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THE REFORM OF CONSTITUTIONAL JUSTICE IN UKRAINE: MODERN STAGE

The article draws attention to improvement of constitutional justice in Ukraine by the means of constitutional reform, in particular, there are analyzed innovations proposed by the draft law on justice, the draft law on deputies and judges immunity and the draft law on the decentralization of power. This article contains a detailed assessment of the proposed legislative innovations and the potential constitutional and legal consequences of their implementation. Though there are discovered certain shortcomings that generate threats to proper implementation of the constitutional justice exceptional tasks, a number of progressive advantages of the draft laws are allocated. Thus, it is concluded that if developed observations were taken into account and research activities were subordinated to the relevant needs of society and actual challenges of today, there would be conditions necessary for achievement in Ukraine of the long expected environment of a real constitutionalism, legal, democratic and fair state.

Key words: constitutional justice, the Constitutional Court of Ukraine, legal understanding of the constitutional jurisdiction, constitutional reform process, draft amendments to the Constitution of Ukraine.

Introduction. So as to develop coordinated proposals for amendments to the Constitution of Ukraine with the involvement of representatives of different political forces, public, domestic and international organizations, and to promote social and political consensus concerning improving the constitutional regulation of social relations in Ukraine, on the 3rd of March, 2015 there was established Constitutional Commission as the President of Ukraine special subsidiary body¹.

One of the results of the Commission's activity has become the draft amendments to the Constitution of Ukraine regarding justice², in particular a number of proposals related to the improvement of constitutional justice in Ukraine. In general, it should be noted concerning this part of the draft law that the amendments proposed by the Constitutional Commission are necessary, constructive, balanced and systemic. Along with that, some provisions of the draft contain certain shortcomings and therefore, in view of the fact that the final decision on its finite wording to be submitted to the Supreme Council Ukraine by the subject of constitutional initiative - the President of Ukraine has not been formed yet, the below mentioned observations and conclusions may be taken into account at any of the following stages of the draft adoption.

Furthermore, it should be appreciated that an important objective of constitutional reform, in addition to the amendments to the Constitution direct developments, is to ensure a broad public and professional discussion of proposals for constitutional reform in Ukraine with the participation of leading experts in constitutional and other fields of law, in the social and political sciences spheres, public figures, representatives of non-government and international organizations.

The purpose of the article. This article is aimed at a scientific research and assessment of the state of constitutional justice reform in Ukraine and the role of the Constitution of Ukraine improving in this process. In order to develop substantiated conclusions and propose concrete provisions of the draft amendments to the Constitution of Ukraine a detailed analysis of the proposed legislative innovations and the potential constitutional and legal consequences of their implementation is needed.

¹ Указ «Про Конституційну Комісію» 2015 (Президент України). *Урядовий кур'єр*, 41.

² Проект змін до Конституції України в частині правосуддя, схвалений Конституційною Комісією та направлений до Венеціанської Комісії 2015 (Верховна Рада України). *Офіційний сайт Конституційної Комісії* <<http://constitution.gov.ua/work/item/id/16>> (2015, December, 21).

The principal material. A positive fact to be considered is a high level of attraction of professional expert community to these amendments analysis and discussion, though not all representatives thereof are included to the composition of the Constitutional Commission. There is a reason to hope that this should significantly contribute not only to the quality of the draft law content, but will provide to the draft a support both in parliament and in society. Unfortunately, the importance of these circumstances has not been properly evaluated during the work on another essential project on amendments to the Constitution – on the state power decentralization. It became one of the reasons for the extremely negative resonance in regard to this draft prior approval by the Supreme Council of Ukraine process and for the lack of the legitimacy of the document that is highly required in such cases.

