The Venice Commission and Ukraine: the Ukrainian path to democracy through law

KYIV 2016
Publication and distribution of "Parliament" bulletin is part of the project implemented by the Agency for Legislative Initiatives within USAID

"RADA: responsibility, accountability, democratic parliamentary representation"
Project implemented by East Europe Foundation.

The opinions and statements expressed in this publication reflect personal positions of the authors and may not necessarily reflect the position of USAID.

"PARLIAMENT" BULLETIN

POPULAR SCIENCE JOURNAL

Issue 3, 2016

Certificate of state registration of printed media
KB 5474 of 13.09.2001 issued by the State Committee on Information Policy of Ukraine.

Founder and publisher:
NGO "Agency for Legislative Initiatives"
Kyiv 04071, Nyzhny Val str. 15, of. 303
info@laboratory.kiev.ua (+38,044) 531 37 68

Editor in Chief:
Roman Kobets

Responsible Editor:
Olexander Zaslavsky

Author:
Oleksandr Ilkov

The issue was prepared by:
Svitlana Matvienko
Uliana Poltavets Maria
Vrabel Olesya
Kyrichenko Anastasia
Borodina
Viktoria
Baklazhenko
Valeria Yakushko
Olha Zaediya
Evhen Pinchukov
Iryna Podlesna
Tetyana Chernukha
Iryna Cherpak

Artwork:
Mykola Kovalchuk

Pre-press:
Oksana Plaksiy IE
N.L.Kashtalyan
Serhiy Tkachenko. Foreword. ................................................................. 5

Oleksandr Ilkov. The Venice Commission and Ukraine: the Ukrainian path to democracy through law. ........................................... 6

1. The Venice Commission: the creation intention, scope, and philosophy. ............... 7
   1.1. Background and the purpose of creation .................................................. 7
   1.2. Principles of operation of the Venice Commission ...................................... 8
   1.3. Standards, scope, and forms of activities of the Venice Commission ............... 11
   1.4. Cooperation between the Venice Commission and the Member States in the legislative field. 14

2. Cooperation between the Venice Commission and Ukraine: an overview. ............... 19

3. Cooperation between the Venice Commission and Ukraine within the framework of the constitutional processes. ............................................................... 27
   3.2. "Playing with rules, not according to the rules" (2000-2004). ......................... 32
   3.3. The Constitutional reform without prospects of implementation (2005-2010) ........ 38
   3.5. The current constitutional reform (2014-2016) ............................................ 44

Summary ................................................................. 48

References ................................................................. 50

Annex 1. Key reports and studies of the Venice Commission. ................................ 52
2016 was marked as the twentieth anniversary since Ukraine gained full membership in the Venice Commission of the Council of Europe following enforcement on December 7, 1996 of the Law of Ukraine On Ukraine’s Accession to the Partial Agreement on the European Commission “For Democracy through Law”. Cooperation between the Venice Commission and Ukraine has started earlier when on July 14, 1992 Ukraine filed its application to join the Council of Europe.

Over the years, documents of the Venice Commission and its Opinions for Ukraine have not only become sources of references in research papers of local lawyers, but often they are the basis for search for appropriate legal solutions of pressing problems in the legislative activity of the Verkhovna Rada of Ukraine. They are used as important arguments in the process of stipulating legal positions of Ukraine’s Constitutional Court and other judicial authorities. Documents of the Venice Commission are an expression of the European constitutional and, in particular, electoral heritage – a concentrated summary of the years of development of the European democracy, its core values and traditions, which got constellated as common experience of lots of states.

The study offered to your attention is important not so much for promotion of the principles and general information regarding this international institution, as for analysis of outcomes of cooperation between Ukraine and the Venice Commission over the past two decades, realization of what this partnership offered to our country, its independence and development of democracy, as well as for understanding further prospects.

Now when Ukraine takes actions aimed at amending the Constitution and drafting various laws in the field of electoral legislation and legislation on political parties, it is hard to overestimate the impact and significance of this cooperation since opinion of the Venice Commission regarding constitutional and legislative acts is a true indicator of whether the path chosen by the state is in line with European standards and values.

I would like to express special gratitude to the Agency for Legislative Initiatives and personally Oleksandr Ilkov for holding the fundamental study "The Venice Commission and Ukraine: the Ukrainian path to democracy through law". This paper is a good example of cooperation between the civil society of Ukraine and the international community. The Agency for Legislative Initiatives has always demonstrated high standards of such cooperation. They have been and remain our reliable partners.

Serhiy Tkachenko,

Project Manager, the Venice Commission, the Office of the Council of Europe in Ukraine
The Venice Commission and Ukraine: The Ukrainian path to democracy through law

Oleksandr Ilkov, member of the Board of Ukrainian Bar Association, Honored Lawyer of Ukraine

Abstract: The article analyses the experience of cooperation between Ukraine and the European Commission for Democracy through Law (the Venice Commission) and highlights the philosophy and major fields of activity of the Venice Commission, as well as its principles, standards and methods of work. It was specially emphasised that not only the Venice Commission's Opinions on Ukraine should be considered in the process of drafting and improving Ukrainian legislation but also studies of the Venice Commission in general as an integral part of the «European constitutional heritage». The author concludes that Ukraine's readiness to cooperate with the Venice Commission and proper consideration of the Commission's recommendations could be regarded as an indicator of democratic processes taking place in the country and its commitment to European values.

* * *

For over 20 years, all the major social, political, and legal processes aimed at building the democratic and rule of law-governed Ukraine have been accompanied by involvement of the European Commission For Democracy Through Law, better known as the Venice Commission.

Opinions and recommendations of the Venice Commission on constitutional and legal issues are a certain benchmark used to evaluate compliance of the legal framework of the state’s functioning with the recognized European democratic standards, those of human rights and the rule of law. The focus of this study is the aspect of Ukraine's cooperation with the Venice Commission on the Ukrainian path towards democracy through law and the basic principles and philosophy of this European institution.
1. The Venice Commission: the creation intention, scope, and philosophy

Background and the purpose of creation

The European Commission For Democracy Through Law (the Venice Commission) is an advisory body of the Council of Europe on constitutional issues. The idea of creating the Venice Commission belongs to the world famous Professor of Law La Pergola (then the Minister for European Policy of Italy) who believed that sustainable democracy could be built only within a clear constitutional framework based on the rule of law. It is his belief that laid the basis not only for the name of the newly established European institution, but also determined the philosophy of its operation [1]. Its other name, which is more often used and therefore better known – Venice Commission\(^1\) – is associated with the place where plenary sessions of the Commission are held – Venice\(^2\).

The Venice Commission was established on May 10, 1990 by 18 Member States of the Council of Europe in the form of a Partial Agreement of the Council of Europe (an instrument that allows a group of Member States of the Council of Europe with the consent of the Committee of Ministers to team up in order to address common topical issues\(^3\)). The establishment of the Venice Commission was due to historical, legal, and political processes of the late 1980’s - early 1990’s: the fall of the Berlin Wall, the collapse of communist regimes in Central and Eastern Europe, and these countries’ “return to Europe”. These processes marked ”an unconditional victory of democracy and the rule of law over the legacy of totalitarianism in these countries” [2] and led to an unprecedented expansion of the Council of Europe when lots of the “new democracies” became its members. It also contributed into the additional focus of the Council of Europe on consolidation of democratic institutions in the Member States. The main goal of creating the Venice Commission was to render qualified legal aid to new member states in bringing their legal and institutional frameworks in conformity with the Council of Europe standards [3].

By 2002, the Venice Commission had included all member states of the Council of Europe, and a number of non-European states also expressed their desire to join. In this regard, the new (revised) Charter of the Venice Commission was adopted, and the latter started acting based on the Enhanced Agreement that allowed for participation in activities of the Council of Europe bodies of non-member states.

---

1 Currently, “Венеційська Комісія” is often used in Ukraine, but Law of Ukraine of 22.11.1996 No.547/96-VR On Accession of Ukraine to the Partial Agreement on the European Commission For Democracy through Law specifies the name “Венеціанська Комісія”.

2 In Venice, only plenary sessions of the Venice Commission are held. The Permanent Secretariat of the Commission is located and operates in Strasbourg.

3 The mechanism of the Partial Agreement was also applied to create the Group of States against Corruption (GRECO).
The Venice Commission, established as "an experimental laboratory for institutional change implementation" in "anticipation of the great changes to come", successfully performed its task of "providing emergency constitutional aid" for "new democracies" at the phase of drafting new constitutions, and in the course of time it evolved into the most influential independent international organization which provides professional assistance in the field of the constitutional law. [4]

Some facts:

◆ As of September 1, 2016 the Venice Commission includes 61 Member States: all the 47 member states of the Council of Europe and 13 non-European countries (Algeria, Brazil, Chile, Costa Rica, Israel, Kazakhstan, Republic of Korea, Kyrgyzstan, Mexico, Morocco, Peru, Tunisia, and the USA) and Kosovo.

◆ Plenary sessions of the Venice Commission are held 4 times a year: in March, June, October, and December.

◆ The President of the Venice Commission since 2009 is Gianni Buquicchio. The Head of the Secretariat is Thomas Markert.

Principles of operation of the Venice Commission

The organizational basis for operation of the Venice Commission is its independence, political neutrality and impartiality, professionalism and competence.

*Independence of the Commission* is ensured with its statutory provisions4. Members of the Venice Commission and Substitute members are appointed by the governments but do not represent them. Each member of the Commission acts individually and shall not receive and execute any instructions.

Members of the Venice Commission and Substitute members are appointed for the term of 4 years. A repeated appointment is possible. Early termination of powers of a member of the Venice Commission may happen exclusively upon his/her personal request or if the Commission itself makes the decision that the member of the Commission can no longer perform his/her functions.

Independence of the Commission, as a principle of its establishment, is complemented with political neutrality and impartiality in its activities. The Venice Commission is not a political body although it can be referred to as an instrument used by bodies of the Council of Europe (the PACE and the Committee of Ministers) to obtain a clear legal framework for further political actions [5].

Members of the Venice Commission never work on Opinions on the countries that appointed them. The task forces working to prepare Opinions regarding a particular state usually do not include Commission members from neighbouring states and the states that have tensions or conflicts with this state [6].

When issuing its Opinions and recommendations, the Venice Commission always acts solely for the interests of the respective state as a whole rather than of a political majority or the opposition. If legal regulation of a certain issue can be achieved in several equivalent ways, none of which is contrary to European standards, the Venice Commission does not insist, in its recommendations, on application of only one of them. Demonstrating its impartiality, the Venice Commission does not issue Opinions at the peak of election campaigns in a given country so that its position could not be used in the political struggle. [7]

The high prestige of the Venice Commission is also ensured with competence and professionalism of its members. The Venice Commission consists of the experts who have been recognized and have experience in democratic institutions or have made a significant contribution to the development of the law or political science. Typically, members of the Venice Commission are professors of law and political science, judges of the constitutional courts, members of parliaments, ombudspersons. To issue Opinions on specific issues, the Venice Commission also involves individual experts and specialists who are not members of the Commission 5.

