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

# UKRAINE

# OPINION

# ON THE DRAFT LAW ON CONSTITUTIONAL PROCEDURE (DRAFT LAW NO.4533) AND ALTERNATIVE DRAFT LAW ON THE PROCEDURE FOR CONSIDERATION OF CASES AND EXECUTION OF JUDGMENTS OF THE CONSTITUTIONAL COURT (DRAFT LAW NO. 4533-1)

**Adopted by the Venice Commission**
**at its 126th Plenary Session**
**(online, 19-20 March 2021)**

**on the basis of comments by**

**Mr Paolo CAROZZA (Member, United States)**
**Mr Srdjan DARMANOVIC (Member, Montenegro)**
**Mr Christoph GRABENWARTER (Member, Austria)**

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## I. Introduction

1. By letter of 26 January 2021, the Speaker of the Verkhovna Rada (Parliament of Ukraine), Mr Razumkov, requested an opinion of the Venice Commission on the draft law on constitutional procedure (draft law no. 4533, CDL-REF(2021)015) and the alternative draft law on the procedure for consideration of cases and execution of judgments of the Constitutional Court (draft law no. 4533-1, CDL-REF(2021)016).

2. Mr P. Carozza, Mr S. Darmanović and Mr Ch. Grabenwarter acted as rapporteurs for this opinion.

3. On 22 February 2021, the rapporteurs, assisted by Mr Dürr and Mr Dikov, had online meetings with the following interlocutors: the Deputy Head of the President's Office of Ukraine and Chairperson of the Working Group on the Judiciary Reform under the President's Commission on Legal Reform, the Chair of the Parliamentary Committee on Legal Policy and members of the Committee, the President and Judges of the Constitutional Court of Ukraine, representatives the international community and NGOs. The Constitutional Court sent written comments on the draft law. The Commission is grateful to the Council of Europe Office in Kyiv for the excellent organisation of these meetings.

4. This opinion was prepared in reliance on the English translation of the draft laws. The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings. Following an exchange of views with Mr Andrii Kostin, Chairperson of the Committee on Legal Policy of the Verkhovna Rada and Ms Olha Sovhyria, Deputy Chairperson of the Committee on Legal Policy, Chairperson of the Sub-committee on Political Reform and Constitutional Law, it was adopted by the Venice Commission at its 126th Plenary Session (online, 19-20 March 2021).

## II. Background

### A. Urgent opinion on the Reform of the Constitutional Court

6. This Opinion follows the adoption and endorsement of two urgent opinions of the Venice Commission on the Legislative Situation regarding anti-corruption mechanisms, following Decision 13-r/2020 of the Constitutional Court of Ukraine and on the Reform of the Constitutional Court.[1]

7. President Zelenskyy of Ukraine had requested these opinions after the adoption by the Constitutional Court of Decision 13-r/2020 on 27 October 2020 that had invalidated large parts of the anti-corruption legislation in force.

8. Decision 13-r/2020 triggered a heated public debate. President Zelenskyy introduced in Parliament draft law No. 4288 that would have declared null and void Decision 13-r/2020 and terminated the powers of all judges of the Constitutional Court.

[1] CDL-PI(2020)018, endorsed as CDL-AD(2020)038, Ukraine - Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Legislative Situation regarding anti-corruption mechanisms, following Decision N° 13-R/2020 of the Constitutional Court of Ukraine and CDL-PI(2020)019, endorsed as CDL-AD(2020)039, Ukraine - Urgent opinion on the Reform of the Constitutional Court.

9. At the request of the President Zelenskyy, the Venice Commission issued the two urgent Opinions. The first urgent Opinion CDL-AD(2020)038 dealt with the anti-corruption mechanisms, whereas the urgent Opinion CDL-AD(2020)039 (hereinafter "the Urgent Opinion") addressed a possible reform of the Constitutional Court.

10. The urgent opinion identified a number of shortcomings in Decision 13-r/2020:

- Firstly, the reasoning of Decision 13-r was incomplete and unpersuasive because it misused international standards and general principles of constitutionalism regarding separation of powers and judicial independence. The decision lacked any reasoned explanation both about the general principles it invoked and also about the specific legislative provisions that it invalidated.
- Secondly, notwithstanding formal recusal requests, the Court's procedures relating to this case failed to deal adequately with serious allegations of possible conflicts of interest on the part of at least four of the 12 Constitutional Court judges who had participated in the decision.
- Thirdly, the reach of Decision 13-r went substantially beyond the scope of the request for constitutional review that had been submitted to the Court, even though an explicit legislative authorisation for the Constitutional Court to extend the scope of a petition had been repealed in 2016.
- Fourthly, in contrast to the common practice of the Court in previous cases involving the unconstitutionality of important legislative provisions, the Court in this case (and without explanation) had not provided for any period of delay in the entry into force of the judgment.