On the other hand, there should be appreciated an active position of most researchers who, basing on the accumulated during prior periods materials that significantly complement current knowledge in the field of the constitutional justice reform, propose to use such developments not only for the Constitution of Ukraine amending, but for future organizational and legal support of judicial reforms in Ukraine as well. Therefore, among the representatives of the constitutional law science in this context should be highlighted the works of such scholars as M. Koziubra, V. Musiyaka, A. Selivanov, I. Slidenko, V. Fedorenko, S. Shevchuk.

However, we should recognize that a number of scientific papers on the issues of justice reform in general and of constitutional justice in particular, are too theoretical in nature and hardly can be useful for solving of the specific problems occurring at the present stage of legal improvements Ukraine. In the opinion of I. Slidenko, in the analytics of the constitutional law there already is noted a surprising feature of the overwhelming majority of studies related to constitutional control, - they are referred to the essential, but not to the proper. Constitutional control is undergoing a certain sort of brutal mystification - instead of a search for the optimality authors restrict themselves to various kinds of statements that are usually based on the extracts from the national legislator works.¹

Therefore, it is necessary to gradually deviate from the habit to focus the scientific works, based solely on scholars' personal interests, but to subordinate research activities to the relevant needs of society and acute challenges of today. Moreover, the adaptation of national idea of constitutional control in Ukraine has been conceived as an instrument of democratization of new independent state based on the rule of law, independence, collegiality, equality of the judges, transparency, full and comprehensive review of every case and validity of its decisions. Each of these principles had to guarantee the high authority of the Constitutional Court of Ukraine as the main tool of its effectiveness within the mission on the rule of Constitution of Ukraine throughout the state establishment.

In the meantime, the practice of these principles implementation, as in many other areas of public life in Ukraine, is not always consistent with their declared provisions. Among more than 300 decisions and conclusions adopted during the Constitutional Court of Ukraine existence, only few of them have made a significant contribution to the establishment of democracy and constitutionalism ideals in Ukraine. Along with this, a number of the sole body of constitutional jurisdiction acts have an ambiguous effect on the process of the Ukrainian state building, and some of them became one of the key factors that led to the Revolution of Dignity 2014 and military and political processes that followed.²

In this regard, it appears reasonable and necessary to provide an analysis of the proposed amendments to the Constitution of Ukraine that hold forth many hopes.

It is proposed to remove from the text of the Chapter VIII of the Constitution (“Justice”) the rules devoted to regulation of the relations connected with the Constitutional Court activities. This proposal indicates a change in the fundamental positioning of the sole body of constitutional jurisdiction and granting it an additional special status that may not be covered by the scope of one of the government “branches”. This amendment shall be evaluated as plausible, since it is logically conditioned by the essential difference in the legal nature both of general jurisdiction courts and the Constitutional Court and of judges of these public institutions.

However, it is proposed to present the Article 147 of the Constitution of Ukraine in the new edition, in particular to remove the provision that the Constitutional Court of Ukraine is the sole body of constitutional jurisdiction in Ukraine. Perhaps indicated proposal is one of the most significant

¹ Сліденко, І.Д. (2010). *Феноменологія конституційного контролю. Генеза, природа і позиціонування в контексті аксіологічних, епістемологічних, практиологічних, синергетичних аспектів*. Київ: Істина, 10.

² Різник, С., Федоренко, В. (2015). Поновлення авторитету Конституційного Суду України як запорука ефективного функціонування держави. *Право України*, 5, 97-110.

shortcomings of the draft law. Although the idea to exclude the Constitutional Court from the judiciary system is logical and prudential, it does not take into account all possible negative practical implications, including its content incorrect understanding by the subjects of law enforcement that, by contrast, may lead to unnatural duplication of functions of general jurisdiction courts and the Constitutional Court.

Relevant concerns, even without above mentioned amendments, have been already expressed by the eminent constitutional and legal science and practice representatives. The adoption of such innovations may generate additional superfluous confusion in constitutional legal understanding of the constitutional jurisdiction exclusiveness, as well as lead to the cases of the general jurisdiction courts competence overriding.