Independence and high professional reputation of Commission members (even though they come from different countries and different legal systems) eventually make it possible to adopt most decisions by consensus, not compromise, and this, in turn, increases the reception level of the Commission’s recommendations and their consideration by member states. Despite the fierce debates that sometimes occur at the plenary sessions of the Venice Commission, Commission members realize that they share "collective responsibility" for the decisions made and, conscious of the high mission of the Venice Commission, they refrain from defending any interests, including interests of the states that appointed them.[8] The constructive orientation of the Venice Commission on the search for consensus decisions and prevention of any possible conflict situations are also reflected in the internal documents regulating operation procedures of the Venice Commission.

---

5 For example, the co-rapporteur on issuing the Opinion on the draft constitutional amendments aimed at decentralization of power in Ukraine was an involved expert of the Congress of Local and Regional Authorities of the Council of Europe, Alain Delcamp. Opinions on election laws are usually issued in cooperation with the Office for Democratic Institutions and Human Rights of OSCE (together with this institution, the Opinion on the draft laws of Ukraine on freedom of peaceful assembly was also prepared and adopted).
The revised Rules of Procedure of the Commission adopted by the Venice Commission at its 50th plenary session
(Venice, March 8-9, 2002)

Article 3a
Independence and impartiality of members

1. Members shall act in a manner that is, and is seen to be, independent, impartial and objective with respect to any issue examined by the Commission.

3. Members shall notify the President through the Secretary of any potential conflict of interest, i.e. any circumstance which might appear to influence their impartial and objective consideration of any issue examined by the Commission, in particular but not limited to any task, remunerated or not, entrusted to them by a government.

4. When entering into a relevant agenda item the President shall, if he or she considers that there is a potential conflict of interest, announce to the Commission that the member shall not take part in the vote. The member concerned may take part in the debate but in doing so shall declare his or her interest in the matter being discussed.

5. Members shall be prudent when commenting in public on decisions of and texts adopted by the Commission.

Guidelines relating to the working methods of the Venice Commission adopted by the Venice Commission at its 84th plenary session (Venice, October 15-16, 2010)

The Plenary

♦ the chair of the meeting ensures that the discussions proceed smoothly and that sufficient time is devoted to substantial issues;

♦ as a rule, if a member of the Commission has substantial objections in relation to a draft opinion or draft report which has been circulated for the purpose of discussion at the Plenary, he or she should inform the rapporteurs prior to the Plenary;

♦ to the extent that it is possible, suggestions relating to the wording of the opinions and reports should be submitted to the rapporteurs or the secretariat in writing, prior to the Plenary session;

♦ oral presentations by guests and observers will be agreed in advance by the President of the Commission.
Standards, scope, and forms of activities of the Venice Commission

In its activities the Venice Commission, being an advisory body of the Council of Europe, is guided by the standards laid as the foundation for establishment and operation of this organization. These standards are democracy, protection of human rights and freedoms, and the rule of law.

The Statute of the Venice Commission defines its key objectives: strengthening the understanding of the legal systems of the participating states, notably with a view to bringing these systems closer; promoting the rule of law and democracy; examining the problems raised by the working of democratic institutions and their reinforcement and development (Article 1).

In order to implement these objectives, the following priorities of operation of the Venice Commission were outlined:

a. the constitutional, legislative and administrative principles and techniques which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law;

b. fundamental rights and freedoms, notably those that involve the participation of citizens in public life;

c. the contribution of local and regional self-government to the enhancement of democracy (Article 1 of the Statute).

In practice, activities of the Venice Commission are focused on the three key areas:

◆ democratic institutions and fundamental rights;
◆ constitutional justice;
◆ elections, referendums, and political parties.

Approaches of the Venice Commission differ depending on the area, which its opinions and research apply to.

Recommendations of the Venice Commission in the field of human rights are generally based on standards legally binding for the states (hard law), which significantly simplifies its work. When providing its recommendations in this area, above all the Venice Commission is guided by the Convention on Human Rights and Fundamental Freedoms and the respective case law of the European Court of Human Rights. [9]

In the areas of democracy and the rule of law, the stance of the Venice Commission is based on the “common European constitutional heritage” (which refers to soft law), a significant contribution to development of which was made by the Commission itself. Activities of the Venice Commission in all these areas are aimed to identify the best regulation practices through comparative analysis of available models and concepts that exist in different countries and develop on the basis of the comparative analysis (benchmarking) the standards that should act as a guide for democratic states governed by the rule of law. [10] This activity of the Venice Commission is described with the concept of “constitutional engineering”, because it ensures the convergence of national constitutional designs and constitutional and legal approaches [11].
The work of the Venice Commission combines two basic approaches: cooperation with individual member states and general studies on specific issues that are within the priority areas of its operations.

In Ukraine, the Venice Commission is better known in the context of issuing Opinions and recommendations concerning the Ukrainian legislation. However, activities of the Venice Commission are much broader. In particular, activities of the Venice Commission regarding research and drafting reports and guidelines allow for analysing of a variety of legal systems of the member states and highlighting the best practices, as well as developing common approaches to understanding of the key principles of functioning of democracy and the rule of law. These general studies may and should be used by the states that seek to bring their legislation in line with European standards (the list of such studies is attached in the Annex).

Such studies may be held by the Venice Commission either at its initiative or at the request of the Council of Europe (Article 3.1. of the Statute). Their development may be associated with particular relevance of the issue, awareness of the diversity of approaches to addressing it in different member states, availability of a large amount of Opinions and recommendations of the Venice Commission on this particular issue, which allows for fixating common position, and the best practices developed by the Commission.

There are examples when development of the relevant studies was predominantly linked with the Ukrainian context. In particular, at the request of the PACE Committee on Legal Affairs and Human Rights in 2013 the Venice Commission adopted the Report on the relationship between political and criminal ministerial responsibility (CDL-AD(2013)001)6, the relevance of which was substantiated with the facts of conviction of former members of the Government of Ukraine for criminal charges.

Activities of the Commission in the field of the electoral law made it possible to determine a specific aspect of the European constitutional heritage – the European electoral heritage. The key documents in this field developed jointly with the OSCE/ODIHR is the Code of Good Practice in Electoral Matters and Guidelines for constitutional referendums at national level, as well as the Code of Good Practice on Referendums (2007), recognized as model documents of the Council of Europe in this field. Moreover, the Venice Commission prepared and approved a series of comparative studies on specific aspects of the electoral law, in particular a report on electoral systems, election laws, election administration, etc. [12].

The Venice Commission jointly with OSCE/ODIHR has also produced a series of generalizing studies in the field of human rights and fundamental freedoms, including Guidelines on the freedom of assembly, adopted in 2007 (revised in 2010), and the Guidelines on revision of the law on freedom of conscience and religion of 20047.

A separate form of activities of the Venice Commission is holding activities aimed at strengthening independence and institutional

---

6 http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)001-e

7 The list of general studies and reports of the Venice Commission is attached in Annex 1.
capacity of constitutional courts and election commissions, developing the dialog and exchange of experience among them.

In 2002, in line with the revised Statute of the Venice Commission, the Joint Council on Constitutional Justice was set up, composed of members of the Venice Commission, representatives of constitutional courts of the member states and their associations. Activities of the Venice Commission in the field of the electoral law are guided by the Council for Democratic Elections – a tripartite body comprising representatives of the Venice Commission, the PACE, and the Congress of Local and Regional Authorities.

The Venice Commission periodically organizes conferences and seminars in cooperation with constitutional courts of member states to discuss issues of constitutional justice relevant to them. Each year, the European Conference of Electoral Management Bodies is held under auspices of the Commission, as well as specialized trainings and seminars for election commissions, judges hearing election disputes.

A special form of cooperation between the Venice Commission and constitutional courts is issuing at the request of the latter of amicus curiae statements, which covers not constitutionality of the act, but a comparative analysis of constitutional and international law provisions that may be applied by the respective constitutional court when considering an appropriate case. The Constitutional Court of Ukraine in its practice has never addressed the Venice Commission with such a request. While recently in an interview the President of the Venice Commission Gianni Buquicchio mentioned that the Constitutional Court of Ukraine may submit such a requested to them, in particular in the context of the submission of the Supreme Court of Ukraine regarding unconstitutionality of certain provisions of the Law of Ukraine On the Judiciary and the Status of Judges adopted in the context of the constitutional reform of the judiciary.

Another important activity of the Venice Commission is creation of databases in the field of the constitutional justice and electoral legislation, which have become a unique source of information for end beneficiaries (judges and members of electoral commissions), as well as for researchers and experts in the fields of the constitutional and electoral law. To promote development of the fundamental justice, the Venice Commission launched a directory of decisions of constitutional courts, CODICES, which currently contains more than five thousand decisions, and three times a year they publish a Bulletin on Constitutional Case-Law, which includes extracts from the most important decisions of constitutional courts (from more than 50 countries). The Commission also maintains the VOTA database - a collection of election legislation of the Commission's member states.

Finally, it should be noted that, given the special role of constitutional courts in legal systems of the member states, there are cases where the Venice Commission acts in support of constitutional courts, incl. to protect them from interference from governmental

---

8 The latest such conference (International Conference "Constitutional control and processes of democratic transformation in the modern society") was held on October 7, 2016 in Kyiv on the occasion of the 20th anniversary of the Constitutional Court of Ukraine. Electronic resource: http://www.01.gov.ua/novyna/z-nagody-20-01-richnyci- konstytucynogo-sudu-ukrayiny-v-kyyev-prohodyla-mizhnarodna.
authorities. In its declaration of December 16, 2005 the Venice Commission expressed concern about the suspended process of appointments of new judges to the Constitutional Court of Ukraine and called "Ukrainian authorities, and especially the Ukrainian Parliament, to quickly take the necessary steps to restore the composition of the Constitutional Court of Ukraine." The declaration noted that "in countries where it has been established, the constitutional court is an institution of crucial importance in ensuring the functioning of the various state bodies within constitutional limits. They have the key function of guaranteeing the respect for fundamental principles of democracy, the protection of human rights and the rule of law, which are also the basic standards of the Council of Europe, of which Ukraine is a member."9

Cooperation between the Venice Commission and the
Member States in the legislative field

The key forms of cooperation

There are various forms of cooperation between the Venice Commission and member states.

The key and the most common form is to express Opinions on constitutional and legislative texts. The subject of analysis of the Venice Commission may be both draft legislation, and laws already in force.

When the Commission receives a request to provide its Opinion on a legislative draft that is not yet approved, it acts as an "advisor." Involvement of the Venice Commission at early phases of adoption of a draft law makes it possible for the Commission to, on the one hand, assist in establishing a dialog on its provisions between the majority and the opposition and between government and civil society and, on the other, the relevant national authorities can take into account recommendations made by the Venice Commission before adoption of the final text of the law. If the Venice Commission issues recommendations on the acting laws and the Constitution, the role of the Commission is rather that of an "auditor". Then the main task of the Commission is not to criticize the current provisions but give recommendations for their improvement, thus sticking to its role as an "advisor" [14].

The Venice Commission may also issue its Opinions not on specific texts of draft laws or laws, or not only on them, but in respect of a certain legal situation in a country, including due to adoption of specific regulations. In particular, the first Opinion of the Venice Commission on Ukraine was granted in September 1995 to analyze the constitutional situation in Ukraine10. The Venice Commission later also adopted its opinions on

9  http://www.venice.coe.int/webforms/events/?v=2005

10 Opinion on the present constitutional situation in Ukraine following the adoption of the Constitutional Agreement between the Supreme Rada of Ukraine and the president of Ukraine (CDL-INF(1995)(02)).
different legal issues in Ukraine.

