Venice Commission

Thirty-year quest for democracy through law

1990 – 2020

Commission de Venise

Trente ans à la recherche de la démocratie par le droit

Juristförlaget i Lund
Distribution: eddy.se

Editors
Simona Granata-Menghini
Ziya Caga Tanyar

The Venice Commission is grateful to Professor Hans-Heinrich Vogel, its former Member in respect of Sweden, and to the University of Lund for their generous assistance for the publication of this book. The Commission would like to thank Ms Ana Gorey, member of the Secretariat, for preparing the layout of this volume.

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Address to the publisher:
Juristförlaget i Lund
Box 207
S-221 00 Lund
+46 46 2221016 (tel)
+46 46 2221164 (fax)
www.juristforlaget.se

ISBN: 978-91-544-0578-7
9 789154 405787
© Författarna och Juristförlaget i Lund
Grafisk form: *Alf Dahlberg*/Pan Eidos
Layout: Ana Gorey
Photo: Roberto Basile
Tryck: Exakta AB, Malmö
Lund 2020
ISBN 978–91–544–0578–7

Serhiy Holovaty[1]

Backbone of the Rule of Law: The decisive contribution of the Venice Commission in Ukraine

The European Commission for Democracy through Law – more commonly known as the Venice Commission - has been a vital part of Ukraine's transition from totalitarianism to democracy from the beginning of Ukraine's constitutional process. In the twenty years from the signing of its Terms of Accession to the Council of Europe in 1995 to the constitutional reforms of 2016 that followed the Revolution of Dignity, Ukraine experienced a constant tension between authoritarian and democratic initiatives and tendencies in the development of its state institutions. The conflict involved the establishment of key state institutions set out in Ukraine's Terms of Accession: the functioning of the state prosecutor's office, the establishment of an independent judiciary and the proper and effective role of the Constitutional Court.

This paper will highlight the leading role played by the Venice Commission during this period. The Commission effectively guided Ukraine to compliance with European standards of justice as a democracy governed by the Rule of Law by producing 28 opinions, firmly upholding the European standards to be implemented in Ukraine's fundamental law (as well as in ordinary legislation) and leading the transformation of Soviet-era legal thought in Ukraine.

I. Introduction

The Venice Commission's involvement in Ukraine's constitutional development predated Ukraine's accession to the Council of Europe. Ukraine became a member of the Council of Europe in November 1995 with a Constitution in force dating from Soviet times, the Soviet Basic Law of 20 April 1978, based on the Commission's Opinion that the country had strong prospects to meet the standards of the Council of Europe by "implementing democracy, fundamental rights and freedoms and the Rule

[1] Member of the Venice Commission in respect of Ukraine. Former Vice President of the Venice Commission (1999-2001).

of Law."[2] Pursuant to its Terms of Accession, Ukraine finally adopted a new Constitution on 28 June 1996, almost five years after proclaiming its independence. Progress was made and in 1997, the Venice Commission produced an Opinion assessing the new Constitution, particularly from the standpoint of the Rule of Law, finding that "the important elements of the Rule of Law have found proper expression" in Chapter I (General Principles), namely that:

- the Constitution has the highest legal force and its norms have direct effect; laws and other legal acts are adopted on its basis and have to conform to it (Article 8);
- the principle of separation of powers is recognized and the bodies of the legislative, executive and judicial power exercise their authority within the limits established by the Constitution and in accordance with the laws (Article 6);
- the principle of legality has found a further clear expression in Article 19;
- the constitutional provisions concerning human rights are directly applied by the courts (Article 8, para. 3).[3]

Overall, the Venice Commission concluded that "the principles of the Rule of law were well reflected in the text of the Constitution."[4] Indeed, a few years later, the Venice Commission would positively assess Ukraine's democratic transition, stating that "a number of amendments had been made to the Constitution, particularly with the view to ensuring Ukraine's transition from a communist regime to freedom, democracy and the Rule of Law."[5]

This assessment by the Venice Commission of Ukraine's achievements in implementing "important elements of the Rule of Law" or "the principles of the Rule of law" into its Fundamental Law was naturally met with great satisfaction by the Ukrainian political establishment, legal community and in academic circles. We were all proud that Ukraine was the first and only nation among all the former Soviet republics that enshrined the notion of "the Rule of Law" in its Constitution. However, my experience was that this was done more by intuition than through a conscious understanding

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[2] Venice Commission, CDL-INF(1995)002, Opinion on the present constitutional situation in Ukraine. Following the Adoption of Constitutional Agreement between the Supreme *Rada* of Ukraine and the President of Ukraine, p. 13 (G. Conclusion).

[3] Venice Commission CDL-INF(1997)002, Opinion on the Constitution of Ukraine, p. 2.

[4] *Ibidem*, p. 13.

[5] Venice Commission CDL-AD(2002)002, Opinion of the Resolution on the principles of the State policy of Ukraine in the sphere of human rights adopted by the *Verkhovna Rada* of Ukraine on 17 June 1999, para. 3.

of any exact meaning of this notion. I state this as the person who at the time of drafting the Constitution and at the moment of its adoption by the Parliament on 28 June 1996 was the only one to insist that the notion of the Rule of Law appear in the text of the Ukrainian Fundamental Law (at that time I held the position of Minister of Justice and at the same time was also a member of the *Verkhovna Rada*, Ukraine's parliament). Through some tough persuasion, my initiative was ultimately supported by a qualified majority of MPs, resulting in the following formulation in the Constitution: "In Ukraine, the principle of the Rule of Law is recognized and is effective" (Article 8, para. 1).

II. Historical background

There are objective historical, cultural and institutional factors behind these issues. For a period of more than three centuries Ukraine was smothered first by Russian absolutism and then by the Russian version of Marxism. Both factors had immeasurable influence over the development of the Ukrainian legal culture and tradition. For its part, the Russian legal culture and legal tradition were under the lasting influence of German positivism, embodied in the concept of *Rechtsstaat,* which became "*pravovoie gosudarstvo*" (or *legal state*), and was adjusted to Russian political developments during various historical periods. In Soviet times, this spawned the notion of *the principle of socialist (soviet) legality,* which became the backbone of the Soviet political and legal system and which dominated Soviet legal thought for many decades. It mutated into derivatives as *the principle of supremacy of a law* (in Ukrainian: *verkhovenstvo zakonu*; in Russian: *verkhovenstvo zakona*) where "a law" (*zakon*) meant simply an ordinary statute.

It is well known that the concept of *verkhovenstvo zakona,* alongside the concept of *socialist (soviet) legality,* were developed by Stalin's Prosecutor General, *Andrei Vyshynsky,* in the 1930s as an outcome of his own "theory of state and law", according to which "law draws its force, and obtains its content, from the state."[6] Vyshynsky's concept of *socialist (soviet) legality* was officially approved by Stalin as the equivalent to *Leninist legality*.[7] The legal term "*verkhovenstvo zakona*", as it was always used in the Russian, Ukrainian or Belorussian languages would mean in English "the supremacy of an ordinary

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[6] Vyshynsky Andrei. *The Law of the Soviet State*. Translated from Russian by Hugh W. Babb; Introduction by John N. Hazard. – New York: Macmillan, 1954. – P. 5.

