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Ihor Slidenko
DonFRI Office, expert (PhD)

About Strategies of the Reform for the Constitutional Control Institutions in Ukraine

The process of the state creation in Ukraine during 1991 – 2005 is characterized largely by the external copying of institutes proper for the western democratic countries with the established regimes, together with their simultaneous installation in a state mechanism and attempts to adjust them to the requirements of the real state creation. It should be noted that sometimes this copying was not corresponding. In addition, copied institutes and institutions were not according to standards and requirements, which are compulsory from the point of view of the modern theory of constitutionalism and positive practice of the state creation. Installation of these institutes and their subsequent positioning in the state mechanism of Ukraine did not allow an immanent execution of their functions or influenced (deviated) on their nature. Mostly, the previously mentioned concerns to the process of implementation and subsequent functioning of constitutional justice institute in Ukraine. Thus, it should be noted that constitutional justice as an operating instrument in the system of public power, became the inalienable standard of modern democracy. Any successful model of democratic organization of public power applies this institute actively and widely for the solving of problems connected with their functioning.

2002 -2007 year period in Court activity allows to talk about the necessity of regeneration of constitutional justice organ authority and renovation of constitutional justice in Ukraine. The carrying out of this task is possible throughout the definition of the proper plan of actions - general strategy, e.g. „road map" – complex of measures on reformation of constitutional justice institute. The strategy stipulates a tool and measures on its application accordingly. The features of political establishments' culture and inadequate understanding of location and role of constitutional justice in the mechanism of public power in the modern state characterize the real condition of

businesses in this sphere. These factors provoke the usage of this institute for realization of political aims. During the periods of aggravation of home policy situation in Ukraine, they always tried to utilize CCU exactly in this way. Actually, the period of 2002-2004 is characterized by politization of this organ decisions. The situation becomes threatening when try to utilize new-organized CCU in the same way.

Another negative tendency observed during 2005-2006 consists in blocking of this organ's work by the Supreme Soviet, throughout too formalized process of empowering of CCU judges. This fact shows the other side of politization of constitutional justice institute through an attempt to block its work and simultaneously to influence on its formation through political expedience. Today, the analysis of normative material in relation to implementation of constitutional justice institute and real practice of the Constitutional court of Ukraine allows to select the problematic moments in theoretical and practical fields. They are connected with institutionalization of constitutional justice and the practice of its application.

A. *CCU positioning in the existent state mechanism.* Existent status, in obedience to Constitution and type law, practically does not solve a problem of positioning of such organ from the point of view of its nature and functions. From the point of view of existent status and clear fixing of quasi-judicial nature of such organ the changes are expedient. These changes must have both formal (up to the change of the name) and essential (institutionalization of the proper functions and plenary powers) character.

B. *Adequacy of existing forms of control.* It is necessary to select an effective symbiosis of previous and following forms of control, in accordance with the necessities of acting constitution and system of legislation. Under the condition of the mixed model, priority should be given to the previous forms of control (French model). The most important problem is the verification of Constitutional changes by the Constitutional court of Ukraine. An existing model (art. 157-158 of Constitution of Ukraine), as 2002-2004 Court practice showed, obviously does not correspond to a functional necessity. At the terms of saving of similar plenary powers, Court must take into account not only volume of constitution (quantitative index) but also essence (qualitative index).

C. *Adequacy of plenary powers with executable by the Constitutional court of Ukraine functions.* According to the existing ideas about functional component of such organ, providing of positive law hierarchy by application of control-observant plenary powers is basis of its activity. For example, arbitral function or others can be the additional one. Composition and essence of additional functions correlates to the concrete form of state rule and state regime. However, such plenary powers as official interpretation, with existing status create more problems in the legal system (non-fulfillment of decisions of CCU) than solve them.

D. *Methodological problems, connected with realization of CCU plenary powers.* The analysis of most cases allows talking about absence of system approach during the realization of plenary powers. Mostly it concerns to plenary power according to official interpretation, in a less measure in relation to verification of constitutionalness. An adequate methodological base (as possible to judge from practice) is absent in acceptance of cases in trying and refusing in trying.

E. *The biggest problem in CCU practice is a problem of realization of its decisions, especially decisions on interpretation.* This problem actually does not depend on Court itself. In addition, there are no ways of its solving together with existing negative tendencies and not quite certain nature of such acts.

F. *From the point of view of analysis of CCU practice tendencies, the extremely negative factor is politization of court*. Moreover, its continuation is possible, if we take into account composition of court and method of its forming. The series of resonance cases (according to the terms of president) expressly specifies exactly on such development of events. Existent depolitizational instruments (prohibition on membership in political parties for judges etc) have formal character and do not correspond to existent necessities.