We could also separately mention the Opinions of the Venice Commission where it essentially offers *interpretation of current constitutional provisions in the light of European standards*. In the history of cooperation between the Venice Commission and Ukraine, in this context we could individually mention the Opinion on constitutional aspects of the death penalty in Ukraine, which was adopted in 1997 against the background of the hard pressure from the Council of Europe on Ukraine due to infringement of the obligations it undertook when joining this organization - to introduce a moratorium on executions and full abolishment of death penalty.

Some features of cooperation between the Venice Commission and some member states are related to the subject of requests for an Opinion. The Statute of the Venice Commission stipulates that both the states and organizations that are its members, and Council of Europe bodies can file requests for its Opinions (Committee of Ministers, Parliamentary Assembly, Congress of Local and Regional Authorities, Secretary General).

If a state addresses the Venice Commission for its Opinion, that, as a rule, demonstrates its wish to test a legislative initiative regarding its compliance with European standards and, obviously, the will to further implement the recommendations issued. In cases where the request is initiated by bodies of the Council of Europe, the respective state may be not interested in that the Venice Commission held such an assessment. Such a request is usually submitted by bodies of the Council of Europe in order to verify the relevant legal acts or their drafts against obligations arising from membership in the Council of Europe, or in the presence of significant indicators of that the adopted act or a certain legal situation in a certain state cause doubts regarding their compliance with principles of the Council of Europe or the European constitutional heritage.

The Venice Commission also ensures cooperation with the member states through *involvement into the law-drafting process, and even by direct drafting of legal acts*. For example, in 1997 experts of the Venice Commission at the request of the Office of the High Representative drafted a new electoral law for all types of elections in Bosnia and Herzegovina.

The recognized authority of the Venice Commission caused its involvement into the special mission – *resolution of international and interstate conflicts, as well as granting expert legal aid in post-conflict situations*. The Venice Commission has been involved by Council of Europe bodies,  

---

11 In particular, in March 2000 the Venice Commission gave its Opinion on the constitutional referendum in Ukraine; in October 2004 – on the procedure for amending the Constitution of Ukraine, in December 2010 – on the constitutional situation in Ukraine, and finally in March 2014 – as to whether the decision of the Verkhovna Rada of the Autonomous Republic of Crimea on organization of the referendum on accession to the Russian Federation or going back to the Constitution of the Crimea of 1992 was in line with constitutional principles.

and by the European Union to give legal assessment of conflicts (Georgian-Ossetian conflict, the occupation of the Crimea), for assistance in finding legal mechanisms to step out of conflict situations or resolve them (Bosnia and Herzegovina, the conflict in Donbas), as well as to help in drafting new constitutions and constitutional laws (the constitutional process in Tunisia after the events of the Arab spring).

**Taking into account the situation and the socio-political context of the state within cooperation with the Venice Commission**

It should be noted that while working with such a complex and sensitive matter as the "constitutional law", which for a long time remained a sovereign right of states, the Venice Commission certainly should consider political, social, religious, and cultural characteristics of the countries it cooperates with and the specific socio-political context in which it issues its Opinions [16].

Typically, the Venice Commission avoids determining in its Opinions of "the only possible model" or "the only possible option" when it comes to the choice of legal mechanisms that will ensure democracy and pursue the rule of law. However, recommendations of the Venice Commission are never abstract. They are aimed at looking for optimal solutions to the most pressing and difficult issues determining the content of a reform in the particular state. To be "applicable", recommendations of the Venice Commission must be "viable", i.e. those that can be implemented in a particular socio-political situation in the country. That also ensures certain "flexibility" and "variability" of the Venice Commission in evaluating possible solutions of a legal situation [17].

---

13 In particular, the Venice Commission in its Opinions, including on Ukraine, has repeatedly stressed that there is no "ideal form of governance," recognizing both the presidential, and parliamentary, and mixed forms of government, which that can fully provide for functioning of democracy in a state. Analysing the constitutional reform in Ukraine in 2003 and highlighting Ukraine’s transition to "a more parliamentary and less presidential form of government" proposed with the constitutional amendments, the Venice Commission said: "The choice between a presidential and a parliamentary system is a political one to be freely made by each single state. However, the system chosen should be as clear as possible, and the provisions should not create room for unnecessary complications and political conflicts. If a presidential system is chosen, certain minimum requirements of parliamentary influence and control should be fulfilled. In a parliamentary system, in turn, basic requirements arising from the principle of the separation of powers should be respected."

14 When issuing its Opinion on the draft constitutional amendments relating to the judiciary in Ukraine, the Venice Commission recommended to attribute the High Council of Justice with the authority to transfer all judges, including to a court of higher level, and noted that, given the current situation in Ukraine, it is acceptable – as a transitional measure – to establish for a limited period such powers of the President of Ukraine in view of the need to ensure national security interests. Providing upon the request of the Ukrainian authorities its recommendations on possible ways to ensure continuity of the functioning of the Constitutional Court of Ukraine, the Venice Commission proposed several possible solutions to this problem - both at the constitutional, and at the legislative levels.
For a deeper understanding of a particular situation and developing effective recommendations, one of the stages of preparing Opinions by the Venice Commission is a visit to the state on which it is provided. The purpose of such visit is holding a dialog with key stakeholders: the government and the opposition, civil society, and other stakeholders [18]. This allows the Venice Commission to better understand the essence of the reform, specific features of the legal system of the state, its political and social context in which the relevant legislation is adopted, pros and cons regarding the proposed changes.

Despite the above cited "flexibility" and "variability", the Venice Commission often offers absolutely definite Opinions and very specific recommendations.

There are multiple examples where the Venice Commission formulated a very specific position on implementation of legal reforms in various fields in Ukraine. This applies, in particular, to the position of the Venice Commission according to which fundamental changes in the organization of the judiciary can be implemented only by amending the Constitution of Ukraine (this position was expressed in the Commission’s Opinions on all laws and drafts concerning the judicial system and the status judges in Ukraine). Another obvious example is the reform of the election legislation, where starting from 2005\(^{15}\) the Venice Commission has been consistently recommending that the Ukrainian authorities adopted the unified Election Code, which would govern all types of elections in Ukraine. Such positions of the Venice Commission have been worked out based on its long-term cooperation with Ukraine and its deep understanding of the legal system of our country - both at the level of formally defined constitutional and legislative provisions, and their practical application.

Relevance and effectiveness of the Venice Commission are also ensured through its efficiency in issuing relevant recommendation. Final Opinions can only be approved at its plenary sessions, which are held four times a year. However, sometimes reforms undertaken in a particular country or the legal situation faced by certain countries require urgent response. In such cases, the Venice Commission resorts to issuing preliminary Opinions even before their final approval at the Commission’s plenary. In individual cases such Opinions are issued in a very short time after receipt of the relevant request\(^{16}\).


\(^{16}\) In particular, the preliminary Opinion of the Venice Commission on the draft amendments to the Constitution of Ukraine on the judiciary prepared by the working group of the Constitutional Commission was issued within three working days of receipt of the request. Prior to that, the Venice Commission at its last plenary session specifically authorized co-rapporteurs to prepare the respective Opinion on issues of the constitutional reform in Ukraine to submit the preliminary Opinion to the Ukrainian authorities for their review and consideration (CDL-PI(2015)016).
How an Opinion of the Venice Commission is prepared

A request for an Opinion from a state, bodies of the Council of Europe, or international organizations

Setting up a working group from among members of the Commission - rapporteurs, experts, and employees of the Secretariat of the Commission

Drafting the Opinion

A visit to the state and holding meetings with governmental bodies, civil society, and other stakeholders

Drafting the final version of the Opinion

Submitting the final draft Opinion to Commission members

Discussion of the draft Opinion at sub-commissions and with authorities of the state (if necessary)

Discussion and adoption of the Opinion at the plenary session

Providing the Opinion to the subject of the request

Publication of the final Opinion of the Commission on its website: www.venice.coe.int

Follow-up

---

17 Based on materials from the official website of the Venice Commission:
http://www.venice.coe.int/WebForms/pages/?p=01_activities&lang=EN
2. Cooperation between the Venice Commission and Ukraine: an overview

Ukraine became a full member of the Venice Commission on December 7, 1996 after enactment of the Law of Ukraine On Ukraine’s Accession to the Partial Agreement on the European Commission "For Democracy through Law". In January 1997, the President of Ukraine for the first time appointed a Representative of Ukraine to the Venice Commission18.

However, we should note that cooperation of the Venice Commission and Ukraine began four years earlier - after on July 14, 1992 Ukraine applied to join the Council of Europe. At the first phase, the Venice Commission provided expert assistance in drafting of legislation [19], which were not formalized in official documents, while the first Opinion of the Venice Commission on Ukraine, namely its analysis of the constitutional situation in Ukraine after adoption of the Constitutional Treaty, as noted, was granted in September 1995.

It is involvement of experts of the Venice Commission to draft the Constitution of the independent Ukraine that was, actually, one of the first experiences of cooperation between Ukraine and the Venice Commission. Subsequently, the Venice Commission was to some extent involved in all stages of the constitutional process in Ukraine, including the current one (see more on this in Section 3 of this paper).

Ukraine's cooperation with the Venice Commission (and, in fact, Ukraine's readiness to adhere to the path "for Democracy through Law") had its specificities during the different phases of formation and development of our state, it often depended on changes in the political power and, accordingly, the chosen vectors of the domestic and foreign policy. Traditionally, this was due to presidency terms.

A characteristic feature of the period of 1995 through 2004 was that the overwhelming majority of requests to the Venice Commission on issuance of Opinions for Ukraine were addressed to it by Council of Europe bodies. There are several reasons for this.

On the one hand, this can be explained by the fact that Ukraine was subject to active monitoring regarding performance of its commitments undertaken upon its accession to the Council of Europe. Here the role of the Venice Commission was to provide assessment and recommendations for bringing the Ukrainian legislation in line with European standards, including in terms of fulfilment of undertaken commitments.

On the other hand, it can be stated that there was lack of political will of the state leadership to really comply with commitments to the Council of Europe and establish close cooperation with the Venice Commission in drafting the relevant legislation. This is evidenced in resolutions and recommendations of the Parliamentary Assembly of the Council of the Europe adopted during the indicated period - they repeatedly raised the question of possible sanctions against Ukraine for a failure to comply with its commitments19. The reluctance of Ukrainian authorities

18 With Decree of the President of Ukraine of January 15, No. 22/97, Serhiy Holovaty was appointed the Representative of Ukraine to the Venice Commission

to cooperate in drafting of draft laws was also pointed out by Venice Commission\(^\text{20}\). The beginning of Ukraine’s cooperation with the Venice Commission demonstrates certain lack of understanding of the principles of European institutions in general and the Venice Commission in particular regarding their foundation principles\(^\text{21}\).

This period was marked by one of the most resonant issues, when the Venice Commission imperatively intervened for protection of the Council of Europe standards through interpretation of acting constitutional provisions.