[7] See Strogovich M.S. *Socialist legality, legal order and application of the Soviet law (For the universities of Marxism-Leninism)*. – Moscow: Mysl, 1966. – S. 17-22. (*Sotsialisticheskaya zakonnost, pravoporiadok i primenieniye sovetskogo prava: dlia universitetov marksizma-leninizma*) [in Russian].

statute". Even at the end of the Soviet Union, the Communist party under the leadership of *Mikhail Gorbachev* continued to accommodate (in 1988) the concept of *sotsialisticheskoie pravovoie gosudarstvo (Socialist Rechtsstaat)* as an official doctrine to be used as a new basis for the "radical strengthening of *socialist legality*" within the framework of the *perestroika* process.[8] By any interpretation, this type of language constitutes a solid obstacle to making the *Rule of Law* effective or operative in any relevant country.

At the time of the adoption of the Ukrainian Constitution in 1996, we did not understand the origins of the notion of "the Rule of Law," or its genuine meaning. Most jurists at that time did not possess a clear understanding of the substantive meaning of "the Rule of Law", or what was meant by the "the principles of the Rule of Law" that were so "well reflected in the text of the Constitution". The term, the "highest legal force" of the Constitution, was, in fact, generally understood by Ukrainian jurists as representing the top of a hierarchical order within the national system of legal norms, rather than exceptional principles that govern such norms. Indeed, the political and legal elites had great difficulty in understanding how the principle of separation of powers relates to the notion of "the Rule of Law" and why the "direct application of human rights" should be treated as an element of "the principle" of the Rule of Law.

We certainly did not appreciate the broad definition of the Rule of Law worked out in 1959 by the International Commission of Jurists, expressing the Rule of Law as a *value* that belongs to a *common heritage* or constitutes a *common principle* for European nations:

> *"[t]he principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of men."*[9]

The Parliamentary Assembly of the Council of Europe was sufficiently concerned by this disconnection in understanding that it passed a resolution (initiated by this author) proclaiming that "certain traditions of the totalitarian

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[8] See Резолюция XIX Всесоюзной конференции КПСС: О демократизации советского общества и реформе политической системы. *Коммунист*. – 1988. – № 10. – С. 68 [Resolutions of XIX All-Union CPSU Conference: On democratization of Soviet society and the reform of the political system. *Communist*, `1988, No. 10. – P.68 (in Russian)].

[9] The Rule of Law in a Free Society: a report on the International Congress of Jurists. New Delhi, India. January 5-10, 1959 / prepared by Norman S. Marsh; with a foreword by Jean-Flavien Lalive. – Geneva: International Commission of Jurists, 1959, p. 197.

states [were] still present in theory and practice" in most of the post-Soviet states. In particular, "the Rule of Law" was still perceived as the "supremacy of the rules", or "written rules" set up in statutes (*verkhovenstvo zakona*).[10] The Assembly's report on this matter confirmed that in the states impacted by the Soviet Union "much of the legal-positivist tradition of the Soviet era is still prevailing."[11] Consequently, in its resolution, the Assembly drew attention to the fact that understanding the "Rule of Law" as the "supremacy of statute laws" (in Russian – "*verkhovenstvo zakona*") is a formalistic interpretation of this notion and "runs contrary to the essence" of the Rule of Law.[12]

The resolution demonstrated that the debate on this issue was not merely of a theoretical or academic nature. It had profound political and constitutional significance, since an interpretation of *the Rule of Law* that fosters the notion of *the* rule *by* law based on positivist legal thinking can easily be abused to create very favourable conditions for *autocratic rule*. Indeed, Soviet-era legal thinking and methodology constituted a serious obstacle to the development of Ukraine's legal system on the basis of the Rule of Law.

III. Institutional transformations required by the Rule of Law

After the adoption of Ukraine's new democratic Constitution in 1996, the Venice Commission became actively involved in shaping the process of Ukraine's constitutional reform. Ukraine's continuous cooperation with the Venice Commission in the field of constitutional development is explained by the fact that the 1996 Constitution contained a number of serious inadequacies, born out of political compromise. At the time of its adoption, an alliance of communists, post-communist socialists and former Soviet *nomenklatura* constituted a supermajority in the *Verkhovna Rada*. Accordingly, although the principles of the Rule of Law were reflected in the text of the Constitution, several provisions of Ukraine's fundamental law emanating from Ukraine's Terms of Accession that unfortunately remained "unsatisfactory from a legal point of view"[13] and not yet achieving European standards of the Rule of Law, the most important of which involved 1) the Public Prosecutor's Office (PPO); 2) the Judiciary, and 3) the Constitutional Court.

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[10] See The principle of the Rule of Law. *Motion for a resolution* presented by Mr Holovaty and others. *Doc 10180. 6 May 2004*.
[11] See The principle of the Rule of Law. Report. Committee on Legal Affairs and Human Rights. Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group. *Doc 1343, 6 July 2007*.
[12] See: The principle of the Rule of Law. Resolution 1594(2007). Text adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2007 (para.4).
[13] Venice Commission, CDL-INF(1997)002, Opinion on the Constitution of Ukraine, p. 13.

1. Public Prosecutor's Office (PPO)

Of all the institutions of state in Ukraine, none has proven harder to reform than the so-called Public Prosecutor's Office, or *Prokuratura* (I will use the term "*prokuratura*" or "procuracy" throughout, as the term "prosecutor" does not begin to convey to the western-trained mind the vast powers of supervision, control, and outright repression vested in this Soviet-era institution).

The "*prokuratura*" system in the Soviet period has been described by the Venice Commission as follows:

> *The prosecution on criminal cases in court represented only one aspect of the procuracy's work, matched in significance throughout much Soviet history by a set of supervisory functions. In its nutshell, the procuracy bore responsibility for supervising the legality of public administration. Through the power of what was known as "general supervision", it became the duty of the procuracy to monitor the production of laws and instructions by lower levels of government; to investigate illegal actions by any governmental body or official (and issue protests); and to receive and process complaints from citizens about such actions. In addition, the procuracy supervised the work of the police and prisons and pre-trial phase of criminal cases, and, in particular, making decisions on such crucial matters as pre-trial detention, search and seizure, and eavesdropping. Finally, the procuracy was expected to exercise scrutiny over the legality of court proceedings. Supervision of trials gave the procurators at various levels of the hierarchy the right to review the legality of any verdict, sentence, or decision that already gone into effect (after cassation review) and, through a protest, to initiate yet another review by a court. Even more troubling, the duty to supervise the legality of trials meant that an assistant procurator, who was conducting a prosecution in criminal case, had an added responsibility of monitoring the conduct of the judge and making protests. This power placed the procurator in the courtroom above both the defence counsel and the judge, in theory if not also in practice.*[14]

Thus, the wide scope of the *prokuratura*'s authority as an effectively separate, and unaccountable branch of power, *outside* of the criminal justice system, was an obvious affront to notions of democratic accountability, justice and governance. As this was incompatible with European standards and Council of Europe values, as part of its Terms of Accession to the Council of Europe, Ukraine committed to transforming this institution into a body compliant with

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[14] Solomon and Foglesong, *The Procuracy and the Courts in Russia: A New Relationship?* In East European Constitutional Review, Vol 9 No 4 Fall 2000; quoted in Venice Commission, CDL-AD (2005)014, (Prosecutor's Office) of the Russian Federation, point. 5.