11. Nonetheless, the Opinion made clear that in relation to the specific case decided by the Court, the Constitutional Court's decisions were final and binding. Blocking the activity of the Constitutional Court would amount to a major, severe, breach of the rule of law, and the constitutional principles of the separation of powers and the independence of the judiciary.

12. However, Decision 13-r/2020 was a strong indication that a reform of the Constitutional Court was warranted. Elements of such a reform should be notably:

- strengthening the requirements for the Court to provide reasoned decisions;
- improving the legislative provisions, and the Court's practices, regarding the definition and handling of potential conflicts of interest and the recusal of judges;
- providing greater clarity regarding the possible disciplinary procedures and sanctions to which judges may be subject when violating their judicial obligations;
- improving the procedural legitimacy of Constitutional Court decisions;
- considering whether and how Constitutional Court decisions and proceedings may be reopened after a judgment has already been rendered; and
- establishing better processes for identifying candidates and selecting judges to the Constitutional Court, including through the creation of a new screening body with international participation, which could help ensure that judges have the requisite high moral character and integrity.

13. While the procedure before the Constitutional Court and notably aspects relating to the rights and obligations of the parties should be regulated in the Law on the Constitutional Court, the Court should be able to define further details of its procedure in its own Rules of Procedure.

14. The Venice Commission recommended filling the current vacancies at the Constitutional Court by the Parliament and the Congress of Judges only after an improvement of the system of appointments (screening body). A constitutional amendment should provide for the election of the parliamentary quota with a qualified majority at a later stage.

15. In the light of the specific situation in Ukraine, the Venice Commission recommended that the Constitutional Court show some restraint if the amended provisions were challenged before the Court. However, the Constitutional Court should be consulted on the reform. The Court's written comments should be considered thoroughly, notably as they point to possible incoherencies between the Draft Law and the existing Law on the Constitutional Court.

16. The introduction of the Draft Law on Constitutional Procedure and the alternative draft is a reaction to the Venice Commission's recommendations. The Venice Commission warmly welcomes that President Zelenskyy withdrew draft law No. 4288 that would have terminated the powers of all judges of the Constitutional Court.

### B. Scope of the opinion – previous opinions

17. The request for opinion covers both draft law no. 4533 on constitutional procedure and an alternative draft law no. 4533-1 on procedure for consideration of cases and execution of judgments of the Constitutional Court of Ukraine. The main draft law and its alternative draft are very similar but they differ in some points. This Opinion analyses only the main draft law no. 4533. Notably, since the request that draft law has been adopted in first reading and the alternative draft law no. 4533-1 is no longer pending before Parliament. However, this Opinion will refer to the alternative draft law on occasion, when the Commission recommends taking up elements from that draft.

18. This Opinion is based on international and regional standards, and many of the details of the law do not rise to the level of applicability of those standards. This Opinion does not engage in an analysis or evaluation of the Law's compliance with said standards except insofar as the proposed changes touch upon or affect those principles and practices reflective of international/regional standards.

19. Currently, the status and activities of the Constitutional Court are governed by the Constitution,[2] the Law on the Constitutional Court[3] and the Court's own Rules of Procedure.[4] In 2016, the Venice Commission provided an opinion on the then draft law on the Constitutional Court.[5]

## III. Analysis

### A. Appointment of judges of the Constitutional Court

20. In the Venice Commission's view, the reform of the appointment process is essential to the reform of the Constitutional Court generally. It was a missed opportunity to not include this in the current law. Article 148 (3) of the Constitution provides that the selection of candidates for the office of judge of the Constitutional Court is conducted on a competitive basis under the procedure prescribed by law. Therefore, the selection procedure can be improved without

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[2] http://www.ccu.gov.ua/sites/default/files/constitution_2019_eng.pdf; http://www.codices.coe.int/NXT/gateway.dll/CODICES/constitutions/ENG/EUR/UKR?f=templates&fn=default.htm.
[3] http://www.ccu.gov.ua/sites/default/files/law_on_ccu_amended_2017_eng.pdf; http://www.codices.coe.int/NXT/gateway.dll/CODICES/laws/ENG/EUR/UKR?f=templates&fn=default.htm.
[4] http://www.ccu.gov.ua/sites/default/files/rules_2018_0.pdf.
[5] Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court; see also CDL-AD(2006)016, Opinion on possible Constitutional and Legislative Improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine; CDL-AD(2015)043, Secretariat Memorandum on the compatibility of the Draft Law of Ukraine on amending the Constitution of Ukraine as to Justice as submitted by the President to the Verkhovna Rada on 25 November 2015 (CDL-REF(2015)047) with the Venice Commission's Opinion on the proposed amendments to the Constitution of Ukraine regarding the Judiciary (remarks on articles 126, 148, 149-1).

constitutional amendments and many important improvements can be made in the appointment system on the basis of ordinary law.