In December 1997, the Venice Commission issued the Opinion on constitutional aspects of the death penalty in Ukraine, where it stated that “the death penalty is inconsistent with the Constitution of Ukraine.”

Remarkably, in its Opinion, the Venice Commission noted that when analysing the draft law on amending the Constitution of Ukraine earlier it recommended to add a provision that would directly ban the death penalty, but the respective recommendation was not taken into account\(^\text{22}\).

It should be noted that the said Opinion was adopted against the background of severe pressure of the Council of Europe on Ukraine for violating the commitments Ukraine undertook when joining the Council of Europe, namely to introduce a moratorium on executions and to fully abolish the death penalty.

After publication of the Opinion of the Venice Commission in January 1998, the Parliamentary Assembly of the Council of Europe adopted Resolution 1145(1998) Executions in Ukraine, which stated: ‘The Assembly is “struck by the fact that at least 13 death sentences were executed in Ukraine in 1997”’. Only on December 29, 1999 did the Constitutional Court of Ukraine adopt Decision No.11-rp/99 in a death penalty case that deemed

\(^{20}\) In the Opinion on the Draft Law on the Judiciary (q), adopted in 2000, the Venice Commission stated:

>“The Commission notes that the adoption of a new law on the organisation of the judiciary is of the highest importance for the establishment and consolidation of the rule of law in Ukraine. The importance of this law is reflected in the Joint Programme of co-operation between Ukraine and the Council of Europe and the European Commission which provides for Council of Europe assistance for the drafting of this and other related laws. The Commission notes that hitherto the Ukrainian authorities have not had recourse to Council of Europe assistance for the draft. The present opinion was drafted at the request of the Parliamentary Assembly and the Commission’s rapporteurs have not had the benefit of direct contacts with the authors of the text. Under these conditions many aspects of the draft have remained difficult to understand for foreign lawyers.”

\(^{21}\) Already in November 1997, the President of Ukraine Leonid Kuchma amended his own Decree and appointed S.Stanik as the Representative of Ukraine to the Venice Commission. Naturally, this Decree was never put into practice because, as already noted, the Statute of the Venice Commission does not include the possibility of recalling representatives by the States that appointed them.

\(^{22}\) This recommendation was included into the Opinion of the Venice Commission during the immediate discussion of the draft Opinion at its plenary session, after the representative of the Ukrainian side expressed doubts regarding the position formulated by the Venice Commission in the draft Opinion that provisions of the draft Constitution, according to which “no one shall be arbitrarily deprived of life” excludes the possibility of application of death penalty in Ukraine.
unconstitutional the provisions of the Criminal Code of Ukraine stipulating death penalty as a form of punishment.

Overall, during this period Ukraine adopted most of legislative acts in the field of functioning of democratic institutions and protection of human rights and freedoms, which was associated with the need to implement provisions of the Constitution of Ukraine adopted in 1996 and fulfil Ukraine’s commitments undertaken upon its accession to the Council of Europe, identified, particularly, in PACE Opinion of September 26, 1995 No.190 (1995) regarding Ukraine’s application to join the Council of Europe and in the subsequent resolutions and recommendations for Ukraine adopted in the process of monitoring these commitments. However, only a small portion of them was subject to analysis of the Venice Commission, while in most cases these Opinions were issued not on draft laws but on already passed laws on the request of the Council of Europe. Only at the end of the second term of President L. Kuchma (2004), the Venice Commission was involved in preparation of draft laws, including at the request of Ukrainian authorities, and it issued its Opinions on a number of draft laws in the field of protection of national minorities (ethnic minorities, indigenous peoples, ethnic policy), elections of Members of Parliament of Ukraine, the prosecution office.

The period of Ukraine’s cooperation with the Venice Commission after the Orange Revolution (2005-2009) was fundamentally different from the previous one, in particular due to the fact that most Opinions of the Venice Commission were issued at the request of public authorities of Ukraine. Only two Opinions on Ukraine were issued by the Venice Commission during this period at the request of Council of Europe bodies. The recurrent political conflicts in Ukraine and the political crises caused by them led to another feature of interaction with the Venice Commission during the presidency of Viktor Yushchenko. This feature was that some requests from Ukrainian authorities for the Venice Commission to grant Opinions on individual acts of legislation and existing laws was, in fact, aimed at de-legitimization of a number of legislative initiatives initiated during 2007-2009 by the parliamentary majority (which, as knows, during that period had various configurations). The presence of a number of extremely critical Opinions by the Venice Commission adopted over the years was a reaction to draft laws initiated in the midst of political struggle and aimed to achieve short-term political objectives (for example, the implementation of Article 81 of the Constitution of Ukraine concerning the so-called “imperative mandate”). Under such conditions, it was difficult


24 Based on PACE Resolution of April 19, 2007 No.1549 (2007) "On functioning of democratic institutions in Ukraine", in June 2007 the Venice Commission issued the Opinion "On the legislative provisions relating to early elections in Ukraine" (CDL-AD (2007)021), and in 2008, at the request of the PACE Monitoring Committee, the Opinion on the draft Constitution of Ukraine, which was prepared by the working group chaired by V. Shapoval (CDL-AD (2008)015).
to ensure compliance with the European standards of democracy and the rule of law, however, it is obvious that this was not intended\textsuperscript{25}. During this period, the Ukrainian authorities also used a new form of cooperation with the Venice Commission twice – a request for advisory assistance to address a specific constitutional and legal situation. The both requests were initiated by the Minister of Justice of Ukraine.

The first request concerned an issue extremely topical at the time for Ukraine - ensuring continuity of functioning of the Constitutional Court of Ukraine in connection with the situation of delayed appointment, and then - blocking the procedure of oath-taking by judges of the Constitutional Court of Ukraine\textsuperscript{26}.

The Venice Commission in its Opinion adopted in June 2006\textsuperscript{27} provided recommendations for the necessary constitutional and legislative changes that would ensure continuity of functioning of the Constitutional Court of Ukraine. One of them, namely changing the way of oath-taking – at a session of the Constitutional Court of Ukraine, not at a parliamentary session – was implemented only ten years after, in the Law On Amendments to the Constitution of Ukraine on Justice, adopted in June 2016.

The second request to the Venice Commission dealt with the need for clarification of whether Ukraine could introduce the possibility for a Minister (previously elected as an MP of Ukraine) to continue exercising the powers of an MP of Ukraine after resigning from the government\textsuperscript{28}. The Venice Commission issued the Opinion (CDL-AD (2006) 035), according to which this model, although fully compatible with the principles of


\textsuperscript{26} On October 18, 2005 the term of service of ten judges of the Constitutional Court of Ukraine expired, while three more positions of judges had been vacant prior to that. Thus, at the time the Constitutional Court of Ukraine included 5 active judges of the 18 stipulated in the Constitution of Ukraine, which made it impossible to hold sessions of the Constitutional Court of Ukraine, since the quorum established for it under the Law was 12 judges. Earlier, on October 5, 2005 the Parliamentary Assembly of the Council of Europe in its Resolution No.1466 (2005) called on the Ukrainian authorities “to ensure that the composition of the Constitutional Court of Ukraine is renewed without undue delay after the expiration of the term of office of its judges.” Although the Congress of Judges of Ukraine and the President of Ukraine appointed judged of the Constitutional Court in November 2005, the Verkhovna Rada of Ukraine not only failed to appoint judges within the parliamentary quota, but also did not provide for oath-taking by the other judges. The Venice Commission in December the same year adopted a special Declaration, which called on Ukrainian authorities, especially the Parliament, to ensure renewal and, consequently, functioning of the single body of constitutional jurisdiction in Ukraine.


\textsuperscript{28} For a long time in Ukraine they discussed the idea of introducing the possibility for combining positions in the government with the mandate of an MP of Ukraine. The corresponding provision was included into the draft Law of Ukraine On Amendments to the Constitution of Ukraine (Reg. No.4180), which was approved as a basis. However, this provision was excluded from the final text of the law that amended the Constitution of Ukraine in December 2004 (№2222-IV).
parliamentarism, does not meet provisions of the acting Constitution of Ukraine, and thus it can be implemented only after the respective amendments to the Constitution29.

Ukraine’s interaction with the Venice Commission in 2010 to 2013 was characterized by several aspects.

First of all, the change of power in the state marked a revision of the rules of functioning of a number of key democratic institutions (judiciary, the national referendum, parliamentary elections) and emergence of new themes (legislation on languages).

"Noting such legislative activity of the new government", the Parliamentary Assembly in its Resolution 1755 (2010) of October 4, 201030 stated that "the haste with which the government is implementing these reforms may adversely affect respect for the proper democratic principles and, ultimately, the quality of the reforms as such." With this in mind, in the same Resolution PACE noted that "close cooperation with the European Commission for Democracy through Law (the Venice Commission) is crucial to ensure that the reform sets that are currently being developed are fully consistent with European standards and values." The Assembly "called on the authorities and leadership of the Verkhovna Rada of Ukraine to ensure that the final versions of the draft laws were submitted for obtaining Opinions of the Venice Commission before their final adoption."

The next PACE Resolution 1862(2012), adopted in January 201231, in fact, contained an assessment of to what extent its previous Resolution was complied with in this regard. PACE welcomed "the systematic requests by the authorities for the opinion of the Venice Commission on the draft laws they prepare", noting, however, that "on several occasions, the draft laws on which opinions had been asked were subsequently withdrawn" while "the recommendations of the Venice Commission were not taken into account in the laws ultimately adopted by the Verkhovna Rada", and urged "the authorities to take fully into consideration the opinions of the Venice Commission when preparing new laws, including opinions on previous draft laws on the same subject matter."

The same Resolution defined key areas of legal reforms in Ukraine, namely the general constitutional reform, constitutional and legislative changes on justice and the prosecution system, and that determined further priorities in cooperation with the Venice Commission.

After the Revolution of Dignity, the change of the government in the state, and the events associated with annexation of the Crimea and the military conflict in the Donbas, the agenda of cooperation between Ukraine and the Venice Commission was complemented with absolutely new themes (annexation of the Crimea, lustration, de-communization, check for integrity) and new priorities (decentralization, including in the context of implementation of the Minsk agreements), other issues, which had been repeatedly subject to analysis but Ukraine never resolved them, became relevant again (the judiciary reform, freedom of peaceful assembly, imperative mandate, parliamentary immunity).


30 http://zakon2.rada.gov.ua/laws/show/994_a19

31 http://zakon2.rada.gov.ua/laws/show/994_a57
While in the context of Ukraine’s cooperation with the Venice Commission in the constitutional process there is a clear intention and readiness of the Ukrainian authorities to adhere with the recommendations provided, which in most cases (but not without exception) were taken into account in the final text of the adopted constitutional amendments on the judiciary and the draft law on decentralization of powers adopted as a basis (more details will be offered in the relevant section of the study), in the area of legislative amendments different trends may be observed.

It can be stated that currently comments and recommendations expressed by the Venice Commission to the already adopted laws have not been finally implemented.

This is particularly true about the Laws of Ukraine On Lustration and On Condemnation of the Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition on their Symbols\(^{32}\).

It should be noted that despite the obvious conceptual nature of the controversies of the both laws above in terms of their compliance with the Convention on Human Rights and Fundamental Freedoms, the Venice Commission as a whole recognized the right of Ukraine to hold the “lustration” and the “decommunisation”.