Council of Europe standards.[15] Having regard to the strong tradition of the *prokuratura* system in Ukraine, the Venice Commission deemed it "indispensable to explicitly provide for limitations in the text of the Constitution itself."[16]

But old habits die hard and the Commission was less than impressed to find that the 1996 Constitution retained the supervision powers of the procuracy in point 9 of the document's Transitional Provisions:[17]

> *Article 9. The procuracy continues to exercise, in accordance with the laws in force, the function of supervision over the observance and application of laws and the function of preliminary investigation, until the laws relating the activity of state bodies in regard to the control over the observance of laws are put into force, and until the system of pre-trial investigation is formed and the laws regulating its operation are put into effect.*

Stating that this provision propagated "a Soviet-style '*prokuratura*'",[18] the Commission provoked the authorities to try to limit the scope of the procuracy's powers through a subsequent amendment to the 1996 Constitution bestowing upon it the powers of '*supervision of the observance of human and citizens' rights and freedoms and the fulfilment of laws by bodies of executive power and by bodies of local self-government'*. The Venice Commission expressed its concern with this interpretation of European values, stating that "the extension of the power of the Prosecutor can be considered a step backward not in line with the historical traditions of the procuracy in a state subject to the Rule of Law. In a state like Ukraine <…> it is of paramount importance that the institution that supervises compliance with the Rule of Law is non-political."[19]

This tension between the authorities and the Commission came to a head regarding a whole slew of constitutional issues, including the prokuratura, during the political crisis of the so-called *Orange Revolution* that arose after the presidential elections in 2004. It reflected to a great degree the difficult democratic transformation underway in Ukrainian politics and society as a whole, as Ukrainians sought to shed their Soviet heritage. By 2004, while the democratic forces were in the ascendancy, the post-Soviet

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[15] Venice Commission, CDL-AD(2013)025, Opinion on the Draft law on the Public Prosecutor's Office of Ukraine, para. 27.
[16] Venice Commission, CDL-AD(2006)029, Opinion on the Draft law of Ukraine amending the Constitutional provisions on the Procuracy, para. 26.
[17] Venice Commission, CDL-INF(1997)002, Opinion on the Constitution of Ukraine, p. 8.
[18] Venice Commission, CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, para. 8; CDL-AD(2006)029, Opinion on the Draft Law of Ukraine amending the Constitutional provisions on the Procuracy, para. 4.
[19] Venice Commission, CDL-AD(2003)019, Opinion on the three Draft Laws proposing amendments to the Constitution of Ukraine, paras. 44, 73.

nomenklatura elites responded by trying to tighten their grip on power. In addition to attempting to steal the presidential election, in a last-ditch effort to shore up their position, on 8 December 2004 the nomenklatura forces pushed through an amendment to the Constitution (Article 121) in order to restore the function of a Soviet-type of *Prokuratura*. The amendment essentially conferring a fifth function on the procuracy:

> '*to supervise the observance of human and citizens' rights and freedoms, and the observance [of] of laws on these matters by bodies of state power, local self-governments, their officials and functionaries'*.

The Venice Commission rejected this innovation as well,[20] but to no avail: the amendment was adopted despite "the strongly-expressed opinion of the Commission"[21] against it. Regardless, the Venice Commission remained adamant in recommending to the Ukrainian authorities to bring "the role and functions of the public prosecutor's office into line with the European democratic standards"[22] and to make clear that "the prosecutor's office is not a separate (fourth) pillar of state power, as was the case previously in the Soviet system", thereby diminishing "the risk of returning to the system of *Prokuratura*."[23] Given the specific circumstances of Ukraine, the Venice Commission welcomed "the option in favour of an independent prosecution service in the framework of judicial power."[24] In order "to break with the Soviet model of *Prokuratura*",[25] the Commission advised the administration "to limit the role of procuracy to criminal prosecution."[26] The Commission has maintained this consistent position to this day.

Following the Orange Revolution, the democratic forces lead by President Victor Yushchenko tried to remove the entire separate Chapter on the procuracy from the Constitution. These draft changes were supported by the Venice Commission, which found them to be "in accordance with the European guidelines on the role of prosecutor's office and in line with Ukraine's commitments to the Council of Europe."[27]

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[20] Venice Commission, CDL-AD(2006)029, Opinion on the Draft Law of Ukraine amending the Constitutional provisions on the Procuracy, para. 8.
[21] *Ibidem*, para. 9.
[22] Venice Commission, CDL-AD(2005)015, Opinion on the amendments to the Constitution of Ukraine, paras 35-42.
[23] Venice Commission, CDL-AD(2006)029, Opinion on the Draft Law of Ukraine amending the Constitutional provisions on the Procuracy, para. 9.
[24] *Ibidem*, para. 12.
[25] *Ibidem*, para. 19.
[26] *Ibidem*, para. 24.
[27] Venice Commission, CDL-AD(2008)015, Opinion on the Draft Constitution of Ukraine, para. 76.

But the unreconstructed nomenklatura-dominated parliament foiled these attempts and the pendulum swung back to the revanchists during the presidency of Victor Yanukovych. The Venice Commission's stated fears about the scope and possible abuse of constitutional provisions regarding the procuracy in Article 121 proved to be well-founded. Determined to impose a Russia-style authoritarian regime on Ukraine's people, President Yanukovych used this provision to prepare a Draft Law on the Public Prosecutor's Office that would actually expand the *prokuratura*'s powers as a repressive tool of the state.

The Venice Commission did not mince words in its evaluation of the draft legislation. Concluding that the draft law essentially cemented the model of the Soviet *Prokuratura*, the Commission complained that "none of the major criticism made by the Venice Commission in its earlier opinions of 2001, 2004 or 2006 have been taken on board in this new draft."[28] The Venice Commission felt the draft law essentially created "a type of fourth power,"[29] and was "an attempt to preserve the status quo and put an end to reform efforts undertaken on the basis of the 1996 Constitution of Ukraine."[30]

The Commission then revisited the core of the issue - the procuracy's constitutionally-mandated "supervision function" – that effectively anchored the procuracy to the old system, "where the prosecutor's wide role is derived from the weakness of other institutions in the protection of human rights."[31] Summarizing its decade-long struggle to apply European standards to the institution of the procuracy, the Commission decried the widening scope for abuse and the threat of the erosion of democratic values, along with its possible use as a repressive instrument of power:

> *the retention of the general supervision power has – despite its supposedly transitional nature – been a repeated source of concern not only because it is buttressed by wide powers for public prosecutors to summon persons to appear before them, to enter any premises in the public and private sectors and to order action to be taken to comply with the law <…>. The general supervision function and its accompanying powers thus give the Public Prosecutor's Office*

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[28] Venice Commission, CDL-AD(2009)048, Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, para. 7.
[29] *Ibidem* para. 19.
[30] *Ibidem* para. 28.
[31] Venice Commission, CDL-AD(2012)019, Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, para. 11; CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, para. 22.