21. Draft law no. 4533 establishes a new law on the Procedure of the Constitutional Court, separate from the existing Law on the Constitutional Court, but it also amends the existing Law by introducing there a new article on disciplinary procedure (see below).

22. With one exception, draft law no. 4533 does not address the system of appointments of judges of the Constitutional Court nor the competitive selection required by Article 148 of the Constitution. In its Urgent Opinion CDL-AD(2020)039, the Venice Commission had recommended that a "screening body for candidates for the office of judge of the Constitutional Court should be established, with an international component, which could include international human rights experts and participation from civil society, to ensure the moral and professional qualities of the candidates."

23. Draft law no. 4533 does however affect the procedure of appointments of judges by amending Article 11 (3) of the Law on the Constitutional Court, which reads:

> *"3. A Constitutional Court Judge shall comply with the criterion of political neutrality. A Judge may not be affiliated with political parties or trade unions, or display his or her disposition towards them, or participate in any political activities.*
> *In particular, a person may not be appointed to the position of a Constitutional Court Judge if on the date of his or her appointment he or she:*
> *1) is a member or holds a position in a political party or other organisation that pursues political objectives or participates in political activities;*
> *2) is elected to an elective office in a government or local self-government authority, holds representative powers;*
> *3) participates in managing or financing a political campaign or other political activities.*
> *..."*

24. Item 6 (5) (d) of the Final Provisions of Draft law no. 4533 would replace item 2) of the above criteria with the provision, that as *"[t]he Judge of the Constitutional Court may not, among other things, [be] appoint[ed] a person who is a citizen of another state as of the day of such appointment"*.

25. This amendment would result in the possibility to appoint an active member of the Government or Parliament. This would contradict the purpose of Article 11 (3) requiring political neutrality for the judges of the Constitutional Court. The Venice Commission recommends removing item 6 (5) (d) of the Final Provisions Draft law no. 4533 and to strictly adhere to the prohibition of appointing active members of Parliament as judges of the Constitutional Court. As the only provision dealing with appointments, the amendments to Article 11 (3) does not fit into Draft law no. 4533, which deals with procedure and discipline. Instead of that provision, the Commission recommends implementing - possibly in separate legislation - its recommendation from the urgent Opinion CDL-AD(2020)029 to establish, a screening body with an international component for Constitutional Court candidates.[6] Considerable substantial changes can be made consistently with the current constitutional provisions. The introduction of such a screening body would not require any constitutional amendment but would implement in practice Article 148 of the Constitution.

[6] The Ambassadors of the G7 countries in Ukraine recommended to [emphasis added]: temporarily institute a modest increase in the decision-making quorum of the CCU; *postpone ongoing selection procedures for CCU judges until new selection rules are introduced; urgently establish a clear and transparent competitive selection process for CCU judges with the meaningful participation of internationals in vetting all candidates;* strengthen disciplinary proceedings and ethical requirements for CCU judges; establishing an independent Ethics Commission that is empowered to vet current HCJ members and submitting a motion as necessary to dismiss HCJ members to appointing bodies for their final decision; mandate impartial open deliberation of cases and voting by CCU judges.

26. The Venice Commission repeats its recommendation made in paragraph 104 of the Urgent Opinion that current vacancies at the Constitutional Court should be filled only after an improvement of the system of appointments.

### B. Case allocation and composition of senates and boards

27. The draft law institutes a variety of forms of transparency into the process of constitutional adjudication. These are very welcome, positive developments.

28. Article 9 establishes an Automated Document Management System, providing public (anonymised) access to case files and which would also be used for the automatic composition of senates (Article 12 (2)) and panels (Article 13 (1)). This is welcome. However, the law should also specify for how long these bodies are composed and when/how the composition can change (see also Article 30 (6) on the change of a judge from one senate to the other senate).

29. The draft law thus would establish substantially new processes for the distribution of work internally to the Court, through the Senates and Boards, and in the assignment of rapporteur judges (Articles 9 (3), 30 (1)). The automated system that it introduces can be a good development insofar as it can both increase work efficiency and (more importantly) help reduce any arbitrariness or political influence (or the perception of such influence) on the distribution of cases in the Court.

30. Although on balance an automated system might be best, the practical use of the system and even the codes in automated processes can be manipulated to introduce political and ideological influence and corruption under the appearance of neutrality. To contain any such abuse, it is essential that the results of the automated system be open to the public so that any pattern showing possible abuse can be detected.

31. It is also positive that draft Article 36 allows the judges to overcome a possible blockage by the judge-rapporteur or the chair in establishing the Court agenda.

### C. Access to constitutional justice

32. A number of provisions on constitutional complaints are added or amended. The draft law would implement a variety of measures aimed at improving applicants' access to constitutional justice, which are positive developments:

- possibility to introduce constitutional complaints electronically (Article 24 (5)),
- electronic correspondence with the initiator of the constitutional complaint (Article 24(6)),
- set period for the elimination of shortcomings (Article 28 (3)),
- interim measures to secure constitutional complaint (Article 27),
- reimbursing expenses (Article 46),
- providing a remedy (compensation) for undue delay (Article 44 (4), Final Provisions, item 2); extending certain deadlines; etc.

