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INTERPRETATION OF UKRAINIAN PROVISIONS CONCERNING THE EXECUTION OF THE DECISIONS OF THE CONSTITUTIONAL COURT IN COMPARISON WITH THE ITALIAN EXPERIENCE

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A prompt and correct execution of the decisions of the court is a necessary condition to be observed for the good functioning of any system relying on the primacy of law. In fact, as the European Court of Human Rights has held in its judgement of 19th March 1997 concerning failure of the Greek government of giving effect to a previous European Court's decision, the right of access to a Court guaranteed by Article 6.1 of the European Convention on Human Rights would be illusory if a state's "legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, publc and expeditious - without protecting the implementation of judicial decisions…Execution of a judgement given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6".

The need for a prompt and correct execution of judicial decisions is even stronger in the case of Constitutional Courts, because of their decisive role in the constitutional order.

Execution of Constitutional Courts decisions might raise problems for many reasons. The first one is that State organs constitutionally bound to execute them refuse to comply with their own task.

It is worth adding that refusals to execute the Court's decisions are usually very rare in older constitutional democracies, while younger democracies might meet big problems at this respect. The main reason for this usually consists in the fact that the Court has not strenghtened yet its authority upon other institutions, which might resist to it either on political grounds or because of the long inheritance of the past. These factors might occur together in Eastern European countries, where the communist regimes ignored, if not fought against, the supremacy of law upon the political will of the rulers.

Does all this mean that any attempt of lawyers to enhance the performances of the Court on this ground is unuseful? Does all this mean, in other words, that lawyers, and the Court herself, should just have to wait the time to pass, leaving to the organs of the State the opportunity to choose the better occasion to execute the Courts decision?

Of course, this cannot be the right answer. While recognizing the importance of culture, habit and political will in structuring the behaviour of State authorities towards the Court's decisions, lawyers should try to find out the legal and institutional factors which might concur in barring the enforcement of those decisions. At this respect, the exposition from our distinguished hosts of the effective situation of the execution of the Ukrainien Court's decisions remains of course crucial for any consideration.

At any rate, execution of Constitutional Court's decisions is everywhere a very complex issue, depending from the particular kind of decision, from the kind of effects which the Constitution provides for that decision, and from the authority bound to execute it. Uncertainty surrounding provisions on these issue might create difficulties in executing such decisions even while State organs do not contrast the Court's decisions. This raises problems of interpretation of the provisions regulating the matter.

On the other hand, lawyers of older democracies could enhance the understanding of the problems at stake by giving account of the solutions which have been reached at this regard in the constitutional experience of their own countries.

If this is so, I will firstly draw attention to the problems posed from Ukrainien provisions concerning the execution of Constitutional Court's decisions (I), and will then give a brief account of the Italian experience on the same issue (II).

I

1. According to Ukrainien provisions, the question concerning the binding force of the Constitutional Court's acts (A) is distinguished from the question of the effects of these acts and of the subjects which are bound to their execution (B).

(A) Article 150 of the Ukrainien Constitution, after giving the Court the distinct tasks of "the official interpretation" of the Constitution and laws of Ukraine and of reviewing laws and other acts of Parliament, President, Cabinet and the Crimenian Parliament, states that the Court "renders decisions on issues set forth in this Article which are binding throughout the territory of Ukraine, are final and may not be appealed" (para. 3).

Article 151 gives the Court the further tasks of judging on the constitutionality of international treaties signed by Ukraine and of the removal of the President by the order of impeachment. Decisions held by the Court on these issues apparently do not fall under the provision of Article 150.3.

This may be the reason why the Law on the Constitutional Court of 16th October 1996, after having distinguished between "decisions of the Court", concerning constitutionality of laws and other legal acts before mentioned (Article 61), and "opinions of the Court", concerning the official interpretation of the Constitution and the laws, the judgments on international treaties and the judgements on the President's removal (Article 62) states that "Decisions and opinions of the Constitutional Court of Ukraine are equally binding" (Article 69).

The law on the Court has thus solved, at least on textual grounds, the problem of the binding force of the Court's opinions which the Constitution had left aside.