> *an extensive ability both to intrude into the functioning of the executive and to interfere with the interests and activities of private individuals and organisations. This capacity is compounded by the entitlement of the Prosecutor General and other public prosecutors to participate in the proceedings of the Verkhovna Rada, boards of ministries, central executive agencies, local councils and other administrative bodies <…>. These powers and rights individually and cumulatively run counter to the appropriate separation of powers in a democracy, as well as posing threat to rights and freedoms that are supposedly safeguarded by the Constitution.*[32]

Harking back to Ukraine's Terms of Accession, the Venice Commission called for "a comprehensive reform in line with the country's commitment to the Council of Europe," essentially demanding that the procuracy be completely reconfigured.[33]

While the Commission's persistent complaints regarding the need to limit the power of the prosecutor's office fell on deaf ears in the executive branch, the efforts of the Venice Commission had begun to influence the judiciary. The Venice Commission's position on this issue, among others, was implemented through the Constitutional Court of Ukraine's decision of 30 September 2010.[34] While less than satisfactory as a final resolution to the issue of the broad supervisory powers of the *Prokuratura*, it was an important interim step; it set the foundation for the constitutional reforms regarding the judiciary and law enforcement bodies that followed the Revolution of Dignity in 2016. Work remains to be done – the Venice Commission's concerns regarding parliament's ability to remove a Procurator General through a vote of non- confidence and the right of the procuracy to represent "the people's interests" in any court proceedings have not yet been implemented. However, while amendments that the Venice Commission positively accessed to establish a new system of prosecution as part of the judiciary[35] have not yet been adopted, the trend of reforms in this area give cause for optimism.

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[32] Venice Commission, CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, para. 25.
[33] Venice Commission, CDL-AD(2009)048, Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, para. 30.
[34] CCU Judgment No. 2-pn/2010. 30 September 2010 (Case No. 1-45/2010).
[35] Venice Commission, CDL-AD(2015)026, Opinion on the amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 39.

2. The Judiciary

Perhaps the most difficult institutional transformation to implement in any transitional democracy is judicial reform. That is because the stakes are so high – once the judiciary has been suborned by the executive, the latter acquires a virtual unaccountable monopoly on state power. The impulse of the executive branch of government to control the independence of the judiciary is not just the legacy of a totalitarian dictatorship – these tensions unfortunately often manifest themselves in some developed democracies as well. The situation is that much more complicated when trying to shed the legacy of a traditionally subordinated judiciary to one that functions as an independent branch of state power.

The Venice Commission was highly engaged in the crucial efforts to create a truly independent judicial branch of power. In numerous opinions the Commission consistently highlighted that the judiciary "is of the highest importance for the establishment and consolidation of the Rule of Law in Ukraine"[36] and that "the guiding principles of the Rule of Law require the guarantee of an independent judicial system."[37] Until (and even after) the constitutional reforms of 2016, the Commission found itself in perpetual tension, even conflict, with successive Ukrainian administrations over respect for the independence of Ukraine's courts, whether it involved the:

a. interference of political institutions in establishing the court structure, appointment and dismissal of judges;
b. initial appointment of a judge and probationary period;
c. dismissal of a judge for a "breach of oath";
d. role of the High Council of Justice;
e. lifting of a judge's immunity by parliament and the scope of immunity;
f. organization of courts;
g. judicial budget; and
h. corruption in the judiciary.

Of these, we will focus our attention on political interference, the role of the High Council of Justice, the organization of the courts, and corruption in the judiciary.

The genesis of many of these disputes was not merely ideological or transactional; they emanated from the idiosyncratic compromises and (mis)

[36] Venice Commission, CDL-INF(2000)005, Opinion on the Draft Law of Ukraine on the Judicial system, p. 2.
[37] Venice Commission, CDL-AD(2010)003, Joint Opinion on the Draft Law on the judicial system and the status of judges of Ukraine, para. 7.

understandings of the role of judges in a society governed by the Rule of Law that found their way into the text of the 1996 Constitution itself.[38] As the Venice Commission noted, "the most serious problems concerning the independence of the judiciary in Ukraine lie in the constitutional provisions <…>. To achieve an effective justice reform that satisfies European standards in Ukraine, constitutional amendments are necessary <…>."[39] The constitutional reforms enacted in 2016 following the Revolution of Dignity resolved many of these issues, due in large part to the Venice Commission acting throughout as the protective guardian of the country's judicial reform process, guiding it to a stable maturity.

At the heart of the tensions was the issue of **the involvement of political institutions in establishing the court structure, and appointment and dismissal of judges**. The 1996 Constitution provided that the courts should be established by the President according to the law (Article 106.23), leading the Venice Commission to criticize the constitutional framework granting the President discretionary powers regarding the selection and appointment of judges, as well as the power to remove and dismiss a judge.[40] The Commission pointed out that as long as these powers remained in the Constitution, the potential for politicization would always be present.[41] It took the position that the power of the President to establish and liquidate courts should be removed from the Constitution and that "this should be considered as a legislative matter."[42] The Commission pointed out that courts must be established "by law", which meant that the decisions should be made by the *Verkhovna Rada*, not by the Executive.[43]

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[38] Venice Commission, CDL-AD(2011)033, Joint opinion on the Draft Law amending the Law on the Judiciary and the status of judges and other legislative acts of Ukraine, para. 79; see also CDL-AD(2015)026, Opinion on the amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 6.

[39] Venice Commission, CDL-AD (2015)007, Human Rights and Rule of Law (DGI) of the Council of Europe on the Law on judicial system and the status of judges and amendments to the Law on the High Council of Justice of Ukraine, para. 58.

[40] Venice Commission, CDL-AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine, para. 63.

[41] Venice Commission, CDL-AD(2011)033, Joint opinion on the Draft Law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine, para. 61.

[42] Venice Commission, CDL-AD(2015)007, Human Rights and Rule of Law (DGI) of the Council of Europe on the Law on judicial system and the status of judges and amendments to the Law on the High Council of Justice of Ukraine, paras. 58, 92.
Ibidem, para. 92.