33. These provisions are welcome, as they will strengthen the position of the individual applicants but they will also improve the efficiency of the Constitutional Court.

### D. Recusal

34. Draft Article 15 (4) provides detailed rules on recusal and self-recusal of the judges. There should be (self-)recusal, *inter alia,* when:

> *"1) the Judge has a direct or indirect interest in the results of case consideration;*
> *2) the Judge is a family member or a relative of individuals involved in the case;*

*3) after being appointed to office and following the commencement and before the end of case consideration by the Court, the Judge has publicly expressed his/her opinion on the subject of the constitutional submission, petition, complaint or otherwise publicly cast discredit on his/her objectivity and impartiality;*
*4) other circumstances cast doubt on the objectivity and impartiality of the Judge."*

35. According to draft Article 15 (6) a request for (self-)recusal has to be submitted in writing and the Constitutional Court has to adopt a ruling on that request, that contains a motivated reply on the grounds for recusal. That ruling is published in the Register of Court Acts. Finally, draft Article 15 also provides that "the terms 'real conflict of interest', 'potential conflict of interest' are used in the meaning given to them in the Law of Ukraine 'On Prevention of Corruption'".

36. The Venice Commission is of the opinion that the detailing of rules regarding recusal proceedings is very important and goes directly to its recommendations. The provisions on recusal are clear and helpful, especially insofar as they require transparent and reasoned decisions. They also live up to the recommendation in paragraph 102.5 of the Urgent Opinion, which sought a definition of "conflict of interest".

37. Article 15 could be read as implying that a judge could be recused who has expressed any academic or professional opinions in that area of law, even beyond the specific case. However, it would not be appropriate or necessary for a judge to recuse himself solely for opinions expressed on broad points of law, but only where they relate directly to the case in question or reasonably call into question the judge's ability to be impartial in the matter.

38. Article 15 could be further improved by providing that a judge should always (self-)recuse when s/he had expressed his/her opinion on the case, not only after being appointed to office and the beginning of the consideration of the case. In its paragraph 102.8, the Urgent Opinion had recommended that the failure to self-recuse should be defined as a disciplinary offence. This should explicitly be included in the law. However, a minor or non-intentional failure to self-recuse should not result in the dismissal of the judge but in a lower sanction (see below on the graduation of disciplinary proceedings).

39. Finally, draft Article 38 (2) provides that the general quorum of 12 of the 18 judges of the Grand Chamber is reduced if judges are recused but the quorum cannot fall below 10 judges. This is positive and implements the recommendation in paragraph 102.7 of the Urgent Opinion to reduce the quorum in order to avoid the risk of *non liquet*.

### E. *Non ultra petita*

40. The limitation of the scope of a Constitutional Court decision to the scope of the petition in Article 6 (5) is a positive change that is consistent with the recommendation in paragraph 102.1 the Urgent Opinion to make more explicit Parliament's presumed intention to limit the scope of Constitutional Court decisions to the specific questions raised by the parties before it. On the other hand, it is helpful that Article 6 (4) does not limit the Court to arguments brought by the parties.

### F. Disciplinary proceedings

41. The final provisions of the draft law provide amendments to the Law of Ukraine "On Constitutional Proceedings". In particular, a new Article 21–1 on the disciplinary responsibility of judges of the Constitutional Court is added. This new Article determines certain grounds and procedure for bringing judges to disciplinary responsibility and designates those who can initiate such proceedings. Also, the meaning of 'gross disciplinary misconduct' is determined (see Article 21-1 (1)).

42. According to Article 21-1 (3), the motion to bring a Judge of the Constitutional Court to disciplinary responsibility can be filed by at least three judges of the Court and by the appointing authorities, i.e. the President of Ukraine, the Congress of Judges and one third of all members of the Verkhovna Rada. The Court's Standing Commission on the Rules of Procedure and Ethics examines the case whereas it is for the Grand Chamber to adopt a disciplinary sanction, i.e. to dismiss the judge.

43. In paragraph 102.3 of its Urgent Opinion, the Venice Commission had recommended that the disciplinary procedure be regulated in the Law on the Constitutional Court, with further details set out in the Rules of Procedure. Article 21-1 implements this recommendation, which is positive.

44. As concerns the bodies competent to initiate disciplinary proceedings, in its Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, the Venice Commission pointed out that disciplinary proceedings against judges should not be initiated by the President of the State.[7]

45. The Commission reiterates that it should not be possible that the executive power directly initiates disciplinary proceedings against Constitutional Court judges. The Venice Commission recommends taking up the proposal of the alternative draft law no. 4533-1 to give this power to the National Agency on Corruption Prevention within its field of competence.