(B) Under Article 152, paras. 2 and 3, "Laws and other legal acts or their particular provisions, which are considered unconstitutional by the Constitutional Court of Ukraine, lose the validity from the date of the adoption of the decision on their unconstitutionality. Material, psychological damage to physical as well as legal entities by unconstitutional acts and actions is compensated by the State in the order established by law".

Article 70 of the law on the Court specifies the content of Article 152 of the Constitution by stating that, where necessary, the Court may determine "the order and terms of fulfilment and oblige appropriate State authorities to secure fulfilment of the decision or adherence to the opinion", and may demand from these authorities "written confirmation" of that fulfilment or adherence. At any rate, "Failure to fulfil decisions or adhere to opinions of the Constitutional Court of Ukraine carries with it liability in accordance with the law".

This sounds sufficiently clear. But, obviously enough, the question of whether these provisions will be effectively observed is a different question, which depends also on the fact that the Constitution has given the Court different tasks, the nature of which is now necessary to ascertain.

2. In this respect, we have to follow the distinction between decisions and opinions.

Decisions of the Court

Decisions of the Court give resolution to the issues on correspondence to the Constitution of laws and other legal acts mentioned from Article 150.1, n. 2.

With regard to this task, the Constitutional Court of Ukraine seems to have been entrusted with a kind of control of constitutionality which scholars label as "abstract control". The distinction between "concrete" and "abstract control" relies on the fact that the former presupposes an individual case brought before ordinary judges, and then to the Constitutional Court, concerning the violation of a constitutional right which the complainer assumes committed by statutory law, while the latter regards the conformity of laws with the Constitution, irrespective of the individual's constitutional rights which the law might have infringed.

The assumption that questions raised before the Ukrainian Court deal only with an abstract control is both demonstrated from Articles 55 and 150 of the Constitution.

Article 55 gives to courts of ordinary jurisdiction and to the Authorised Human Rights Representative of the Verkhova Rada of Ukraine the task to protect human and citizens' rights and freedoms, adding that "After exhausting all domestic remedies, everyone has the right to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or participant". The fact that Article 55 does not mention the Constitutional Court among these judicial authorities demonstrates that that Court is entrusted only with abstract control questions.

Article 150.2 specifies the authorities entitled to apply to the Court on issues of conformity with the Constitution of laws, and the other acts herein mentioned. It seems to me that these authorities may apply to the Court to the extent that they assume that these acts encroach their own jurisdiction. Therefore, the task of the Court consists in resolving a conflict between the complaining authority and the authority which has approved the act driven before the Court. Under Article 150.1, questions concerning the conformity of laws with the Constitution are brought before the Court only to the extent that the petitioner assumes that the law has encroached its own jurisdiction.

At any rate, the provisions before mentioned presuppose that, in accomplishing the tasks with which the Court is entrusted, the Court acts as a judicial and not as a consultative organ.

Opinions of the Court

As we have seen, Article 62 of the law on the Court states that opinions of the Court give resolution to issues concerning official interpretation, judgements on international treaties and the President's removal. Although Article 62 does not mention it, it is worth adding to this list the conclusion regarding the correspondence of the draft law amending the Constitution to the requirements of Articles 155 and 158 of the Constitution, which Article 159 reserves to the Court.

The task of giving an official interpretation of the Constitution is unknown in the constitutional experience of the United States and of Western European countries. On the contrary, some of the new Constitutions of Eastern Europe do provide such a task, but, unlike the Ukrainien Constitution, specify directly the authorities which can apply to the Court (e.g. Article 125, para. 5, of the Russian Constitution).

Of course, courts interpret always laws under their scrutiny. But that scrutiny depends on a request which, in turn, deals with a concrete interest of the petitioner (from time to time consisting in an individual’s constitutional right, in an authority’s jurisdiction, or even in the judge’s duty to enforce the only laws which the Constitutional Court does not deem unconstitutional).

Conceiving the Court as an organ of mere consultation implies one of the following consequences. If the opinion given by the Court is not observed, its role its seriously compromised. If the opinion is instead executed, that opinion will become part of the decision-making process, thus inserting the Court among political authorities.

The same can be said for the other opinions rendered from the Court under Articles 151 and 159 of the Constitution, to the extent that even in these cases the opinions of the Court are inserted in the decision-making processes.

3. Article 70.4 of the law on the Constitutional Court establishes that authorities failing to comply both with decisions and opinions are "liable in accordance with law".