[43] Venice Commission, CDL-AD(2015)026, Opinion on the amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 18; CDL-AD(2013)014, Opinion on the

However, the Venice Commission had no objection to the *pro forma* appointment of judges by the president as Head of State, "when the latter is bound by a proposal of the judicial council and acts in a 'ceremonial' way, only formalizing the decision taken by the judicial council in substance."[44] The idea was that the President only ratifies a decision of the judicial council and his decision therefore has the effect of a "notary".[45]

The Venice Commission similarly weighed in on constitutional powers to appoint judges. Articles 85(27) and 128 of the 1996 Constitution provided that the *Verkhovna Rada* (Parliament) had the power to make lifetime appointments of judges. The Venice Commission criticized these provisions many times,[46] considering them to unduly politicize appointments.[47] Instead, the Commission recommended that "the preparation of candidacies, should be entirely in the hands of an independent body" and that these "competences should be attributed to a High Council of Justice composed of a majority of judges."[48]

Similar concerns were expressed regarding the *Verkhovna Rada's* **power to lift a judge's immunity** pursuant to Article 126 of the 1996 Constitution: "it is not appropriate that the parliament should have any role of lifting a judge's immunity" since "this involves a political body in a decision concerning the status of judges and their immunities."[49] Consequently, "the competence to

Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para. 14; CDL-AD(2010)026, Joint opinion on the Law on the Judicial system and the status of judges of Ukraine, para. 16.

[44] Venice Commission, CDL-AD(2013)034, Opinion on proposals amending the Draft Law on the amendments to the Constitution to strengthen the independence of judges of Ukraine, para. 16.

[45] Venice Commission, CDL-AD(2010)003, Joint Opinion on the Draft Law on the judicial system and the status of judges of Ukraine, para. 38.

[46] Venice Commission, CDL-AD(2010)003, Joint Opinion on the Draft Law on the judicial system and the status of judges of Ukraine, para. 64; see also CDL-AD(2015)007, Human Rights and Rule of Law (DGI) of the Council of Europe on the Law on judicial system and the status of judges and amendments to the Law on the High Council of Justice of Ukraine, para. 47.

[47] Venice Commission, CDL-AD(2007)003, Opinion on the Draft Law on the Judiciary and on the Draft Law on the status of judges of Ukraine, para. 23; CDL-AD(2010)003, Joint Opinion on the Draft Law on the judicial system and the Status of Judges of Ukraine, para. 45; CDL-AD(2010)026, Draft Joint opinion on the law on the judicial system and the status of judges of Ukraine, para. 64.

[48] Venice Commission, CDL-AD(2007)003, Opinion on the Draft Law on the Judiciary and on the Draft Law on the status of judges of Ukraine, paras. 23, 29; see also: CDL-AD(2009)024, Opinion on the Draft Law of Ukraine Amending the Constitution, para. 87.

[49] Venice Commission, CDL-AD(2009)024, Opinion on the Draft Law of Ukraine amending

lift judges' immunity should not belong to a political body like the *Verkhovna Rada*",[50] and that immunity should not be lifted by Parliament, but only by the High Council of Justice as part of its constitutional mandate.[51]

The Venice Commission was as strongly critical with regard to a provision of Article 126(5) of the Constitution, which allowed the dismissal of a judge for a **"breach of oath."**[52] As the Commission also pointed out, the language of the judicial oath provides for "indiscriminate sanctions of judges or removal from office by those who oppose the decisions of judges."[53]

The constitutional reforms of 2016 were ushered in based on a 2015 presidential draft law to amend the Constitution, which provided that judges will no longer be elected by the *Verkhovna Rada*, but will be appointed by the President upon the submission of the High Council of Justice, on the basis of an open and competitive process.

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the Constitution presented by the President of Ukraine, para. 84; CDL-AD(2007)003, Opinion on the Draft Law on the Judiciary and on the Draft Law on the status of judges of Ukraine, para. 12; CDL-AD(2013)034, Opinion on the Draft Law on the Judiciary and on the Draft Law on the status of judges of Ukraine, para. 25; CDL-AD(2015)007, Human Rights and Rule of Law (DGI) of the Council of Europe on the Law on judicial system and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, para. 58.

[50] Venice Commission, CDL-AD(2015)007, Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, para. 58.

[51] Venice Commission, CDL-AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine, para. 27; CDL-AD(2010)026, Draft Joint opinion on the law on the judicial system and the status of judges of Ukraine, para. 130(5); CDL-AD(2013)034, Opinion on proposals amending the Draft Law on the amendments to the Constitution to strengthen the independence of Judges of Ukraine, paras. 25, 57.

[52] Venice Commission, CDL-AD(2009)024, para. 90; Joint opinion on the Law amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal. CDL-AD(2010)029, Joint opinion on the law amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, para. 43; CDL-AD(2011)033, para. 63; Opinion on the Draft Law on the amendments to the Constitution, strengthening the independence of judges. CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para. 24; CDL-AD(2013)034, para. 54; CDL-AD(2015)007, Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, paras. 51, 52.

[53] Venice Commission, CDL-AD(2011)033, Joint opinion on the Draft Law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine, para. 41.

These changes received the full support of the Venice Commission as "it marked the end of the power of the *Verkhovna Rada* to influence the judiciary, which represented a threat to the independence of the judges and of the judiciary as such" and where the President was given "a ceremonial role" in appointing candidates submitted by the High Council of Justice, whose proposals assumed to be binding on the President.[54] The Venice Commission also welcomed other amendments that followed its recommendations, including removing the power of the President to dismiss judges and the authority of the parliament to lift judicial immunity, which were conferred on the High Council of Justice,[55] and removing the 'breach of oath' offence[56] from the Constitution.[57]

In this context, perhaps the most institutionally significant contribution the Venice Commission made to the development of the Rule of Law in Ukraine's judicial system involved the constitutional empowerment of the **High Council of Justice**. From the outset, controversy around the independence of this institution had been the subject of the Venice Commission's particular opprobrium. The Commission found it very unsatisfactory that Article 131 of the 1996 Constitution provided for a High Council of Justice that played no role in the procedure of establishing courts and that was composed of politically appointed representation in which judges constituted a minority.[58] The Commission recommended a constitutional amendment to ensure that the Council had the powers to act as the "guarantor of the independence of courts and judges," given that "the main task of the Council is to safeguard the independence of the third power and individual judges."[59] Changing the composition of the High Council of Justice to provide for a membership made up of a majority of judges elected

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[54] Venice Commission, CDL-AD(2015)027, Opinion on the proposed amendments to the constitution of Ukraine regarding the Judiciary, paras. 14, 26.
[55] *Ibidem*, para. 15.
[56] Venice Commission, CDL-AD(2015)026, Opinion on the amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 24.
[57] Venice Commission, CDL-AD(2015)007, Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, para. 52.
[58] Venice Commission, CDL AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukrainepara. 69; CDL-AD(2007)003, Opinion on the Draft Law on the Judiciary and on the Draft Law on the status of judges of Ukraine, para. 43.
[59] Venice Commission, CDL-AD(2008)015, Opinion on the Draft Constitution of Ukraine (prepared by a Working Group headed by Mr V.M. Shapoval, para. 73.