46. Decision 13-r/2020 implied that any supervision of judges by the anticorruption bodies would be a violation of separation of powers and judicial independence. The Venice Commission rejects such a position and affirms that giving anticorruption bodies some supervisory powers over judges is consistent with the general principles of constitutionalism and the rule of law.

47. A problematic aspect of the draft law is that it lacks any form of graduated sanctions; the only sanction in disciplinary proceedings seems to be dismissal (see Article 21-1 (8), "bringing a Judge of the Constitutional Court to disciplinary responsibility by dismissing him/her from the respective post").

48. According to Article 149, last sentence, the dismissal of a judge of the Constitutional Court has to be decided by not less than two third of the votes of the full Court. This is reflected in draft Article 21-1 (11), which also provides that the Judge subjected to disciplinary proceedings shall not vote. The relevant ground in Article 149 of the Constitutional is *"commission by him or her of a serious disciplinary offence, flagrant or permanent disregard of his or her duties to be incompatible with the status of judge of the Court or reveals non-conformity with being in the office."*

49. This high voting requirement, combined with the fact that dismissal is the only disciplinary sanction, makes it nearly impossible to discipline a Constitutional Court judge. In order to operationalise the disciplinary system at the Constitutional Court of Ukraine, the draft law should introduce a simple majority for sanctioning disciplinary offences below the threshold of "serious disciplinary offence". Such disciplinary offences do not lead to the dismissal of the judge and they should be punishable with other sanctions, such as warnings, reprimands, reduction of salary, etc. When lower level sanctions are also available and can be applied by a lower majority, it becomes more likely in practice that the Constitutional Court imposes sanctions on judges who have violated their obligations.

50. Finally, Article 21-1 (9) (4) provides that disciplinary proceedings shall be dismissed if the Court fails to adopt a resolution within six months upon the receipt of the motion. This provision

[7] Venice Commission, CDL-AD(2016)001, on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, para. 92 seq.

could easily lead to inaction or attempts of blocking proceedings within the Court to avoid any sanctions. Instead, the Court should be obliged to take a decision within six months but inaction by the Court should not automatically lead to the end of the proceedings.

### G. Reopening of a case when the criminal liability of a judge in relation to that decision has been established

51. Para 102.4 of the Urgent Opinion had recommended introducing the possibility for the re-opening of cases of the Constitutional Court when the criminal liability of a judge in relation to that decision has been established (e.g. bribe taking).

52. The draft law does not envisage the possibility for the Constitutional Court to review its own decision in the event that one of its judges voting in favour of that decision has been condemned in final instance for taking a bribe in connection with the adoption of that decision. This - hopefully very rare case - should be regulated in the draft law.

### H. Annulment of legal provisions by Grand Chamber only

53. According to Article 42 (12), if, when considering a case initiated upon a constitutional complaint, the senate concludes that the challenged law (or provision) is not compliant with the Constitution, the senate adopts a draft decision on its unconstitutionality and files a motion to the Grand Chamber requesting the latter to uphold such decision. The Grand Chamber may then either commence full consideration of the case by the Grand Chamber, or uphold the Senate's draft decision. If the Grand Chamber rules to commence case consideration on its own, the hearing of the case shall start anew (Article 42 (13)). If the Grand Chamber upholds the draft decision of the senate, this decision shall be deemed adopted (Article 39.12, 39.13 und 39.14).

54. The senate thus cannot itself annul a legal provision but has to refer its draft decision to the Grand Chamber for approval. The Grand Chamber can either confirm the senate's draft decision or commence its own hearing. In such a case, in the Grand Chamber the same voting rules apply as for appeals originating there (i.e. 12 out of 18 judges have to vote in favour of confirming the annulment of the legal provision). The Venice Commission's remarks on the voting requirements below apply also in this case.

55. Article 42 (12) takes up the recommendation in paragraphs 84 and 102.10 of the Urgent Opinion and this is welcome. The reason for that recommendation was that in order to provide more legitimacy for the annulment of a legal provision, in the specific situation in Ukraine, more judges should be involved in such a decision. The Commission had recommended this mechanism only for cases when the President or Parliament request the senate to do so. As the issue is the annulment of a legal provision that Parliament adopted and/or that may have been initiated by the President, it would be in their interest to "defend" the law in the Grand Chamber against the senate's finding of unconstitutionality. However, they might also agree with the senate's assessment and might not be interested in defending their law before the Grand Chamber. Therefore, for procedural economy, to shorten the proceedings, the case should be transferred to the Grand Chamber only if the President or the Parliament request such a transfer.

### I. Rules of procedure vs. internal regulations

56. In line with the recommendation in paragraph 40 seq. of the Urgent Opinion, the draft law does explicitly recognize and respect the Court's capacity to make its own internal regulations (formerly called Rules of Procedure). However, the draft law is insufficiently clear on the relationship between the law and those internal regulations. The internal regulations could frustrate the purposes of efficiency, transparency, and accountability that the draft law seeks to advance. There could therefore be clearer provisions specifying that the internal regulations must

be in conformity with the law (Law on the Constitutional Court and the new Law on Constitutional Procedure).