G. *Mode of CCU forming*. Blind copying and inadequate understanding of fully theoretical principle of division of powers influenced on the model of court structure. Participating in alleged forming of three branches of power creates resistance inside a court and this appears in quality of decisions. Most of contradictious special opinions of

judges confirm this thesis. The way of court forming must correlate directly with the form of state rule.

Considering this problem it is necessary to pay attention on:

- problem of the judge special opinion institute (if it is not obiter dictum);
- methodological approaches in solving of judges qualitative composition problem (from the point of view of executable functions and with effective correlation of theoretical and practical specialists). In the same context problem of expert ideas involving requires a solving;
- periodicity or constancy of judges plenary powers (anyway, there should be a possibility of post reholding).

At the existent situation several variants of development of events are possible:

A. *Remaining of the existent modus vivendi of Court*. Obviously, it is impermissible way as everything preserves in indicated conditions. Finally, at such development of events the Court will transform in decorative element of state mechanism, for satisfaction of next imperious establishments requirements. The authority of Court will be fully lost. The Court's proper functions will not be executed.

B. *„Evolutional way"*. It depends on development of political events in Ukraine. The less effective way, however it allows to avoid significant errors in constructing of institute of constitutional justice in Ukraine. The way consists in gradual reformation and adaptation to the existent necessities, depending on direction of state mechanism development, to the parliamentary or mixed forms. The possible dangers of such variant can be so: eventual stagnancy of reforms with their uncertain fin; increasing amount of inadequate Court's decisions, which will form practice and, the worst, wrong positions; the loss of trust to Court is possible.

B. *Immediate replacement of constitutional justice model from „austrian" to „french" one with possible national „shade"*. It can be possible on condition of fund of new Constitution, and consequently III republic in Ukraine. It is the most radical way, which allows to realize an effective modernization of the Ukrainian state in a short-term period. However, it is the most difficult and, at certain terms, dangerous. A basic problem is the absence of clear strategy, which would be based on the own (national)

theoretical elaborations. These elaborations naturally would combine world experience and national specific.

Possible risks and dangers in functioning of constitutional justice institute are:

1. The most dangerous possibility for CCU, in its real condition and existent tendencies, is converting from to the subject of realization of public power into an object with all of the known consequences.

2. There is a serious danger of application of strategy, which will disorganize and actually halt the work of CCU by the quantity of inquiries. Thus, it is possible to paralyze the work of this organ. This variant is possible due to lack of effective criteria of case selection.

3. Many judges of CCU were actually appointed not due to their professional qualities, but because of formal correspondence to the criteria of Law, and the most important thing – because of their political loyalty. This fact enables to establish possible prejudice of judges in acceptance of decisions.

4. Especially dangerous is a tendency to politicize a question about the decision of CCU at the terms of grave political crisis in Ukraine (end 2006 - beginning of 2007). There is a danger of apperception of CCU decisions, even if they are adequate, by opposite political forces. The Party of Regions deputy V. Kiselev expressed this position - if CCU decision will not satisfy his political force it will consider that this decision was accepted under external pressure, and that is why cannot be legitimate.

5. 2006 – 2007 year's period shows the possibility of the actual CCU abandonment from trying of cases. When, due to plenty of cases taken into trying, Court does not try considerable part and the rest is trying in unacceptable terms. This tendency can contain positive sense, if CCU does not take the case to try or stops the trying due to political shade, thus he avoids politization, and negative when Court, actually, abandons from implementation of its functions. Principal reason the abandonment is the one-side politization.

6. Attempt to manipulate the actions of Court, and at the same time public opinion about the possibility of certain decisions acceptance by certain political forces. These manipulations are carried out via technologies „quasi" flood of information from CCU,

in a friendly to certain political forces context. Above all things, public opinion is influenced.

Here are some suggestions about improvement of this institute by the way of CCU active modernization of its next activity. This includes:

- modifying of plenary powers, in the context of Court's status change, and its approaching to the standards of the mixed model. It is the matter of forming of constitutional justice organ similar to the sample of Constitutional Council of France, with all of the proper tool

- modifying of specialists completing and choosing system. An advantage should be given to the professional qualities of candidates. Among them the (constitutional) law theory specialists should be chosen. This is the approach to the essence of Court's plenary powers, which realization requires not only knowledge of normative material, but also analytical qualities for judges. Anyway, it is possible to get practical knowledge by mean of experts bringing;

- to permute the way of Court's forming consensus procedure must be the basis. Parliament and country's leader should participate, thus President must appoint judges;

-possible replacement of Court's status;

- change of Court's plenary powers in the terms of revision of Constitution. To our opinion, Court in general should be deprived of these plenary powers. This is because of their disparity to nature of the organ and absence of actual consequences (as practice shows) from its application;

- definition of limited terms of cases acceptance to trying;

-optimize the activity of CCU informative department, with the purpose of adequate reflection of also results Court's activity but and the activity itself.