by their peers[60] and exercising control over judicial training[61] would ensure that the administration of the judiciary would "be carried out by the judiciary itself or by an independent authority with substantial representation of the judiciary, at least where there is no other established tradition of handling that administration effectively and without influencing the judicial function."[62]

The Venice Commission was very pleased to see that virtually all of its recommendations regarding the High Judicial Council made their way into the 2016 constitutional reforms, including the composition of the HCJ where more than half of its members were proposed to be judges; all decisions regarding a judge's career (promotions, transfers, dismissals) were allocated to the High Council of Justice and not to political institutions; [63] judges would no longer be elected by the *Verkhovna Rada*, but appointed by the President upon the submission of the High Council of Justice;[64] and that the HCJ would have authority over both judges and prosecutors (assuming that the prosecution would be subsumed into the judiciary).[65]

Although the Venice Commission's advice that "the members of the HCJ chosen by the parliament should be elected by a qualified majority, which would favour candidates with cross-party support (or by other mechanisms enabling the opposition to participate in the choice)"[66] and extension of the HCJ's authority over the procuracy were not incorporated into the final

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[60] Venice Commission, CDL-AD(2010)026, Draft Joint opinion on the law on the judicial system and the status of judges of Ukraine, para. 130(3); CDL-AD(2015)007, Human Rights and Rule of Law (DGI) of the Council of Europe on the Law on judicial system and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, paras. 83, 92.

[61] Venice Commission, CDL-AD(2007)003, Opinion on the Draft Law on the Judiciary and on the Draft Law on the status of judges of Ukraine, para. 66; CDL-AD (2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, para. 103.

[62] Venice Commission, CDL-AD (2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, para. 78.

[63] Venice Commission, CDL-AD(2015)027, Opinion on the proposed amendments to the constitution of Ukraine regarding the Judiciary, para. 16; CDL-AD(2015)026, Opinion on the amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 28.

[64] Venice Commission, CDL-AD(2015)026, Opinion on the amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 26.

[65] *Ibidem*, para. 33.

[66] *Ibidem*, para. 37.

amendments, what was accomplished marked a major leap forward for judicial independence in Ukraine according to European standards.

Reorganization of courts was fundamentally an issue of access to and efficiency of justice, but also impacted on corruption in the court system – it is easier to manipulate and extract rents from an opaque, procedurally complex and inefficient court system than from a transparent, efficient and accessible one. The 1996 version of the Constitution facilitated the creation of a four-instance system of local courts, courts of appeal, high specialized courts and the Supreme Court of Ukraine - the establishment and abolition of all of which was left to the discretion of the highest executive body, the President of the State.

The Venice Commission was highly critical of these arrangements, questioning the need for a four-instance court system[67] and proposed to merge the levels of the high specialized courts and the Supreme Court into one.[68] Under this fragmented structure, the Supreme Court was unable to influence the practice of the high specialized courts, a situation that the Venice Commission found profoundly unsatisfactory.[69] It insisted on the extension of the Supreme Court's jurisdiction so that it could exercise "its constitutional status as the highest judicial body in the system of courts of general jurisdiction."[70] The Commission maintained that the competence of the high specialized courts should be read in relation to the role of the Supreme Court, which should be "the ultimate guarantor of the uniformity of the jurisprudence of all courts."[71] The Commission held the view that "as long as the Supreme Court does not regain its general competence as a cassation court, it still has not fully

[67] Venice Commission, CDL-AD(2010)003, Draft Joint opinion on the law on the judicial system and the status of judges of Ukraine, para. 20; CDL-AD(2010)026, Draft Joint opinion on the law on the judicial system and the status of judges of Ukraine, para. 15; CDL-AD(2011)033, para. 8; CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para. 45.

[68] Venice Commission, CDL-AD(2010)003, Draft Joint opinion on the law on the judicial system and the status of judges of Ukraine, para. 21.

[69] Venice Commission, CDL-AD(2013)034, Opinion on proposals amending the Draft Law on the amendments to the Constitution to strengthen the independence of judges of Ukraine, para. 21.

[70] Venice Commission, CDL-AD(2010)026, Draft Joint opinion on the law on the judicial system and the status of judges of Ukraine, para. 125.

[71] Venice Commission, CDL-AD(2011)033, Joint opinion on the Draft Law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine,para. 29.

recovered its role."[72] The Commission pointed out the need to unify the system of ordinary courts and strongly recommended abolishing the high specialized courts and incorporating them into divisions within the Supreme Court (with the possible exception of the high administrative court).[73]

The reforms to the structure and organization of the Ukrainian court system were also designed to facilitate the elimination of **corruption in the judiciary** by encouraging efficiency of access to justice and applying procedural justice. With fewer instances to traverse and more transparent procedural rules, the notion was that claimants would find improvements to the access and efficiency of justice. However, without accountability on the part of the judges themselves, these hopes were likely to remain unrealized. Accordingly, the Venice Commission also recommended to introduce "the duty of judges to disclose their financial situation" that would "prevent financial conflicts of interest and protects judges against the reproach that they might have financial interests in a case," requiring judges to disclose their possessions, financial circumstances, stockholdings, presents, fees and other income, as well as loans.[74]

To change the court system and to bring the role of the political institutions (the President and the *Verkhovna Rada*) in establishing and abolishing the courts in compliance with European standards, the Venice Commission recommended to amend the Constitution, in particular, Article 125.[75] This, too, formed part of the 2016 constitutional transformations, leading to the abolishing of the high specialized courts and their transformation into divisions within the Supreme Court; confirming the Supreme Court as the highest judicial body in the system of courts of general jurisdiction, with the role of ultimate guarantor of

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[72] *Ibidem*, para. 33.

[73] Venice Commission, CDL-AD(2015)026, Opinion on the amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 19.

[74] Venice Commission, CDL-AD(2007)003, Opinion on the Draft Law on the Judiciary and on the Draft Law on the status of judges of Ukraine, para. 75.

[75] Venice Commission, CDL-AD(2007)003, Opinion on the Draft Law on the Judiciary and on the Draft Law on the status of judges of Ukraine, para. 18; CDL-AD(2010)003, Joint Opinion on the Draft Law on the judicial system and the status of judges of Ukraine, paras. 19, 23; CDL-AD(2010)026, paras. 16, 130(1); CDL-AD(2011)033, para. 8; CDL-AD(2011)033, Joint opinion on the Draft Law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine, para. 20; CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para. 45.

the uniformity of the jurisprudence and practice of all courts; and the implementation of a system of electronic financial declarations mandatory for all judges, which are vetted and made accessible to the public at large on a central registry.

3. The Constitutional Court

Because of its paramount role in the judicial hierarchy and the finality of its decisions regarding constitutional interpretation, the Constitutional Court of Ukraine (CCU) deserves separate consideration from the rest of the judiciary. Given its importance as the guardian of constitutional justice, the role and function of the CCU became a key battleground between the Venice Commission and the presidency regarding the institutionalization of the Rule of Law in Ukrainian society.