However, improvement of certain provisions of these legal acts to take account of the recommendations of the Venice Commission would make it possible to ensure their compliance with European standards and reduce social tension associated with their adoption. Otherwise, that will enhance relevance of the statement of the Venice Commission that a legal system “which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognized in a democratic society” (par. 53 of the Opinion on the Decommunization Law\(^{33}\)), and lustration “must never be used... as a measure of revenge and retaliation” (par. 25 on the Final Opinion on the Law On Lustration)\(^{34}\).

\(^{32}\) The revised draft law on amendments to some legislative acts of Ukraine on lustration (Reg. no.2695) was drafted, as mentioned in the explanatory note to it, to pursue recommendations of the Venice Commission, was submitted to the Verkhovna Rada of Ukraine in March 2016. However, after its inclusion into the agenda in June 2016 the Parliament did not consider it again. A draft law on amendments to some legislative acts of Ukraine in the field of condemnation of totalitarian regimes was drafted to take into account recommendations of the Venice Commission and submitted to the Parliament to bring them in compliance with Article 10 of the European Convention on Human Rights (Reg. no.4701). However, this legislative initiative, the author of which was, among others, the Speaker of the Verkhovna Rada of Ukraine A. Parubiy, since May 2016 has not been discussed at a plenary session of the Verkhovna Rada of Ukraine.


Draft laws submitted to the Parliament are positioned as those drafted to implement recommendations of the Venice Commission, however, as their preliminary analysis proves (held, among others, by the Main Scientific and Expert Department of the Verkhovna Rada of Ukraine), they far not fully account for these recommendations, so it would be reasonable to submit them to the Venice Commission for another analysis before final adoption.

Regarding the Law of Ukraine On Amendments to the Law of Ukraine On Elections of Members of Parliament of Ukraine (concerning exclusion of candidates for membership in the Parliament of Ukraine from electoral party lists in multi-mandate constituencies), the so-called “party dictatorship law,” in its Opinion the Venice Commission “considers as contrary to international standards the empowerment of political parties ex post facto to deny the electorate its choice and choose who to place on its party list in a position to be elected. The power of political parties... should be removed in the light of European standards.” Thus, the only possible form of implementing recommendations of the Venice Commission is to eliminate the corresponding provisions from the Law of Ukraine On Elections of Members of Parliament of Ukraine. Implementation of the recommendations of the Venice Commission on this issue will be a true test of maturity and commitment to European democratic standards not only for the ruling majority, but also for all political powers represented in the parliament. Since from provisions of this Law, as indicated in the Opinion of the Venice Commission, not only political parties belonging to the parliamentary majority have "benefited" (Petro Poroshenko’s Block), but also those representing the parliamentary opposition (Radical Party of Oleh Lyashko, Samopomich)\(^35\). It should be noted that the Venice Commission in its analysis of this Law concluded that it is an \textit{ad hoc} act, which applies only to candidates included in electoral lists at the parliamentary elections of 2014 (that could be a problem of translation). However, in reality the amendments made in the Law of Ukraine On Elections of Members of Parliament of Ukraine are standing provisions, and the respective provision on its coverage of candidates included into election lists for parliamentary elections in 2014 was additionally inscribed, so that those amendments were retroactive and could be applied to those candidates.

Regarding Opinions issued by the Venice Commission on draft laws, we can say that most of recommendations of the Venice Commission on the draft Law of Ukraine On Amendments to Some Legislative Acts of Ukraine on Prevention and Combating Political Corruption\(^36\) regarding financing of political parties were taken into account in the final text of the adopted Law (during its preparation for the second reading, recommendations of the Venice Commission contained in the draft Opinion were considered, which were finally approved after adoption of the Law).


The governmental draft Law of Ukraine On Integrity Checking, which was subject to analysis of the Venice Commission\(^ {37} \), was withdrawn from the parliament due to changes in the Cabinet of Ministers of Ukraine in April 2016, and it was not submitted for consideration to the Verkhovna Rada of Ukraine again. The last - and in total the fifth, starting from 2006 - Opinion of the Venice Commission on draft laws on freedom of peaceful assembly\(^ {38} \) was approved in October this year, while the relevant draft laws have not been considered in the parliament.

Finally, it should be noted that despite the active involvement of the Venice Commission into drafting of constitutional amendments on justice, most implementing legislation acts have not been submitted to the Venice Commission. Only amendments to the Law of Ukraine On the Constitutional Court of Ukraine, which were developed within the Council on the Judicial Reform and submitted by Members of the Parliament of Ukraine of this convocation for consideration of the Parliament, will be subject to analysis of the Venice Commission\(^ {39} \). At the same time, without sending for examination by the Venice Commission, in June 2016 a new version of the Law of Ukraine On the Judicial System and Status of Judges was adopted. There is no information on requests to the Venice Commission for its Opinion on the draft Law of Ukraine On the High Council of Justice, which the President of Ukraine has already submitted for consideration of the Parliament.

---


3. Cooperation between the Venice Commission and Ukraine in the framework of the constitutional processes

For a visual representation of the “depth of penetration” of the Venice Commission into Ukrainian topics, demonstrating its comprehensive understanding of the legal system of our state and the key issues of its formation and development, separately in this study we suggest focusing on issues of cooperation between Ukraine and the Venice Commission in the area of implementing constitutional reforms.

"One of the best constitutions among world democracies" (1995–2000)

The issue of the constitutional process, as already noted, was the beginning of both actual and formal cooperation between Ukraine and the Venice Commission.

It is noteworthy that in September 1995, at the time when the Venice Commission issued its first Opinion on Ukraine (namely, on the Constitutional Treaty), our state, being at the final stage of consideration of Ukraine’s application to join the Council of Europe, was the only country in the former Soviet Union that had not adopted a new Constitution.

The conclusion in 1995 of the Constitutional Treaty between the President and the Parliament was the only possible method of changing the constitutional status of public authorities in the absence of a qualified majority of votes in the Parliament for the adoption of the new Constitution. In Ukraine, they later referred to that move as to "an innovation, a new word not only in the European but also in the global constitutional practice", "an analogue of Magna Carta in 1215" [20].

The Opinion of the Venice Commission40, which included not only analysis of the actual text of the Constitutional Treaty, but also a general assessment of the political and legal situation at that time in Ukraine, was somewhat more restrained. The Venice Commission assessed the situation as "ambiguous", and the fact of concluding the Constitutional Treaty – “an unusual step”. However, the Venice Commission noted that “signing of the Treaty and its implementation in the context of the political struggle on-going between the executive and legislative branches of power, is an example of an attempt at a civilized solution of the problem for the transitional period, till adoption of the new Constitution."

The following Opinions of the Venice Commission dealt with the texts as such - first the draft and then the Constitution of Ukraine, adopted on June 28, 1996. In May 1996, the Venice Commission issued its Opinion on the draft Constitution of Ukraine (text approved by the Constitutional Commission on March 11, 1996)41, and in March 1997, the subject of analysis of the Venice Commission was already


the text of the Constitution of Ukraine adopted on June 28, 1996 by the Verkhovna Rada of Ukraine\textsuperscript{42}.

The overall assessment by the Venice Commission of the adopted Constitution of Ukraine was positive, although the Opinion does not actually contain the phrase that was then repeatedly replicated by politicians and researchers, that on "currently one of the best constitutions among democratic countries of the world" [21]. In its Opinion, the Venice Commission noted that "the text finally adopted takes into account many of the comments made by the Commission on earlier drafts," though "several provisions of the Constitution remain unsatisfactory from a legal point of view." Summarizing its Opinion, the Venice Commission noted that "the Commission sees more reasons for optimism. Although the text of the Constitution of Ukraine introduces an extremely strong executive branch under the leadership of a strong President, the checks and balances are in place, and it should prevent application of authoritarian decisions. The principles of the rule of law are well reflected in the text. Introduction of democratic local self-governance, as well as the important role assigned to the Constitutional Court of Ukraine, should lead to establishment of the democratic culture in Ukraine." Analyzing the Opinion of the Venice Commission on the Constitution of Ukraine of 1996, one should separately mention the comments expressed by the Commission regarding Section II of the Constitution of Ukraine, "Human and citizen's rights, freedoms, and duties." Currently, this section of the Basic Law remains virtually unchanged (for the exception of Article 55 of the Constitution of Ukraine, which was amended in July 2016 in the framework of the constitutional amendments on the judiciary), and therefore the comments and recommendations of the Venice Commission are also relevant. Moreover, amending this section was identified as one of priorities of the constitutional reform, and work on them is on-going within the Constitutional Commission set up by the President of Ukraine\textsuperscript{43}.

It can be noted that the 20 years of application of the constitutional provisions on human rights and freedoms in Ukraine clearly confirmed relevance of the comments and recommendations the Venice Commission expressed regarding them. One of the most significant comments of the Venice Commission to Section II of the Constitution of Ukraine "Human and citizen's rights, freedoms, and duties" was the unstructured nature of this section and use of the same phrase "everyone shall have the right" applying it both to fundamental rights and fundamental freedoms, and to social, economic, and environmental rights. The Commission demonstrated its awareness of the fact that "in the former socialist countries there is a tradition of enshrining a large number of social rights in the Constitution and that the societies in these countries are strongly attached to this tradition"\textsuperscript{44}.


\textsuperscript{43} http://www.segodnya.ua/politics/pnews/poroshenko-nazval-osnovnye-prioritety-dlya-novoy-konstitucii-605732.html. — 2015. — 06.04

\textsuperscript{44} In Ukraine, apart from the observation expressed by the Venice Commission, the situation got even more complicated due to the fact that a significant part of MPs at the time of adoption of the Constitution of Ukraine was represented by communists, without whose votes adoption of the new Constitution of Ukraine would be impossible.
However, as noted by the Venice Commission, since the socialist times Ukraine has undergone fundamental changes, and the current Constitution of Ukraine stipulates direct application of its provisions by courts, the tasks of which, among other things, include protection of the rights stipulated in the Constitution of Ukraine. In practice, this could lead to “overload” of courts with the respective cases related to protection of social rights. Such rights as the right to housing (Article 47) and the right to health care (Article 49) provide for the duty of the state to create conditions for ensuring these rights, and therefore – these rights cannot be directly protected by court. While the other rights in the Constitution (such as the right to decent standards of living (Article 48) and to environment safe for health and living (Article 50) do not imply such duty of the state, and this creates the risk of “unrealistic expectations”. Finally, if the courts confirm their inability to fully protect these rights, there is the risk that “capacity” of the constitutional provisions ensuring protection of constitutional rights and freedoms will be questioned.

All risks indicated by the Venice Commission in this section were confirmed in practice.

And currently the main category of disputes considered by administrative courts set up specifically to protect rights and freedoms from unlawful decisions, actions, or inaction of authorities are the so-called “social benefit-related cases”. The European Court of Human Rights has three times (case of “Pronina vs Ukraine,” “Bogatova vs Ukraine,” “Petrychenko vs Ukraine”) recognized as violation on the first part of Article 6 (the right to fair trial) refusal of courts to consider arguments of plaintiffs regarding their pensions’ being inconsistent with the subsistence level guaranteed with provisions of Article 46 of the Constitution of Ukraine, that is, in fact, refusals to directly apply provisions of the Constitution of Ukraine guaranteeing social rights.