Nevertheless, the execution of the Court's acts is strictly affected from their different nature. To the extent that execution of decisions regards judicial functions, any failure to "fulfil decisions", as Article 70 puts it, involves directly the authority and the independent role of the Court in the constitutional order of Ukraine. Failures "to adhere to the Court's opinions" don't have the same effect. They mean, rather, that the organs of the State involved in the single procedure refuse to recognize the codecisional role which the Constitution reserves to the Court in that procedure.

These assumptions drive to the conclusion that the Ukrainien Court should have to concentrate on constitutional review over legislation and other legal acts, which is directly connected with its judicial role, thus ensuring both authority of the Court in the constitutional system and its independence from political institutions.

However, even the task of official interpretation might help in strenghtening the Court's role, provided that certain conditions are observed.

I refer myself to judgments concerning laws prior to the Constitution. It is worth noticing, at this respect, that Article 150.1, n. 2 refers to "laws and other legal acts of the Verkhova Rada of Ukraine", thus excluding laws adopted prior to the Constitution from the judgments of the Constitutional Court under that provision.

Article 150.1 n. 1 refers instead to official interpretation of the Constitution and *laws of Ukraine*, thus letting room for laws adopted prior to the Constitution.

According to the I Transitional Provision, "Laws and other normative acts, adopted prior to this Constitution entering into force, are in force in the part that does not contradict the Constitution of Ukraine".

This provision presupposes that also judges can enforce only the laws which they do not deem unconstitutional. But Article 129 states that "In the administration of justice, judges are independent and subject only to the law", thus meaning that any law, irrespective of when it was adopted, has to be enforced by judges, and finally by the Supreme Court. According to that provision, judges have no power to deem laws they have to enforce as unconstitutional: should they enforce the laws adopted prior to the Constitution irrespective of their conformity with the Constitution? If they do so, the I Transitional Provision would loose any meaning, while, if they don't enforce laws which they deem unconstitutional, the content of Article 129 would be substantially altered.

A reasonable solution to this dilemma might consist in letting judges enforce any law adopted prior to the Constitution, while giving to the Supreme Court, whose judgments are final among the courts of general jurisdiction, the power to apply to the Constitutional Court for an official interpretation concerning the conformity with the Constitution of the laws adopted during the previous constitutional regime.

The solution envisaged can be sustained with three arguments. First, the Supreme Court is "the highest judicial body in the system of courts of general jurisdictions" (Article 125 Ukrainian Constitution), and is therefore the judicial body having the final say about any judicial case. Second, the Supreme Court has already the power to apply to the Court under Article 150.2. Third, the solution envisaged ensures that the power of declaring unconstitutional the laws adopted prior to the Constitution rests upon the Constitutional Court, and, at the same time, that that power can be exerted through the filter of the Supreme Court, thus avoiding an excessive burden of requests from judges.

Whichever conclusion may be reached at that regard, provisions concerning the Court's tasks should be interpreted in accordance with the goal of facilitating the Court's role after the foundation of the new constitutional and political system. In that situation, the more the legacy of the past is difficult to comply with (this is the case of all the regimes founded after the fall of Soviet Union), the more crucial become the first steps of Constitutional Courts for what regards laws prior to the Constitution.

But if judges help, to a certain extent, the Constitutional Court in asserting the primacy of new constitutional principles, adherence to those principles will better advance all over the country. This assumption can be demonstrated by the experience of many countries, especially those where a great uncertainty surrounded the review

over the laws adopted under the previous regime. Some reference to the main moments of the Italian experience might thus appear useful for the purposes of our meeting.

II

1. In the Italian experience, constitutional review over legislation is beyond any doubt the most important of the competences with which the Constitutional Court is entrusted, and even the more frequently exerted by the Court.

The Italian model diverges from those of other European countries, such as Germany, Austria and Spain, on the ground of access to the Court for what concerns the review over legislation. While in these countries access to the Court is not necessarily dependent on other judicial authorities statements in the course of judicial proceedings (*Verfassungsgerichtbarkeit, Recurso de amparo*), according to Italian provisions, constitutional review over legislation depends mainly on a preliminary question raised by ordinary judges to the Court, concerning the constitutionality of the law which those judges have to apply in the particular case they are facing.