### J. Voting requirements

57. Article 38 sets out the quorum and voting requirements for two types of decisions. Article 38 (3) relates to admissibility decisions of the Grand Chamber "session", whereas Article 38 (11) refers to decisions on the merit of the Grand Chamber "plenary session". This distinction between admissibility and on the merit decisions should be set out more clearly in the draft law, maybe by splitting Article 38 in two.

58. Article 38 (3) provides for a simple majority of judges for admissibility decisions. A tie vote results in the case being admissible. Article 38 (11) requires 12 of the 18 judges, i.e. two thirds of the total number of judges, for taking a decision on the merits. This number can be decreased to 11 or 10 votes if one or two judges (self-)recuse but it cannot fall below 10 judges. Currently, Article 66 (11) of the Law on the Constitutional Court requires ten judges to adopt a decision. The majority of ten corresponds to 50 percent (9 out of 18 judges), plus one judge.

59. Draft Article 39 (3) requires a simple majority for admissibility decisions in the senates, whereas Article 39 (11) requires a fixed number of six judges (i.e. two thirds of the total of nine judges) for taking a decision on the merits.

60. The Venice Commission's Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland provides an overview of similar voting requirements and comes to the conclusion that in the vast majority of European legal systems only a simple voting majority is required.[8] A few exceptions to this rule exist: a two thirds majority is required in cases of certain specific competences of Constitutional Courts, e.g., in order to protect a minority, or against an extensive interference with fundamental rights. The examples of an ex-officio-competence in Russia and Serbia cannot be used as an argument in support of such a general rule.[9] In that Opinion the Venice Commission also emphasised that unanimous decisions are required only when a small number of judges is competent to decide a case – e.g., in Austria[10] or in Germany[11]. In these constellations, the requirement of unanimity is compensation for the reduction of the bench and is a safeguard in favour of the applicants. This can, therefore, also not be used as an argument in support of higher voting requirements for all cases decided by the full bench.[12] In respect of the Polish Constitutional Tribunal, the Commission concluded that the requirement of a two thirds majority of the votes might block the decision-making process of the Tribunal and render the Constitutional Tribunal ineffective, making it impossible for the Tribunal to carry out its key task of ensuring the constitutionality of legislation.[13]

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[8] Venice Commission, Poland - Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal, CDL-AD(2016)001, para. 73 ff.

[9] Ibid., para. 76. According to Art 50 of the Law on the CC of Serbia, the procedure for assessing the constitutionality or legality of general acts may be initiated by the CC itself, on the basis of a decision taken by a two-thirds majority of the votes of all judges. This is a special competence for proceedings initiated by the court itself, a competence most courts do not have. Art 72 of the Federal Constitutional Law of the CC of the Russian Federation stipulates that decisions on the interpretation of the Constitution shall be adopted by a two-thirds majority of the number of acting judges, whereas the cases of finding of unconstitutionality are decided by a simple majority. Here, the requirement of a 2/3-majority has the function of limiting a particular far-reaching competence of the CC.

[10] In Austria, the "small formation" of five judges takes decisions not to accept applications by unanimous vote; other decisions are taken by simple majority. This requirement protects the power of the plenary: if no unanimous decision can be reached, a decision on the merits must be rendered. Moreover, every judge of the Court (even those not sitting in the particular formation) may reassign a case from the small formation to the plenary.

[11] The German Federal Constitutional Court, sitting in a panel of three judges, decides by unanimous vote on the inadmissibility of individual complaints (Article 93d(1) of the Federal Constitutional Court Act). When unanimity cannot be reached, the case is referred to a larger panel, i.e. the Senate (Article 93b).

[12] Ibid., para. 77.

[13] Ibid., para. 78 f.

61. The higher voting requirements of draft Articles 38 (11) and 39 (11) can be problematic because they could result in an inability of the Grand Chamber and the senates to take decisions. These provisions do not take into account that the Court often has several vacancies for prolonged periods. On the other hand, in this respect it is welcome that that the draft law does not allow abstention from voting when passing a decision or giving an opinion (see Article 55 (4)). This should facilitate finding the required number of votes.

62. In Ukraine, the specific situation following Decision 13-r/2020 can justify temporarily raising the voting requirement in the Grand Chamber. Any increase in the number of votes required should however be a percentage of the number of judges actually appointed rather than a fixed number of all 18 judges. Raising the number of votes required can be justified only until a certain part of judges have been appointed according to the new system of competitive selection.

63. The law should not make it too difficult for senates to deal with constitutional complaint cases. Decisions on annulling a legislative provision have to be confirmed by the Grand Chamber anyway (draft Article 42(12))) when this is requested by the President or Parliament, as recommended above. Therefore, for senates, number of votes required to take decisions on the merit should not be raised.