Upon the creation in the 1996 Constitution of the Constitutional Court as an entirely new institution, the Venice Commission found the new Law on the Constitutional Court of Ukraine (1996) to be "an important <…> step on Ukraine's way to becoming a full-fledged constitutional democracy". At the same time, it expressed concern about the **lack of clarity regarding who had standing before the Court** - that the rights of parties "involved in a dispute before the Constitutional Court are in no way defined by the Law and will therefore have to be clarified by the rules of the procedure of the Court and its practice."[76]

In addressing the issue of standing, the Venice Commission stressed that "the principle of the Rule of Law requires that the status of the parties in the proceedings before the courts, their rights and the time limits to be complied with during the trial shall be established by Law" and that "leaving these items to the internal rules of procedure of the Court does not comply with the mentioned principle."[77] Later the Commission pointed out that the Constitution itself "should expressly provide for the adoption of a normative act on the internal organization and functioning of the Court, while establishing a distinction between issues to be regulated by law and issues reserved to the regulations of the Court".[78]

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[76] Venice Commission, CDL(1997)018 rev, Opinion on the Law on the Constitutional Court of Ukraine, para. 21.
[77] *Ibidem*, para. 22.
[78] Venice Commission, CDL-AD(2005)015, Opinion on the amendments to the Constitution of Ukraine, para. 47.

A special problem emerged in the fall of 2005 when the Constitutional Court became inoperative. On 18 October 2005, the term of office of ten justices came to an end, adding to three other vacant positions. Therefore, only five judges (out of a full bench of 18 judges - six judges appointed by each of the President, the *Verkhovna Rada* and the Congress of Judges) remained in office, whereas a quorum of twelve judges was required. On 3 November 2005, the Congress of Judges of Ukraine appointed six judges and on 14 November 2005 the President of Ukraine appointed three judges to the Court respectively. However, the *Verkhovna Rada* was reluctant to appoint the four judges under its quota and, moreover, to allow for the procedure of swearing in to take place.

The Venice Commission used this impasse as an opportunity to push for true independence in the administration and conduct of the all affairs of the CCU. With respect to the paralysis of the Court's operations, the Commission recommended default mechanisms through constitutional and legislative amendments, including a proposal to introduce a procedure enabling the newly appointed judges to be sworn in by the Constitutional Court itself.[79]

The Venice Commission pushed further - with respect to the appointment and dismissal of the constitutional judges, it recommended that the Constitution should provide for "a qualified special majority" of votes when judges are appointed by the Parliament,[80] as well as for "a special, qualified majority of members" voting when judges are appointed by the Congress of Judges of Ukraine.[81]

Regarding the dismissal of Constitutional Court judges, it strongly recommended the introduction of a special requirement in Article 149 that a preliminary decision on this matter be entrusted to the Constitutional Court itself.[82]

With respect to the organization and functioning of the Court and for the purpose of safeguarding the functioning and stability of constitutional justice, the Venice Commission recommended that a judge should remain in

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[79] Venice Commission, CDL-AD(2006)016, Opinion on possible constitutional and legislative improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine, paras 19, 21

[80] Venice Commission, CDL-AD(2005)015, Opinion on the amendments to the Constitution of Ukraine, para. 43.

[81] *Ibidem*, para. 44.

[82] *Ibidem*, para. 46.

office after their term has expired until the judge's successor takes office[83] and that the dismissal of judges should be regulated in the Constitution only.[84]

Leaving the decision to detain or arrest judges of the Constitutional Court to the Parliament was considered not desirable by the Commission on the ground that "it would represent a continued politicization of judicial immunity and endanger judicial independence; " the Commission recommended that decisions to lift the immunity of constitutional judges should be left to the Court itself according to a vote "by the plenary of the Court, with the exception of the judge concerned."[85]

The vast majority of these positions of the Venice Commission were incorporated into the constitutional reforms of 2016, which marked a major victory for the institutionalization of the independence of the Constitutional Court. The Commission supported and warmly welcomed the new provisions, which provided that judges are to be appointed/elected after a selection on the basis of a competition among candidates whose high qualifications are listed in the Constitution;[86] a two-thirds vote of the Court members themselves was required regarding the termination and dismissal of judges,[87] the "breach of oath" offence be removed and that the oath of office be taken before the plenary of the Court; judges enjoy inviolability and functional immunity";[88] the budget of the Constitutional Court is not part of the general budget of the judiciary and is allocated taking into account of the proposals of the Chairman of the Court.[89]

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[83] Venice Commission, CDL-AD(2006)016, Opinion on possible constitutional and legislative improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine, para 13; CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para. 25.

[84] Venice Commission, CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para. 21.

[85] *Ibidem*, para. 49.

[86] Venice Commission, CDL-AD(2015)027, Opinion on the proposed amendments to the constitution of Ukraine regarding the Judiciary, para. 24.

[87] Venice Commission, CDL-AD(2015)027, Opinion on the proposed amendments to the constitution of Ukraine regarding the Judiciary, para. 29; CDL-AD(2015)026, Opinion on the amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 46.

[88] Venice Commission, CDL-AD(2015)026, Opinion on the amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 44.

[89] *Ibidem*, para. 45.

The introduction of the mechanism of the constitutional complaint to afford an individual standing before the Constitutional Court for the first time was particularly welcomed, even if it did not go "as far as establishing a full constitutional complaint against individual acts", as the Venice Commission had recommended.[90] The reforms also granted the Court the right to postpone the invalidity of a law found to be unconstitutional.[91]

While certain of the Venice Commission's recommendations remained unfulfilled, they still remain relevant regarding future amendments to the Constitution. Of particular relevance is the introduction of a requirement of a qualified majority in parliamentary voting for the election of the *Verkhovna Rada*'s quota of judges to the Constitutional Court[92] and of the implementation of a more robust right of constitutional complaint.[93]

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Thus, the period of over twenty-five years of co-operation between the Venice Commission and the Ukrainian authorities reached its summit with the passage of comprehensive systemic judicial reform in 2016. These joint efforts resulted in the institutionalization in the Constitution of the fundamental principles and values of the Rule of Law consistently expounded by the Commission. To summarize, the main achievements were:

- Removing the power of the *Verkhovna Rada* and the President to appoint and dismiss judges;
- Limiting the role of the President in the establishment and dissolution of courts;
- Strengthening the guarantees of judicial independence by eliminating the initial 5-year appointment of judges in favour of lifetime appointment for all judges and giving the judiciary a greater role in the budgetary process;

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[90] Venice Commission, CDL-AD(2013)034, Opinion on proposals amending the Draft Law on the amendments to the Constitution o strengthen the independence of Judges of Ukraine, para. 11.
[91] Venice Commission, CDL-AD(2016)034, Opinion on the Draft Law on the Constitutional Court, para. 68.
[92] *Ibidem*, para. 25.
[93] *Ibidem*, para. 39.