In this regard, it would be appropriate to cite an excerpt from the dissenting opinion of Judge M. Melnyk regarding the opinion of the Constitutional Court of Ukraine in the case on the compliance of the draft law on amending the Constitution of Ukraine on state power decentralization with the requirements of Articles 157 and 158 of the Constitution of Ukraine. Thus, in this dissenting opinion it is reasonably stated the following: “The draft law proposes to provide the prefect with a right to void the acts of local governments for reasons of non-compliance with the Constitution of Ukraine “with simultaneous appeal to a court”. Therefore, the draft law stipulates that the examination of this prefect’s appeal will be carried out by the general jurisdiction court ... This implies that proposed amendments to the Constitution of Ukraine oblige the general jurisdiction courts to verify the local government acts for compliance with the Constitution of Ukraine at the prefect’s initiative. ... The Constitution of Ukraine grants to the general jurisdiction courts sufficient powers to apply the Constitution provisions directly even though the operation of current but illegal law or other normative act. However, the Fundamental Law of Ukraine by no means allows the possibility of substitution of the Constitutional Court of Ukraine exclusive jurisdiction by the general jurisdiction courts authority”.¹

Other words, the removal of the provision on the exclusive affiliation of constitutional jurisdiction to the Constitutional Court of Ukraine would create additional threats to the proper implementation of the constitutional justice exceptional tasks and will lead to unpredictable consequences in the area of judicial enforcement.

At the same time the above mentioned does not diminish the positive aspects of the proposed Article 147 of the Constitution. For instance, in the case of its approval paragraph 1 will be laid out as follows: “The Constitutional Court of Ukraine decides on issues of the laws and regulations conformity with the Constitution of Ukraine, provides the official interpretation of the Constitution of Ukraine and exercises other powers in accordance with this Constitution”.

Apparently, this provision stipulates the removal from the Constitutional Court’s jurisdiction the power to officially interpret the laws that is flattering and non-controversial proposal since it reflects not only foreign practice, but meets the purpose and legal nature of the Court, more reasonably separates the objectives of parliament and constitutional justice.

While certain essential constitutional and jurisdictional issues are disregarded in the draft law, few philological improvements of the constitutional text that are of the less importance have gained excessive attention. For instance (not exclusively): instead of Article 148 wording “The Constitutional Court of Ukraine is composed of eighteen judges of the Constitutional Court of Ukraine.” it is propose to set forth: “The composition of the Constitutional Court of Ukraine includes eighteen judges of the Constitutional Court of Ukraine”. Apparently, the substantive difference between these texts may hardly be traced.

In terms of the necessity to find critical for the future of the state and all the Ukrainian people solutions for national constitutional improvement, these amendments reduce awareness of the importance and value of the current stage of state building process, distract attention of experts and all interested active citizens from priority objectives of actual constitutional system of Ukraine reformation. It is essential to keep in mind the need to refrain from unnecessary changes to the Constitution at least on the basis of the norms of paragraph 2, Art. 158 of the Constitution of Ukraine stating that the Supreme Council of Ukraine shall not amend the same provisions of the Constitution of Ukraine twice during the term of office. Therefore, in cases of actual necessity of essential changes to the Fundamental Law implementation, the Ukrainian parliament will encounter risks of exclusively procedural obstacles for the constitutional

¹ *Окрема думка судді Конституційного Суду України Мельника М. І. стосовно Висновку Конституційного Суду України у справі за зверненням Верховної Ради України про надання висновку щодо відповідності законопроекту про внесення змін до Конституції України щодо децентралізації влади вимогам статей 157 і 158 Конституції України, № 2-в/2015 2015 (Конституційний Суд України).*

improvement that will be caused by entirely secondary motives of lexical and grammatical correction of certain provisions of the Constitution.

Supplementation of the Art. 148 with the provision that “selection of candidates for the post of the Constitutional Court of Ukraine judge is carried out on a competitive basis in order defined by law” appears not to meet the sufficient constitutional level, especially as it does not generate any independent legal consequences. This issue may be completely resolved exclusively by the law.