### K. Constitutional doctrine

64. The new notion of "constitutional doctrine" introduced in Article 3 remains somewhat confusing and unclear and would need further clarification to be useful. A positive element of this notion is a reference to the harmonization of the Constitutional Court's decisions with those of the European Court of Human Rights.

65. Article 3 (5) prohibits changes to the constitutional doctrine that would substantially reduce human rights or affect the separation of powers. The exception from this rule in order to protect sovereignty and territorial integrity raises concerns and might be problematic (this might relate to on-going territorial conflicts).

66. Unless the concept of constitutional doctrine can be made clearer, it might be wiser not to include it in the law at this stage. In any case, it would be for the Constitutional Court itself to use and interpret this notion.[14]

### L. Relationship of Ukrainian law with international law

67. Draft Article 32 (5) provides: *"The Court may not refuse to initiate constitutional proceedings on the grounds stipulated by paragraph 6, part one of this Article if the Court decision or opinion on the same subject of the constitutional submission. petition or complaint passed by the international judicial institution whose jurisdiction is recognized by Ukraine, finds a violation by Ukraine of its international obligations, and such violation is directly related to the effect and application of the challenged act (individual provisions thereof)."*

68. This means that the Constitutional Court is bound to initiate proceedings challenging a legal provision that led to a decision of an international court, such as the European Court of Human Rights, finding a violation of a treaty/convention. This is welcome. Of course, the mere initiation

[14] The Constitutional Court of Lithuania, for instance, develops and follows an official constitutional doctrine, which is limited to the interpretation of the provisions of the Constitution by the Court and that reveals the content of various constitutional provisions.

of proceedings cannot bind the Court to give a decision concluding that the challenged provision is unconstitutional.

69. If the Court comes to a conclusion of unconstitutionality and annuls the legal provision, this can contribute to the execution of the decision of the international court. On the other hand, if the Court concludes that the challenged provision is not unconstitutional and remains in force, the obligation of Ukraine to execute the decision of the international court remains in force and Ukraine has to find other means of executing that decision.[15] Even denouncing the treaty would not release the state from the obligation to execute decisions of the international court that were adopted while the treaty was still in force.

70. In draft Article 42 (3), the Constitutional Court should be able to actively seek (international) *amicus curiae* opinions (e.g. from Venice Commission).[16]

### M. Form of reasoning of the Court's decisions

71. Draft Article 56 (4) specifies certain requirements regarding the form of Court decisions, which shall contain:

1) analysis of evidence, documents, expert opinions and other case files;

2) analysis of the requirements outlined in the constitutional submission or complaint and viewpoints of participants, involved participants in the constitutional proceedings, replies to their arguments on the subject of constitutional proceedings;

3) substantiation of the need to find unconstitutional the act (or individual provisions thereof) that lost effect (where appropriate);

4) the Court's opinion on the subject of the constitutional proceedings and its arguments specifying key provisions of the Constitution of Ukraine underlying it, with appropriate and sufficient motives and grounds to adopt a decision;

5) the procedure for executing a decision and peculiarities of the procedure for reimbursing pecuniary and non-pecuniary damage inflicted by unconstitutional acts and actions unconstitutional (where recognised as such by the Court).

72. Furthermore, Articles 32 (3) (6), 33 (6) and 34 (3) specifically require the motivation of inadmissibility decisions and the merging and splitting of procedures.

73. The Commission noted during the meeting that the judges of the Constitutional Court might object to the idea that Parliament would have the power through legislation to establish parameters for the form of the Court's reasoning (Article 56).

74. Insufficient reasoning was the very problem that led to the Venice Commission's conclusion that a reform of the Constitutional Court was warranted. Paragraphs 44 seq. and 101.2 of the Urgent Opinion recommended that decisions have to be sufficiently clear to allow the public and notably the legislature to react appropriately and to implement the decision. The parameters provided in the draft Article 56 are not inconsistent with principles of judicial independence, so long as they do not interfere with the judges' constitutional obligations to interpret and apply the Constitution and to uphold the rule of law. These requirements do not interfere with the judges' responsibilities, they are of a formal character.

[15] Venice Commission, CDL-AD(2020)009, Russian Federation - Opinion on draft amendments to the Constitution (as signed by the President of the Russian Federation on 14 March 2020) related to the execution in the Russian Federation of decisions by the European Court of Human Rights.

[16] Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, para. 66; CDL-AD(2020)039, Ukraine - Urgent opinion on the Reform of the Constitutional Court, paras. 90 seq.