Scholars have repeatedly noticed that that system connects together the abstract review of conformity of the laws to the Constitution and the fact that the same judgement is concretely liked to a judicial case, both in the sense that access to the Court depends on a previous judicial decision and in the sense that the Court's decision upon the question will have effects on the judicial controversy at stake. Hence, it is possible to explain the particular connections of the Italian Court with ordinary judges on the one hand and with Parliament on the other hand, and the double role which the Court has played in the constitutional experience.

In 1956, there was in Italy a striking contrast between the Constitution, which recognizes broadly freedoms and fundamental rights to citizens, and legislation approved under the previous constitutional order, especially in the fascist period, which very often denied those rights. Moreover, in the understanding of ordinary judges, and of the Supreme Court in particular, constitutional provisions concerning fundamental rights were nothing more than mere suggestions for Parliament. Hence, many judicial decisions denyed that judges were allowed to struck down the legislation contrasting with the Constitution, including the legislation approved under the previous regime.

Since its first decision, the Court asserted the supremacy of the Constitution over ordinary legislation, irrespective of the time of its approval. Accordingly, the Court began to play a pivotal role in in the young Italian democracy. But the enterprise was far from easy. In light of the structural features we have seen before, the Court was called to face the reluctancy of judges to accept the supremacy of the Constitution, and also the obvious tendency of Parliament to defend its own traditional prerogatives.

However, during the first two decades of its activity, the Court's main task was to struck down the legislation of the past regimes violating constitutional guarantees of fundamental rights. Scrutinies concerned especially the will of the past political legislatures, and this helped the Court in avoiding to face directly the will of the actual legislatures. By this way, the Court could concentrate herself in accomplishing

a persuasive function towards judges, in order to let them apply to the Court whenever they might doubt about the conformity of the older legislation to the new Constitution.

Relationships between the Court and judges of ordinary jurisdictions were not easy, since judges were convinced that interpretation of statutes was exclusively their own task. On the other hand, according to written provisions, decisions of the Court could be either of annulment of the law or of rejection of the request. In the former case the decision of the Court has binding force towards anybody, that is, to all relationships touched from the law which has been declared unconstitutional, with the exception of issues already definitely settled. In the latter case, the decision binds instead only the judge which has applied to the Court.

In these conditions, it was difficult for the Court to facilitate the acceptance and observance of their decisions from judges. This led the Court to adopt decisions which limited the range of the declaration of unconstitutionality, by telling at which conditions the law was not unconstitutional. But since judges refused even those decisions, the Court decided to adopt decisions expressing the unconstitutional meaning of a statute, thus struckind down the statute only with regard to that meaning. This evolution avoided further contrast with the judiciary, and relations between the two in fact improved.

More recently, for what concerns the meaning of the legislation under its scrutiny, the Court began to rely on the interpretation held by judges, called “living law”, to the extent that it is not controversial among courts of ordinary jurisdiction. Moreover, whenever the legislation can be interpreted in accordance with the Constitution, judges tend to choose that interpretation, thus avoiding any application to the Court. This tendency has remarkably increased in the last period, since constitutional values are more and more familiar to judges.

In the last decades, both the judicial activism of the Court and the fact that its main attention has shifted from the legislation of older regimes to that of the Republican regime might have virtually determined great difficulties with Parliament.

In fact, from the legal point of view, Parliament can always adopt a statute whose content might even repeat the propositions of a statute which has been struck down by the Court, thus contrasting entirely with such a decision. But in the last decades, the authority of the Court in the constitutional system does not raise any more fundamental objections. Both Parliament and Government usually do not contravene to the Court's decisions, and when they have contravened to it judges have followed the Court's decision. On one occasion, for example, Parliament adopted a motion stating that the Court could not act as a legislator and declared a Court's judgement void of effect. But when citizens applied to judges in order to obtain the economic advantages which the Court's decision gave them, judges enforced that decision. This brought Parliament to adopt a new statute which complied with the Court's decisions.

There have been, however, many cases in which political institutions, although acknowledging the need to adopt statutes conforming to the Court's decision, have not intervened in any way. But such cases may occur, not because of Government's or Parliament's intent to contrast the Court's decision, but because of political difficulties in adopting a new statute on the issue at stake.