One of the advantages of the analyzed draft law is the refusal to increase the minimum age for judges of the Constitutional Court to 45 years (as determined by the previous version and was subjected to criticism from the side of experts and the Venice Commission). Instead, in that wording there are remained increased requirements regarding the work experience of the candidate for the post of the Constitutional Court of Ukraine judge, that does not appear reasonable, in particular this article envisages that a judge of the Constitutional Court of Ukraine must be a citizen of Ukraine, who has reached forty years on the appointment day, has a law degree and experience of scientific activity in the legal field or professional experience as a judge or a lawyer for at least fifteen years, currently resides in Ukraine for the last twenty years and speaks the state language.

It is important to realize that the highest level of professionalism is difficult to measure by formal or age criteria. Formal restrictions should become only the minimum confirming a necessary level of outstanding that is the basis of the search for prominent, and what is more significant – authoritative, representatives of science and field of constitutional law so as to perform the honorary functions of the Constitutional Court of Ukraine judges¹.

A significant advantage of the draft law is the amendment to the Art. 149 of the Basic Law, according to which a judge of the Constitutional Court of Ukraine may not be detained or maintained in custody until the conviction by a court without the consent of the Constitutional Court of Ukraine, except his detention during or immediately after committing the crime.

Removing this issue from the of authority of the Parliament and the Supreme Council of Justice (as prescribed in the current Constitution of Ukraine) envisaged in the draft law regarding deputies and judges immunity, is a serious step towards strengthening of the independence of constitutional justice in Ukraine. In this respect, it is worth to support the constitutional provisions of Article 149 of the draft law that the judge of the Constitutional Court of Ukraine does not bear legal responsibility for voting in connection with the adoption of the Court decisions and providing his opinions, except for commitment of a crime or disciplinary offense. The State ensures personal security of judges of the Constitutional Court of Ukraine and their families.

The interim opinion of the Venice Commission on the Article 150 of the Constitution of Ukraine and determination of the relevant authorities’ normative acts as objects of constitutional control should be positively mentioned as well.

Moreover, it is proposed to supplement the Article 55 of the Constitution of Ukraine with a paragraph 3 as follows: “Everyone shall have the right to submit a constitutional appeal to the Constitutional Court of Ukraine on the grounds envisaged by this Constitution and in the manner prescribed by law”.

This amendment has required its regulatory consolidation long since, particularly at constitutional level, as the institute of the constitutional appeal is universal for the democratic states mean not only for the rights and freedoms of man and citizen protection, but also is an instrument strengthening the authority of the Constitution as a social agreement and the act of constituent power of the people in the interest of each citizen.

For the development of this provision the draft law envisages a new Article 151-1 that establishes: “The Constitutional Court of Ukraine decides on the constitutionality of the law of Ukraine at a constitutional appeal of the person who believes that the law of Ukraine applied when making the final judicial decision in her case contradicts to the Constitution of Ukraine. The constitutional appeal may be submitted if all domestic legal remedies have been exhausted”.

Undoubtedly, these fundamental constitutional provisions implementation would depend on its legislative continuation and therefore the extremely important task of the expert community is a qualitative

¹ Різник, С., Федоренко, В. (2015). Поновлення авторитету Конституційного Суду України як запорука ефективного функціонування держави. *Право України*, 5, 97–110.

work over the law on the legal status of the constitutional appeal, detailing the grounds and procedure for its submission to the Constitutional Court.