Finally, in the judgment of the European Court of Human Rights in “Yuriy Ivanov vs Ukraine”, which received the status of a pilot one, “the Court concludes that the violations found in the present judgment were neither prompted by an isolated incident, nor were they attributable to a particular turn of events in this case, but were the consequence of regulatory shortcomings and administrative conduct of the State authorities with regard to the enforcement of domestic decisions for which they were responsible.” The vast majority of decisions of domestic courts that the state has not complied with were, again, associated with implementation of citizens’ social rights guaranteed by the Constitution.

Another comment expressed by the Venice Commission on Section II of the Constitution of Ukraine concerned exclusion from the final text of the Constitution of Ukraine of the provision stating that any restrictions of rights and freedoms guaranteed by the Constitution must apply based on the proportionality principle. As the Venice Commission noted, “e.g. the restrictions on freedom of thought and speech authorised by Article 34, para. 3, are quite large, it will be essential that the

45 See Judgments of the European Court of Human Rights against Ukraine: http://old.minjust.gov.ua/19618
Ukrainian Constitutional Court interprets the various restrictions of human rights as being subject to a general principle of proportionality."

Thus, one can argue that it is breach of the principle of proportionality in imposing restrictions on rights and freedoms that has been repeatedly mentioned in judgment of the European Court of Human Rights adopted in cases versus Ukraine, including on realization of the right to free expression of one’s views and beliefs (Article 11 of the Convention of protection of human rights and fundamental freedoms, see Judgments of the European Court of Human Rights in the case "Lyashko vs Ukraine," “Salov vs Ukraine”, “Shvachka vs Ukraine”).

The principle of proportionality in limiting human rights and freedoms by the Constitutional Court of Ukraine (an important role of which was emphasized by the Venice Commission) was first applied only in 2007 in the case of establishment of political parties in Ukraine (Judgment of the Constitutional Court of Ukraine of June 12, 2007 No.2-rp/2007). In this Judgement, the Constitutional Court of Ukraine ruled on compliance with the Constitution of Ukraine of provisions of the Law of Ukraine On Political Parties, which, in particular, set bans on funding of political parties by public authorities, foreigners, and religious organizations.

In its Judgment, the Constitutional Court of Ukraine ruled that the respective restrictions comply with the principle of proportionality recognized in international legal instruments.46

However, in another part of its judgment, the Constitutional Court of Ukraine did not consider the previously expressed comments by the Venice Commission on the Law of Ukraine On Political Parties in Ukraine47. Moreover, in its Judgment the Constitutional Court of Ukraine referred - to confirm its arguments - to the stance of the Venice Commission, having significantly distorted its wording.

When reviewing constitutionality of the provisions of the law that established requirements for registration of political parties48, the Constitutional Court of Ukraine ruled that "these provisions in no way violate constitutional values, as no prohibition of rights, reducing their scope, establishing insurmountable obstacles to realization by citizens of the right to freedom of formation and activity of political parties took place."

---

46 Judgments of the Constitutional Court of Ukraine in this aspect generally corresponded to the position of the Venice Commission on financing of political parties reflected, in particular, the Guidelines on financing of political parties, adopted by the Commission at its 46th plenary session on 9-10 March, 2001 (CDL-INF(2001)008).


48 In particular, on the requirement to collect signatures in at least two-thirds of districts of two thirds of regions, the cities of Kyiv and Sevastopol, the need for formation of regional, city, and district organizations in most regions of Ukraine, the cities of Kyiv, Sevastopol, as well as establishment within six months from the date of registration of regional and city organizations in most regions of Ukraine, the cities of Kyiv and Sevastopol, in the Republic of Crimea.
Here the Constitutional Court of Ukraine said: "Assessing the provisions of the Law that standardize the procedure of registration of political parties, in accordance with the Constitution of Ukraine and international legal acts recognized in Ukraine, the Constitutional Court of Ukraine also takes into account the position of the Venice Commission as set out in its Opinion adopted at the 41th plenary session on December 10-11, 1999, according to which "requirementS (the author’s emphasis) concerning registration of political parties as such cannot be considered as violation of citizens right to association." In fact, the respective position of the Venice Commission stipulated in the Opinion mentioned was formulated as follows: "the requirementT (the author’s emphasis) on registration of a political party as such cannot be considered as violation of this right." Therefore, the Venice Commission meant that the actual need for registration of a political party as such is not restriction of the right to freedom of association, not that any requirement set for registration is not that.

In fact, analysing in 2002 the law on political parties of Ukraine, the Venice Commission expressed serious concerns regarding the requirements stipulated in it for registration of political parties. In particular, the Venice Commission noted that the requirements set in the Law of Ukraine On Political Parties regarding registration requirements are too complicated, and the set threshold for collecting signatures in support is too high. Moreover, the Venice Commission conceptually did not approve of the approach of the Ukrainian legislation, under which a political party can operate exclusively if having the national status:

"It is particularly difficult to share the assumption in the Law on Political Parties that all political parties should be active nationwide – not only in a region of the country or locally, a requirement that constitutes a legal impediment to forming parties which concentrate on matters concerning regional issues (for example, the Autonomous Republic of the Crimea).

The Commission recalls in this respect that democracies of Europe offer many examples of well established political parties with an agenda focused on and with support concentrated to some part of the country only; and there are even more examples of political parties, which are exclusively active on the local level and within the geographical borders of a local community or a province and which play an important role for democratic life there."

Based on the above, the Venice Commission noted that the requirement regarding nationwide activities of a political party is a serious limitation for political activity at the local and regional levels and must be at least substantially narrowed in the Law.

Summing up, it should be noted that the current Law of Ukraine On Political Parties in Ukraine, despite the fact that it has been repeatedly amended, still contains the above requirements for registration and operation of political parties - both in terms of collecting signatures and on the need to establish regional and local party organizations in most regions of Ukraine (a failure to comply with the second requirement is grounds for cancellation of registration of the political party in accordance with Article 24 of the Law).
Moreover, the amendments to the Law of Ukraine On Political Parties in Ukraine made with Law No. 835-VIII of 26.11.2015 brought back the provisions where signatures in support of the decision to establish a political party have to be collected separately in no less than two-thirds of districts in the Autonomous Republic of the Crimea, which had been previously declared unconstitutional with the already cited Judgment of the Constitutional Court of Ukraine of June 12, 2007 No.2-rp/200749. The Constitutional Court of Ukraine established: "this provision means that no political party can be registered unless it gets signatures in its support of at least two thirds of districts of the Autonomous Republic of Crimea."

Thus, with regard to the temporary occupation of the Autonomous Republic of Crimea and the impossibility for Ukrainian citizens in its territory to exercise their rights, the requirement to collect signatures of at least two thirds of districts of the Autonomous Republic of the Crimea stipulated in the Law of Ukraine On Political Parties in Ukraine de jure and de facto makes it currently impossible to register any new political party in Ukraine.

"Playing with rules, not according to the rules"50 (2000-2004)

The next stage of cooperation with the Venice Commission in the constitutional process was associated with attempts to amend the Constitution of Ukraine of 1996; it covers the period from 2000 (the national referendum on the popular initiative) till 2004 (amendments to the Constitution of Ukraine in December with Law No.2222-IV). Although, in fact, this stage can hardly be referred to as cooperation, since all Opinions by the Venice Commission on various aspects of the constitutional reform during this period were granted at the request of bodies of the Council of Europe, which was extremely critical about the organization of the constitutional process, and many substantive provisions of the proposed constitutional amendments.

In March 2000 the Venice Commission at the request of the President of the Parliamentary Assembly and the Secretary General issued its Opinion on the constitutional referendum in Ukraine51, which was scheduled for April 16 of that year. The Venice Commission found that:

◆ that referendum could not directly amend the Constitution of Ukraine;

◆ it was very controversial if holding a consultative referendum on the popular initiative could be an acceptable option;

---

49 According to the position of the Constitutional Court of Ukraine, isolation of the ARC from the total subjects of the administrative and territorial system violates the constitutional principle of equality of all citizens of Ukraine regardless of their place of residence.

50 Description of the Ukrainian government expressed by Javier Solana in 2002.

Electronic resource: http://day.kyiv.ua/en/article/day-after-day/play-not-rules

whether the current legal framework allows for holding a national referendum is an issue to be decided on by the Constitutional Court of Ukraine;

one of the questions offered for the national referendum was unconstitutional (on no-confidence to the Verkhovna Rada of Ukraine of the current convocation and amendments to the Constitution of Ukraine that based on the no-confidence would allow the President to early dissolve the Verkhovna Rada of Ukraine), others were extremely problematic or unclear;

all in all, adoption of the amendments proposed for approval at the referendum would disrupt the balance of power between the President and the Parliament.

As the Venice Commission noted, these comments raise serious doubts about constitutionality and admissibility of the referendum as a whole.

However, as known, the national referendum was held in April 2000. 4 out of the 6 questions that had been subject to analysis by the Venice Commission were offered for the vote\(^5\).

In October 2000, the Venice Commission at the request of the Chairman of the PACE Monitoring Committee issued its Opinion on implementation of the national referendum in Ukraine\(^5\). The subject of analysis were two draft laws amending the Constitution of Ukraine based on outcomes of the national referendum: the drafts were submitted for consideration by the President of Ukraine and 152 MPs of Ukraine, respectively. In view of the previous critical Opinion of the Venice Commission on the questions offered for the national referendum, the Commission predictably criticized the draft laws that would implement its outcomes. Noting as a general positive thing the fact that the questions regarding amending the Constitution were transferred to the Verkhovna Rada of Ukraine, as provided in Section XIII of the Constitution, the Venice Commission noted, at the same time that if the draft law submitted by the President of Ukraine is adopted by the Verkhovna Rada of Ukraine without the amendments to it proposed by the Venice Commission, this would create serious problems for democracy, the rule of law, and the balance of power in Ukraine.

Most criticism of the Venice Commission was about withdrawal from the Constitution of Ukraine of the provision on parliamentary immunity. Noting that, despite absence of provisions on parliamentary immunity from the legal framework of lots of “old democracies”, the situation in Ukraine as a “new democracy” requires special measures to protect from arbitrary detention and arrests, especially opposition MPs. The Venice Commission also did not approve of the proposal for supplementing the Constitution of Ukraine with another ground for early dissolution of the Verkhovna

\(^5\) Two questions, in particular on no-confidence to the Verkhovna Rada of Ukraine and on adoption of the Constitution of Ukraine with a national referendum, were recognized inconsistent with the Constitution of Ukraine with Judgment of the Constitutional Court of Ukraine of March 27, 2000 No.3-rp/2000.

Rada of Ukraine, namely its failure to form within a month a permanent majority. The Venice Commission noted that this provision significantly weakened freedom of the Parliament’s decision-making, as it would be facing the risk of dissolution for grounds not clearly defined in the Constitution of Ukraine. Actually, in this Opinion the Venice Commission for the first time expressed its concerns regarding “abolition of parliamentary immunity,” as well as introduction at the level of the Constitution of Ukraine of the notion of “the parliamentary majority”, which will keep appearing in the Ukrainian political discourse in Ukraine, and accordingly will be subject to analysis of the Venice Commission.