- Abolishing the "breach of oath" as a ground for dismissal of judges;
- Bringing the composition of the High Council of Justice in line with the European standards, with more than a half of its member judges elected by their peers;
- Empowering the High Council of Justice to take all decisions regarding a judge's career (promotions, transfers, dismissals);
- Making the High Council of Justice responsible for the training of judges and prosecutors;
- Limiting judicial immunity to conduct on the bench, thereby promoting greater judicial accountability;
- Abolishing the high specialized courts and transforming them into divisions within the Supreme Court;
- Installing the Supreme Court as the highest judicial body in the system of courts of general jurisdiction with the role of the ultimate guarantor of the uniformity of the jurisprudence and practice of all courts;
- Balancing the composition of the Constitutional Court, with its members being appointed by the President, the *Verkhovna Rada* and the Congress of Judges, after selection on the basis of a competition among candidates whose high qualifications are listed in the Constitution;
- Introducing a constitutional complaint process for individuals to challenge the constitutionality of laws after exhaustion of the domestic remedies;
- Terminating or dismissing of the Constitutional Court judges by two-thirds vote of the Court itself.

Remaining outstanding as a work-in-progress are the Venice Commission's recommendations with respect to:

- Removing the power of the *Verkhovna Rada* regarding a vote of non-confidence in the Prosecutor General;
- Implementation of a special, qualified majority regarding the appointment of the Prosecutor General and the election of two members of the High Council of Justice and one-third of the members of the Constitutional Court by the Parliament;
- Requiring the vote of a qualified majority of members of the Congress of Judges regarding the appointment of one-third of Constitutional Court judges.

Nevertheless, the post-Revolution of Dignity reforms mark a colossal breakthrough in the institutionalization of the Rule of Law and European values in Ukraine. The opinions and recommendations of the Venice Commission facilitated Ukraine's integration not just into the constitutional structures of the European Union, but also promoted the integration of the concept of the Rule of Law into the Ukrainian legal thought, doctrine and, ultimately practice. Indeed, it is difficult to imagine Ukraine as the dynamic democracy that it is today without the Commission's steely assessments of its progress, keeping the country on a "straight and narrow" democratic path. There is no doubt in my mind that it was the guidance of the Venice Commission that helped shape Ukraine's modern constitutional development.

Since the notion of the "Rule of Law" was incorporated into the statutory documents of the European institutions, Ukrainian jurists and authorities have become more familiar with the substance of the *Rule of Law,* either as a set of *values* on which the "[European] Union is founded,"[94] as one of the *principles* "which form the basis of all genuine democracy,"[95] or as a *fundamental principle* of the European Convention "permeating it all and bonding it together."[96] In particular, in recent years much was done to reach a common understanding or to find a consensual definition of the "Rule of Law" notion both within the European Union[97] and within the Council of Europe institutions, in particular, the Parliamentary Assembly,[98] the Committee of Ministers,[99] and the Venice Commission.[100]

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[94] Consolidated version of the Treaty on European Union (Article 2). *Official Journal of the European Union (C 115/13, 9 May.2008).*

[95] Statute of the Council of Europe (Preamble and Article 3) *(ETS – Nos 1/6/7/8/11).*

[96] *he Hon. Chief Justice Emeritus Prof. John. J. Cremona.* The Rule of Law as a Fundamental Principle of the European Convention of Human Rights // In: A Council for all Seasons: 50th anniversary of the Council of Europe. – [Valetta]: Ministry of Foreign Affairs (Malta), 1999. – P. 124.

[97] See Conclusions [of the] Conference "The Rule of Law in a Democratic Society" (Noordwijk, The Netherlands, 23 and 24 June 1997). *Doc. PC-PR (97) misc 1.*; Council conclusions on the follow-up to the Noorwijk conference: the Rule of Law // Europe. EU Official Documents. Bulletin EU 5-1998.

[98] See The principle of the Rule of Law: Report of the Committee on Legal Affairs and Human Rights. Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group. Doc. 11343, 6 July 2007; Resolution 1594 (2007). The principle of the Rule of Law. Text adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2007 (see Doc. 11343).

[99] See The Council of Europe and the Rule of Law – An Overview, CM(2008)170, 21 November 2008.

[100] Venice Commission, CDL-AD(2011)003rev., Report on the Rule of Law; CDL-AD(2016)007, Rule of Law Checklist.

Even though a consensual understanding has been reached that "the Rule of Law does constitute a fundamental and common European standard to guide and constraint the exercise of democratic power"[101] we have to admit that, for objective reasons, implementing these standards as part of Ukraine's democratic transformation proved to be more difficult than was initially expected at the time of its accession to the Council of Europe – confronting and overcoming the legacy of more than three centuries of influence of Russian absolutism and Marxism was never going to be easy. Even today, the Ukrainian legal thought is still to a large extent influenced by Russian legal thinking, which itself is deficient in the understanding the essence of the *Rule of Law* within its traditional interpretation and application by European institutions.

However, the influence of the Venice Commission in guiding, educating and cajoling Ukraine into the institutionalization of the Rule of Law has had a profound impact on Ukraine's unalterable orientation to the European family of democratic nations and traditions. In effect, the Commission became the backbone of the Ukrainian legal system.

Fruitful co-operation between the Venice Commission and the Ukrainian authorities has successfully continued following the 2016 constitutional reform and will continue further. Indeed, a recent decision of the Constitutional Court rejecting as unconstitutional the administration's unwarranted and arbitrary reduction in the number of judges of the Supreme Court from 200 to 100 was heavily influenced by two *Amicus Curiae* briefs (one on human rights,[102] the other on democracy[103]) and an Opinion of the Venice Commission; these argued that such action would be tantamount to "a second vetting"[104] of judges and would constitute "an obvious threat to their independence and to the role of judiciary in the light of Article 6 ECHR."[105] The Constitutional Court subsequently struck down the law as unconstitutional, grounding much of its judgement on the arguments advanced by the Venice Commission.

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[101] Venice Commission, CDL-AD(2011)003rev., Report on the Rule of Law, para.70.
[102] Venice Commission, CDL-AD(2019)001, *Amicus Curiae* brief on separate appeals against rulings on preventive measures (deprivation of liberty) of first instance courts, Strasbourg, 18 March 2019.
[103] Venice Commission, CDL-AD(2019)029, *Amicus Curiae* brief for the Constitutional Court of Ukraine on Draft Law 1027 on the early termination of a deputy's mandate, Strasbourg, 9 December 2019.
[104] Venice Commission, CDL-AD(2019)027, Opinion on amendments to the legal framework governing the Supreme Court and judicial governance bodies, para. 85.
[105] *Ibidem*, para. 83.

The co-operation between the Venice Commission and Ukraine contained in the Commission's almost 100 opinions and two *Amicus Curiae* briefs reflect a copious amount of intellectual nourishment, substantive legal doctrine and impressive practical guidance. All of which comprise the triad of European common values: Democracy, Human Rights and the Rule of Law - and, because of the crucial role played by the Venice Commission, all of which now form the corpus of Ukraine's legal and body politic.