Although this observation at first sight may appear too formal, it is necessary to point out that from the perspective of legal technique the introduction to the text of the draft law of a paragraph 1-1 of Art. 150 of the Constitution is incomprehensible. In particular, the draft law on amendments to the Constitution of Ukraine (concerning the decentralization of power) specifies the following: “The authority of the Constitutional Court of Ukraine shall include: ... 1-1) at the request of the President of Ukraine resolution of the issue of the head’s of the community, the community council’s, district and regional councils’ acts constitutionality;”

In this case it is important to avoid procedural errors, as if this paragraph is included into the draft law concerning the decentralization of power, it should be observed that this provision is excluded from the text of the draft law on justice that will be submitted to the Parliament. Indeed this draft law is already pre-approved by the Parliament and has all chances to be finally adopted in the current parliamentary session. As stated above, the Supreme Council of Ukraine during the term of office shall not amend the same provisions of the Constitution of Ukraine twice. Therefore if this norm is left in the text of the reviewed draft law, it may lead to unnecessary procedural difficulties, trigger conditions for pseudo-legal casuistic rhetoric of the constitutional reform opponents and even to initialization of the specified issue review by the Constitutional Court of Ukraine.

One more debatable proposal is a supplementation of the Article 151 of the Basic Law refined version with the following provision: “The Constitutional Court of Ukraine at the request of the President of Ukraine or at least forty five people's deputies of Ukraine provides opinions on the constitutionality of issues submitted for a national referendum on people initiative”. Thus, the object of constitutional control over referendums is reduced to the referendums on people's initiative. However, under the Article 85 of the Constitution of Ukraine, the Supreme Council of Ukraine is entitled to assign all-Ukrainian referendums on issues determined by the Article 73 of the Constitution (the issues of the territory of Ukraine changing shall be decided exclusively by national referendum).

Instead, a constitutional narrowing of feasibility of one of the main forms of direct democracy (direct people's will expression) - referendums on people initiative - through the implementation of the previous constitutional review of issues submitted thereto would logically require the application of this approach to referendums on the territory of Ukraine changing as well. In the conditions of the current level of geopolitical tensions and threats to the national security of Ukraine, this constitutional innovation content would demonstrate more comprehensive and systemic vision of constitutional legislator. Therefore, the previous version of the article that is directed for interim opinion of the Venice Commission seemed more justified.

Article 151-2 of the draft law provides as follows: “Decisions and conclusions adopted by the Constitutional Court of Ukraine on matters foreseen in paragraphs 1 and 2 of Article 150, paragraph 2 of Article 151, Article 151-1 of the Constitution, are binding on the territory Ukraine, final and may not be contested”.

Specified provision has to be improved, as besides the powers enshrined in the Constitution mentioned articles, the Constitutional Court provides an opinion on the compliance with the Constitution of Ukraine or laws of Ukraine by the Autonomous Republic of Crimea Parliament before the anticipatory termination of its powers by the Supreme Council of Ukraine (p. 28 of Art. 85), provides opinion on the observance of the constitutional procedure of investigation and the case of impeachment examination (Art. 111), provides an opinion on the draft law on the Constitution amendments conformity with the Articles 157 and 158 of the Constitution (Art. 159). Conclusions adopted on these cases are binding on the territory of Ukraine, final and may not be contested as well. The lack of indications on this fact in the specified draft is incomprehensible.

Conclusions. Summing up, it would be appropriate to agree with the opinion that in the study of the constitutional control an element of consistency is essential. Paraphrasing Gumilev, it may be stated that each institution in the state is both the system and the system element. As a system, it supports own functional parameters, performs the necessary conditions for all stages the existence. As an element of a higher order, it meets the needs of the system and thus obtains a right to exist¹.

¹ Сліденко, І.Д. (2010). *Феноменологія конституційного контролю. Генеза, природа і позиціонування в контексті аксіологічних, епістемологічних, праксіологічних, синергетичних аспектів*. Київ: Істина, 10.

Certainly, the outlined remarks on the draft amendments to the Constitution of Ukraine regarding constitutional justice in by no means shall claim to be exhaustive systematic or indisputable, however this study results may become a good incentive for the continuation of the encircled issues analysis so as to provide a contribution for achievement in Ukraine of the long expected environment of a real constitutionalism, legal, democratic and fair state.

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