Results of the constitutional referendum of 2000 were never implemented in Ukraine. Starting from 2001, the process of the constitutional reform changed its vector, and all drafts submitted to the parliament were to a certain extent aimed at weakening powers of the President of Ukraine and transition to the parliamentary-presidential form of government. This phase ended with adoption on December 8, 2004 of Law of Ukraine No.2222-IV amending the Constitution of Ukraine.

The Venice Commission in July 2001 and December 2003 issued its Opinions on draft constitutional amendments.

While welcoming the overall desire of Ukraine to strengthen powers of the Parliament vs the President, the Venice Commission noted that none of the proposed draft laws provided for establishment of a clear and transparent system of governance.

In October 2004, the Venice Commission at the request of the PACE Monitoring Committee issued its opinion on the procedure of amending the Constitution of Ukraine. Earlier, in January that year, the Parliamentary Assembly of the Council of Europe adopted extremely tough Resolution No.1364 (2004) “The political crisis in Ukraine”, in which the Assembly directly stated that:

“If any further attempts should be made to push through political reforms by amending the Constitution in a manner which is not prescribed by law and by unconstitutional means, or if Ukraine should fail to guarantee free and fair elections on 31 October 2004, the Assembly may decide to challenge the credentials of the Ukrainian Delegation in accordance with Rule 9 of the Assembly’s Rules of Procedure and subsequently may decide to request the Committee of Ministers to suspend the membership of Ukraine in the Council of Europe in accordance with Article 8 of the Statute of the Council of Europe.”

54 Consolidated Opinion on the draft constitutional reform in Ukraine (CDL-INF(2001)011). Electronic resource:

55 Opinion on three draft laws on amendments to the Constitution of Ukraine (CDL-AD (2003)019). Electronic resource:


57 http://zakon2.rada.gov.ua/laws/show/994_610
PACE in its resolution also "expresses regret for the fact that none of the recommendations of the Venice Commission was taken into account when considering the three draft laws (No.3207-1, 4105, and 4180) by either the Constitutional Court of Ukraine, nor the parliamentary Temporary Special Constitutional Commission prior to submitting draft law No. 4105 for discussion in the Parliament. The Assembly therefore strongly called for the relevant authorities of Ukraine to consider all recommendations formulated by the Venice Commission and to continue an open and effective dialog with the Commission for further improvement of the legislation that the Commission is discussing.

At the time the Venice Commission issued its Opinion, the constitutional reform situation significantly changed. The only draft law still on the agenda was draft law on amendments to the Constitution of Ukraine No.4180, which took into account, in particular, comments of the Venice Commission on non-compliance with European standards of independence of judges of the ten years limitation of the term of judges' office\(^58\), which was emphasized by PACE in the aforementioned Resolution, and the recommendation of PACE not to change the method of election of the President of Ukraine on the eve of the 2004 presidential election\(^59\). Instead, a number of other comments by the Venice Commission mentioned in the PACE Resolution, including the imperative mandate of an MP of Ukraine and empowering prosecution, were not considered.

However, the Venice Commission in its Opinion focused not so much on the content of the draft law, but on procedural elements of the constitutional process in terms of their compliance with the amendment procedure stipulated in the Constitution. In this part, the Venice Commission emphasized two significant aspects: the need to get a second Opinion of the Constitutional Court of Ukraine on draft law No. 4180 (new amendments had been introduced into the draft after its previous approval) and the need for the Constitutional Court of Ukraine in its Opinion to investigate compliance with Article 158 of the Constitution of Ukraine\(^60\), because draft law No. 4180 included most of provisions of draft law No.4105 rejected by the Parliament of Ukraine in April 2004.

Summarizing its findings, the Venice Commission noted that "constitutional reforms and their entry into force cannot be subject to short-term political ends."

The next Opinion of the Venice Commission on constitutional issues in Ukraine was granted in June 2005, i.e. after 2004 presidential election. The subject of analysis of the Venice Commission was the text of amendments to the Constitution of Ukraine adopted in the midst

---

\(^58\) Draft law No. 4180 left active the respective provisions of the Constitution of Ukraine of 1996.

\(^59\) Two of the three drafts of constitutional amendments stipulated election of the President of Ukraine in the parliament.

\(^60\) A draft law on amendments to the Constitution of Ukraine that was considered by the Verkhovna Rada of Ukraine but not adopted can be submitted to the Verkhovna Rada of Ukraine no earlier than one year after the day of decision-making on the draft law.
of the Orange Revolution. In its Opinion on amendments to the Constitution of Ukraine adopted on December 8, 2004\textsuperscript{61}, the Venice Commission noted that in the course of the constitutional reform a number of the comments and proposals that the Commission had expressed earlier were taken into account and focused on the provisions of the constitutional amendments that were adopted without regard to its position. Thus the Opinion of the Venice Commission remains relevant as applicable to the current provisions of the Constitution of Ukraine, which determine relations in the power triangle of "the president-the parliament-the government." One of the provisions of the Constitution of Ukraine most criticized by the Venice Commission, which, in its view, is contrary to the generally accepted international democratic standards, is the institute of the so-called "imperative mandate" of an MP of Ukraine introduced with the constitutional amendments of 2004. Repeated calls of the Venice Commission and PACE on unacceptability of this institution in a European democratic and law-governed state have not been regarded by the Parliament of Ukraine\textsuperscript{62}. According to the Venice Commission, the provisions on possibility of depriving an MP of Ukraine of his/her mandate for failing to join the MP faction of the political party or for leaving it "give the party an opportunity to annul election results", "weaken the Verkhovna Rada of Ukraine as such", for it "will consist of MPs of Ukraine who can no longer follow their beliefs," and are not in line with other provisions of the Constitution of Ukraine, according to which "an MP of Ukraine shall represent the people, not a party."

In the Report on the imperative mandate and similar practices\textsuperscript{63}, issued by the Venice Commission in 2009, a separate chapter was focused on Ukraine, since at that time Ukraine was (and still is) the only member state of the Council of Europe that had the option of parties' recalling Members of Parliament voted for at elections. The said chapter was titled "The Ukrainian case. The wrongly called "imperative mandate": a case of a practice against floor crossing"\textsuperscript{64}.

The Venice Commission noted that the practice of MPs' leaving the political parties in the lists of which they were elected is one of problems of "new democracies" in terms of parliamentary stability and allegiance with the voter's choice. However, even though the objective of fighting "party transitions" (including prevention of "sales" of mandates) may look positive, the fundamental constitutional

\textsuperscript{61} Opinion of the Venice Commission (CDL-AD(2005)015). Electronic resource:

\textsuperscript{62} The final text of the Law voted on December 8, 2004 no longer contained only the provision on possible early termination of powers of an MP of Ukraine in case of his/her expulsion from the faction.

\textsuperscript{63} CDL-AD(2009)027. Electronic resource:

\textsuperscript{64} The Venice Commission noted that the MP control mechanism in Ukraine could not be equated to the "imperative mandate", it looked more like the model of "the party and administrative mandate", which is applied in India and South Africa.
principle that prohibits the imperative mandate or any other form of political deprivation of MPs of their mandates is the priority, because it is the cornerstone of the European democratic constitutionalism.

Despite the fact that Article 81 of the Constitution of Ukraine on the possibility of early termination of powers of MPs of Ukraine in the event of their not joining the parliamentary faction of the political party (bloc) from which they were elected at the decision of the higher governing body of the political party (bloc) was in effect in the period from 2006 to 2010, and has been in effect from 2014 onwards, it was first applied in practice only on March 25 this year, when with a resolution of the PPB "Solidarity" congress powers of two MPs of Ukraine were early terminated.\(^{65}\)

Another provision of the Constitution of Ukraine that has been strongly and consistently criticized by the Venice Commission is the one on the necessity of creating in the Parliament of Ukraine the parliamentary coalition bringing together the majority of MPs of Ukraine from the constitutional composition of the Verkhovna Rada of Ukraine.

In its Opinion on the amendments to the Constitution of Ukraine made on December 8, 2004, the position of the Venice Commission was formulated as follows:

"It may be questioned whether such a formalised procedure for forming a parliamentary majority would contribute to enhancing political stability in Ukraine. Furthermore, it could hardly be seen as compatible with the freedom of the choice and decision guaranteed to political parties by the Constitution, in conformity with European standards in this field. Generally speaking, alliances between political parties depend on the free choice of the parties concerned, and will last as long as the governing bodies of the parties find it convenient to stick to the negotiated agreements. In addition, a coalition government may give disproportionate power to small parties and therefore be unrepresentative."

One of the perennial members of the Venice Commission who has repeatedly acted as an expert drafting Opinions on Ukraine, Sergio Bartole, during one of his public speeches in Ukraine was even more categorical: he noted that the amendments made to the Constitution of Ukraine in 2004 conditioned creation of a terrible monster - "a corporation of the majority"\(^{66}\). Thus, in its Opinion, the Venice Commission recommended excluding from the Constitution of Ukraine both provisions on the so-called "party administrative mandate", and those on the parliamentary coalition.

The next set of comments of the Venice Commission dealt with the provisions that stipulated powers of the President of Ukraine. The Venice Commission noted that some provisions defining powers of the President of Ukraine did not meet the declared objective of the constitutional reform, which was to reduce presidential powers and strengthen parliamentarism in Ukraine. In particular:


appointment of the Minister of Defence and Minister for Foreign Affairs upon submission by the President of Ukraine (causing concerns regarding the possibility under such a procedure to ensure the necessary unity of the government);

- overlapping powers of the President and the Cabinet in the field of the national security and defence and foreign policy (can be a source of conflict between the president and the government);

- the Government’s accountability not only to the Parliament but also to the President, the possibility of issuance by the President of Ukraine of Decrees to be binding throughout the territory of Ukraine;

- the right of legislative initiative of the President of Ukraine and his/her right to initiate no confidence vote to the Government.

Moreover, the Venice Commission expressed the need to revise and ensure compliance with European standards of the statute and mandate of the prosecution office (including, and especially, regarding the function of "general oversight"), strengthen the role of the Commissioner of the Verkhovna Rada of Ukraine on Human Rights, and stipulate a special procedure of appointment and dismissal (with a qualified majority of votes of parliamentarians) of heads of some public authorities (the Antimonopoly Committee of Ukraine, the State Property Fund of Ukraine, the State Broadcasting Committee) and judges of the Constitutional Court of Ukraine, which would strengthen their independence and impartiality.

In general, the Venice Commission noted that the adopted constitutional amendments did not fully reach the goal of the constitutional reform - to ensure a balanced and functional system of governance - and emphasized the need for further improvement of the Constitution of Ukraine to bring its provisions into conformity with the principles of representative democracy and the rule law.

The Constitutional reform without prospects of implementation
(2005-2010)

Again, as in the case of the 1996 Constitution, comments of the Venice Commission on shortcomings in the constitutional regulation in the part of public administration organization were proven true in the practice of their implementation after the new constitutional provisions came into effect in 2006. However, the intention to modernize the Constitution of Ukraine was officially declared only in late 2007 - after establishment with a Decree of the President of Ukraine of the National Constitutional Council67, which had to draft a new version of the Constitution of Ukraine. However, after most of the parliamentary factions refused to submit their nominations for the National Constitutional Council and the permanent conflict between the President of Ukraine and the Verkhovna Rada of Ukraine, it became clear that elaborations of that body had little chance to be supported by the parliament.

