professional experience;
- (3) reside in Ukraine for the previous twenty years and
- (4) speak the state language.

Judges of the Constitutional Court are “appointed for nine years without the right of appointment to a repeat term.” In addition, Constitutional Court Judges are subject to a mandatory retirement age: “A judge is dismissed from office by the body that elected or appointed him or her in the event of . . . the judge’s attainment of the age of sixty-five.”

When the Law on the Constitutional Court was adopted in October 1996, with it came the appointment and confirmation of judges to that court. Given the Constitution’s nine-year term limitation, prohibition against serving more than one term, and mandatory retirement age, **a significant number of constitutional judges had to step down from the bench in October 2005.** This exodus of judges caused a persistent constitutional crisis and had posed serious separation of powers issues. Prior to examining the substance of the potential constitutional conflict and its possible solution within the constitutional order of Ukraine it is important to mention the opinion (1) according to it: “Where the problem (*also, added by myself*) lies, however, is in **the administration of the oath of office** and in the attendant ramifications in the event the oath is not administered in a timely fashion”.

### *Avoiding the void created by the absence of replacement judges*

The present Constitution of Ukraine is not able to exclude the void created by the possible absence of replacement judges. Bearing in mind the process of appointment and election of the judges of the Constitutional court it is obvious that each constitutional body empowered to appoint or elect constitutional judges may fail to do that regardless the reasons and despite the fact that Ukraine is, according to Art 1 of the Constitution, a sovereign and independent, democratic, social, **law-based state** in which every constitutional body including the Constitutional court **should work and act in the full composition.** (2)

Thus the full composition of the Constitutional court is an **inevitable constitutional demand** providing for by the Constitution. In connection to that there are two main issues requiring a solution in relation to the full composition of the Constitutional court arising from the specific situation in Ukraine after expiry of a term of office of those judges who had to leave the Court in October 2005 and have not been replaced by new ones.

**The first issue** relates to the possible failure of a competent constitutional body to appoint or elect the number of judges designed to it. It is worth mentioning that it is not important why the body fails if it does so.

*According to Art 148 of the Constitution, the Constitutional Court of Ukraine is composed of eighteen judges of the Constitutional Court of Ukraine. The President of Ukraine, the Verkhovna Rada of Ukraine and the Council of Judges of Ukraine each appoint six judges to the Constitutional Court of Ukraine.*

Taking into account that the Constitutional court **must have eighteen judges** and the **hidden threat of not complying with the duty to appoint or elect constitutional judges** it is conceivable to propose the new rule of securing that situation adding to the Art 148 of the Constitution that might read as follows:

*“ If the President of Ukraine or the Verkhovna Rada of Ukraine or the Council of Judges of Ukraine does not comply with the duty stemming from the prior paragraph of this Article of the Constitution the authority to appoint the rest of the judges who were not appointed or elected within the time prescribed by law (3) shall devolve to that or those of originally authorized bodies which had complied with its or their duty proportionally.*

*If that or those of originally authorized bodies that had complied with its or their duty concerned also fail to appoint the rest of the judges required, the President of Ukraine shall dissolve the Verkhovna Rada of Ukraine or the Council of Judges of Ukraine. If does so the President of Ukraine the Verkhovna Rada of Ukraine shall proceed according to Article 85 para 10 of this Constitution”.*(4)

**The second issue** relates to the administration of the oath of office of the constitutional judges and in the attendant ramifications in the event the oath is not administered in a timely fashion.

I am of the opinion that the situation described could be resolved in a very simple way which was shown recently. If a constitutional judge is not able to take an oath publicly before the Verkhovna Rada of Ukraine (it does not matter why if the reason lies within the Parliament ) then **he or she will take his/her oath in written form** submitting it to the President of Ukraine or the Office of the Verkhovna Rada of Ukraine which should confirm that written form of the oath submitted is or not in compliance of the Constitution and the Law on the Constitutional court. If the President of Ukraine or the Office of the Verkhovna Rada of Ukraine wanted to refuse accepting the oath taken in written form they should give the reasons of that decision that would be reviewable under common rules of reviewing an administrative decision.

## **Conclusions**

The Venice Commission, however, is not entitled to propose some political solutions in such a case as it is uninterrupted functioning of a constitutional court after the expiry of the term for constitutional judges caused by inactivity of the constitutional bodies empowered to appoint or

elect new judges for the term of office. On the other hand the Venice Commission can have a genuine interest of making the proposals ensuring or safeguarding the stable and sustainable development of the constitutional judiciary in a particular country which is a Member state of the Council of Europe. That is the reason of pluck up spirits to recommend the amendments to the Ukrainian constitution as such proposed which can be summarized as follows:

1. The creation of a so called **“safety device”** presupposed for the failure of the President of Ukraine, the Verkhovna Rada of Ukraine and the Council of Judges of Ukraine to appoint or elect new judges of the Constitutional court rests on the possibility of shifting the power to do so from the original constitutional body to another ones (taking into account some various situations) and at the same time to assure that the body or the bodies gaining the additional right to appoint or elect the rest of the judges required for the full composition of the Court will comply with their newly accrued competence under certain pressure to them which could come to an end of their term of office.
2. The simplification of taking the oath is needed provided that the solemn taking of it could be spoiled or marred by whatsoever reasons. The written form of taking the oath may fulfill the purpose of that important act for the legitimacy of a constitutional judge.

## Endnotes

(1) See Bohdan A. Futey: *Crisis in the Constitutional Court of Ukraine: A Court Without Judges?* *The Ukrainian List Exclusives* from 27 August 2005.

(2) It was recently confirmed although indirectly by the President of Ukraine. See *News Forum* from 12 April 2006: “The fact that Ukraine has been living without the Constitutional Court for so long time is Verkhovna Rada's great debt, President Yushchenko stressed at the press conference. In the course of yesterday's meeting with the winners of the elections, Victor Yushchenko centred the attention of the participants on the necessity of the Constitutional Judges' oath of office”.

(3) This the next important issue that the exercise for filling the vacancy must start well in advance so that the selection of new constitutional judges can be finalized by the time the vacancy occurs.

(4) Article 85 para 10 of the Constitution reads as follows: „The authority of the Verkhovna Rada of Ukraine comprises: removing the President of Ukraine from office in accordance with the special procedure (impeachment) established by Article 111 of this Constitution.”