### N. Other issues

75. A series of articles make vague references to applicable criminal law. Articles 7 (6), 9 (5), 18 (2), 42 (2) and 65 refer to "liability provided for by law". Does such legislation exist? If so, there should be clear references to it. Otherwise, these provisions remain mere threats.[17]

76. Draft Article 25 (1) provides that "persons" who believe that a legal provision applied in a final judgment in their case is unconstitutional can bring a constitutional complaint. The scope of the term "person" is even extended to cover legal entities subject to public law when they do not exercise their administrative powers. This provision could enable municipalities, regions or other public entities to make a constitutional complaint, for instance in case of expropriation or other constitutional rights that can be exercised by legal persons. If the range of applicants includes public entities, it should be made clear that legal entities of private law (associations) are covered as well

77. In Article 55 (5) a refusal of (dissenting) judges to sign the decision should not prevent the publication of the decision.[18] In addition to dissenting opinions, concurring opinions should be allowed. This might facilitate the judges on agreeing on a common outcome while diverging on their arguments.[19]

78. The current Law on the Constitutional Court contains numerous provisions on procedure. If a separate law on constitutional procedure were adopted, as envisaged in draft Law no. 4533, it should be ensured that all procedural provisions are moved to the new Law on Constitutional Procedure to ensure coherence.

## IV. Conclusion

79. The Venice Commission welcomes that President Zelenskyy withdrew draft law No. 4288 that would have terminated the powers of all judges of the Constitutional Court. The Venice Commission also welcomes that Parliament is now examining draft law no. 4533 on Constitutional Procedure, which takes up many recommendations made by the Venice Commission in its Urgent Opinion on the Reform of the Constitutional Court.

80. Draft Law no. 4533 brings about many improvements. It substantially changes the current regulations of the constitutional proceedings (Law on the Constitutional Court and Rule of Procedure). The main novelties have been introduced in the field of constitutional complaints, publicity and openness of constitutional proceedings, formation of senates and boards and distribution of cases, access to case materials, disciplinary responsibility of judges and the internal functioning of the Constitutional Court. These changes are welcome.

81. The draft law introduces the Automated Document Management System, which provides public access to case files and is used to compose senates, boards and appoint judge rapporteurs. Judges can overcome a possible blockage by a judge-rapporteur or the Chair in establishing the Court agenda.

82. The draft law would also improve the applicants' access to the Court through various means (electronic complaints and communication, time period for elimination of shortcomings in the complaint, interim measures, reimbursement of expenses, compensation for undue delays). It is positive that the quorum is lowered when one or two judges have (self-)recused.

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[17] See also paragraph 66 of the Urgent Opinion on this point.
[18] Venice Commission, CDL-AD(2016)017, Georgia - Opinion on the Amendments to the Organic Law on the Constitutional Court and to the Law on Constitutional Legal Proceedings, paras 51. seq.
[19] Venice Commission, CDL-AD(2018)030rev, Report on Separate Opinions of Constitutional Courts.

83. In line with its recommendations in the Urgent Opinion on the Reform of the Constitutional Court, the Venice Commission welcomes that decisions of a senate annulling a legal provision have to be confirmed by the Grand Chamber and that the Court is limited to the scope of the appeal/complaint. In line with the Commission's recommendations, draft law no. 4533 also addresses the need to provide sufficient and coherent reasoning for the decisions of the Court.

84. However, draft law no. 4533 also has some shortcomings. Most importantly, the draft law does not contain provisions on a new system of competitive selection of judges involving an international component as recommended in the Urgent Opinion. While this appointment system does not need to be included in draft law no. 4533, the amendment to Article 11 of the Law on the Constitutional Court should be removed and current vacancies at the Constitutional Court should be filled only after an improvement of the system of appointments.

85. The Venice Commission makes the following main recommendations for changes in the he draft law:

- For procedural economy, constitutional complaint proceedings in which a senate finds a legal provision unconstitutional should be transferred to the Grand Chamber only if the President or the Parliament request such a transfer.
- As concerns disciplinary proceedings, instead of the executive power the initiative to start disciplinary proceedings should be given to the National Agency on Corruption Prevention within the limits of its competence.
- In order to operationalise the disciplinary system, for disciplinary offences below the threshold of "serious disciplinary offence", other sanctions should be introduced, such as warnings, reprimands, reduction of salary, etc. and these sanctions should be applied by a simple majority of the judges. Failure to adopt disciplinary sanctions within six months should not automatically lead to the end of disciplinary proceedings.
- The Court should be able to review its own decision in the event that one of its judges voting in favour of that decision has been condemned in final instance for taking a bribe in connection with the adoption of that decision.

86. In Ukraine, the specific situation following Decision 13-r/2020 can justify raising temporarily the voting requirement in the Grand Chamber. Any increase in the number of votes required should however be a percentage of the number of judges actually appointed rather than a fixed number out of all 18 judges. Such an increase can be justified only until a certain percentage of judges have been appointed according to the new system of competitive selection.

87. Finally, the Constitutional Court should be given an occasion to express its view on the revised draft law.

88. The Venice Commission remains at the disposal of the Ukrainian authorities for further assistance in this matter.