67 http://zakon0.rada.gov.ua/laws/show/1294/2007
The Venice Commission also issued its Opinion on the draft amendments to the Constitution of Ukraine prepared by a working group set up under the National Constitutional Council chaired by V. Shapoval, and on the revised draft, which the President of Ukraine submitted to the Parliament.

The both drafts suggested new versions of the Constitution of Ukraine. As mentioned by the Venice Commission in its Opinion on “Shapoval’s draft”, this approach was not entirely clear, because the text of the draft was based on provisions of the acting Constitution of Ukraine. In the opinion of the Venice Commission, the best option would be to amend the current Constitution of Ukraine, which would allow for ensuring the symbolic “constitutional continuity” and promoting the constitutional stability. Moreover, the Venice Commission noted that this approach - amending the Constitution of Ukraine, not drafting a new version of it - would make it possible to clearly focus on the most pressing issues. The priority of the constitutional reform, according to the Venice Commission, was to be overcoming the dualism of executive powers, which, after the amendments of the Constitution of Ukraine made in 2004, became a source of permanent conflicts between the President and the Government and of political instability. Other important reforms, including the judiciary one, could be implemented separately.

The draft Constitution of Ukraine submitted to the Verkhovna Rada by President of Ukraine V. Yushchenko was praised by the Venice Commission as a step in the right direction. It positively assessed the proposed new constitutional provisions on justice, prosecution, corrections of a number of problematic provisions of the Constitution of Ukraine of 2004, in particular those on the "formalized parliamentary majority,” the so-called imperative mandate, the dual accountability of the Cabinet of Ministers of Ukraine to both the President of Ukraine and the Parliament of Ukraine, the differentiation in appointment of ministers at the submission by the President of Ukraine and the Prime Minister of Ukraine.

However, the Venice Commission also expressed a number of critical comments on the proposed constitutional amendments. In particular, the requirement that any constitutional amendments after their adoption shall be approved at a national referendum, according to the Venice Commission, raises the risk of that the procedure for amending the Constitution of Ukraine would be too rigid, and expansion of direct democracy to the national level would cause additional risks to political stability. The amendments relating to organization of public authorities, though, according to the Venice Commission, eliminating a number of sources of conflict, kept the semi-presidential form of governance and the dualism of the executive branch, and therefore - the field for the potential conflict between the President and the Government.

During the indicated period, the Venice Commission assessed yet another draft set of constitutional amendments authored by MPs.
of Ukraine V. Yanukovych, O. Lavrynovych et al. The draft was submitted to the Verkhovna Rada of Ukraine in July 2008, and the Opinion of the Venice Commission was approved in March 2009.

After its visit to Ukraine, the Commission stated that the said draft law was developed under a different political situation and it was no longer relevant, so it limited itself to analysis of key issues and said that its comments could be used to further improve the constitutional framework in Ukraine. In its Opinion, the Venice Commission emphasized that it had repeatedly stressed the need to implement the further constitutional reform after amendments to the Constitution of Ukraine made in 2004, and, again, the key focus of this reform should be clarification of powers of the President of Ukraine, the Parliament of Ukraine, and the Cabinet of Ministers of Ukraine.

One of the most extraordinary proposals of the draft law (along with implementation at the constitutional level of the proportional electoral system with open lists) was the provision where the political party that receives more votes compared to other parties but it is less than the one to ensure election of the majority of the Verkhovna Rada of Ukraine shall receive two hundred and twenty six seats in the Parliament. The corresponding proposal was also implemented in the draft Law of Ukraine On Amendments to the Law of Ukraine On Elections of Members of Parliament of Ukraine, which was also subject to assessment by the Venice Commission (the Opinion of the Venice Commission on the draft Law of Ukraine On Amendments to the Law of Ukraine On Elections of Members of Parliament submitted by MPs of Ukraine O. Lavrynovych and A. Portnov CDL-AD(2009)019).

Assessing the indicated innovation, the Venice Commission noted that the objective of the new electoral system is to ensure a stable parliamentary majority in Ukraine, but the system contains a number of shortcomings, especially relevant in the context of the political situation in Ukraine. The Venice Commission expressed four key arguments against introduction of such electoral system in Ukraine for parliamentary elections:

1) True support for a political party would not be reflected in distribution of mandates

In the first round, political parties may have close results, for example, 14%, 15%, 16%, and in the second round the party wins that received

---


71 http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=32942

72 Under provisions of this draft law, elections will be held in two rounds. After the first round, the political parties that overcome the three-percent electoral threshold are given the right to participate in distribution of seats, and the two of them that received the highest percentage of support participate in the second round. Based on results of the second round, the political party that receives the higher proportion of voters’ support automatically wins 226 seats (the Venice Commission used the term “the artificial absolute majority”). The remaining seats are distributed among the parties that passed the three percent threshold (including the party that lost the second round), based on results of the first round.
in the first round 15%, and it will take more than half of seats in the Parliament. So the final election results would distort results of the first round. This electoral system is problematic in the light of a number of international election standards.

2) In “new democracies”, where the turnout is usually low, it is not recommended to hold elections in two rounds

The voters who supported in the first round a political party that does not make it to the second round might not vote in the second round of the elections, and thus - the final result will be based on votes of an insignificant number of voters.

3) The proposed electoral system will not contribute into ensuring the country’s unity

The political system in Ukraine is clearly divided in terms of political powers between voters in the Western Ukraine and the Eastern and Southern Ukraine. Thus, if one party receives an absolute majority of votes in the parliament, there will be no balanced representation of the regions.

4) This electoral system is not transparent or understandable to voters

If we summarize the process of constitutional modernization in the period of 2005-2010, despite the obvious need to improve the constitutional provisions on organization of state powers, lack of the political consensus in support of constitutional amendments prevented any amendments to the constitution of Ukraine.


Amendments were made in the Constitution of Ukraine in 2010 after adoption by the Constitutional Court of Ukraine of its Judgment of September 30, 2010 No.20-rp/2010 in the case on compliance with the procedures for amending the Constitution of Ukraine. With this Judgment, the Constitutional Court of Ukraine:

◆ deemed inconsistent with the Constitution of Ukraine (unconstitutional) Law of Ukraine On Amendments to the Constitution of Ukraine of December 8, 2004 No. 2222-IV because of breach of the constitutional procedures for its consideration and adoption;

◆ ordered public authorities to immediately execute this Judgment to bring regulations into conformity with the Constitution of Ukraine of June 28, 1996 in the version that applied before it was amended with Law of Ukraine On Amendments to the Constitution of Ukraine of December 8, 2004 No. 2222-IV.

73 http://zakon5.rada.gov.ua/laws/show/v020p710-10
In the rational of its Judgment, the Constitutional Court of Ukraine also referred to the position of the Venice Commission on non-compliance with the constitutional procedures when considering and adopting Law No.2222-IV\(^7\). Later, the President of the Venice Commission Gianni Buquicchio said: "The Commission was proud to see that some of its previous Opinions were applied by the new government, and they therefore became part of the new constitutional history of the country: the Opinions on the 1996 Constitution of Ukraine and amendments to the Constitution of Ukraine made in 2004 were widely applied in debates associated with abolition by the Constitutional Court of Ukraine in September 2010 of the constitutional amendments of 2004" [22].

The next Opinion by the Venice Commission on constitutional issues in Ukraine provided on request of the Head of PACE Monitoring Committee concerned analysis of the constitutional situation in Ukraine after adoption of the relevant Judgment of the Constitutional Court of Ukraine\(^7\). Statements of the Venice Commission from this Opinion, in turn, were later the basis of Resolution of the Verkhovna Rada of Ukraine of February 22, 2014 No.750-VII "On the text of the Constitution of Ukraine in the wording of June 28, 1996, as amended and supplemented by Laws Ukraine of December 8, 2004 No.2222-IV, of February 1, 2011 No.2952-VI, of September 19, 2013 No.586-VII". With this Resolution, the Parliament re-enacted the Constitution of Ukraine as amended on December 8, 2004, with subsequent amendments\(^7\).

Development of constitutional amendments over the period indicated happened in two directions pointed out in PACE Resolution of October 4, 2010 No.1755 (2010) "Functioning of democratic institutions in Ukraine"\(^7\), namely implementing "a comprehensive process of the constitutional reform to bring the Constitution of Ukraine in full compliance with European standards" (paragraph 10), as well as an urgent reform of the constitutional principles of justice (paragraph 7.3).

---

\(^7\) In fact, unlike PACE Resolution of October 5, 2005 No. 1466 "On fulfilment of obligations and commitments by Ukraine" (paragraph 14 of which is quoted in the Judgment of the Constitutional Court of Ukraine), the Opinion of the Venice Commission on amendments to the Constitution of Ukraine adopted on December 8, 2004 contained no direct reference to violation of the constitutional procedure of consideration and adoption of Law No.2222-IV.


\(^7\) In the preamble of the Resolution of the Verkhovna Rada of Ukraine, it is stated that it was adopted, among other things, "in view of Opinions of the European Commission "For Democracy through Law" (Opinion "On the constitutional situation in Ukraine" of December 20, 2010 (hereinafter - the Opinion) on the following: re-enactment - with Judgment of the Constitutional Court of Ukraine - the text of the 1996 Constitution of Ukraine "by recognizing unconstitutional Law of Ukraine On Amendments to the Constitution of Ukraine of December 8, 2004 No. 2222-IV "raised the issue of legitimacy of the existing public authorities, as the president and the parliament had been elected on the basis of the constitutional provisions that were later deemed invalid," as well that "as a consequence of this Judgment of the Constitutional Court of Ukraine, the President of Ukraine gained much more powers than it was known to voters at the time of his election," and that since then "the key activities of public authorities had been based on standards amended by the Court, not on the provisions amended by the Verkhovna Rada of Ukraine as a democratically legitimate authority" (paragraph 70 of the Opinion)."

\(^7\) http://zakon2.rada.gov.ua/laws/show/994_a19
In order to ensure comprehensive reforming of the Constitution of Ukraine, the Constitutional Assembly was established in May 2012. To this, the Venice Commission issued its Opinion on the concept of formation and functioning of the Constitutional Assembly, in which generally noted that the initiative to establish the Constitutional Assembly to launch the constitutional reform process, without entrusting it only to the parliament or the president, is welcomed.

In its Opinion, the Venice Commission reiterated that key priorities and the outcome of the constitutional reform should be:

- "effective strengthening of the stability, independence and efficiency of state institutions through a clear division of competencies and effective checks and balances" and "should also introduce additional mechanisms and procedures of parliamentary control over the actions and intentions of the executive".
- provisions on the judiciary aiming at "laying down a solid foundation for a modern and efficient judiciary in full compliance with European standards".
- effective functioning of local self-government, in full respect of European standards in this field.

The Venice Commission also called on the authorities of Ukraine to ensure that the Constitutional Assembly is the only specialized body to work on the constitutional reform, which will "make it possible to form the potential for a coherent and inclusive reform process and reduce the risk of political confrontation."

However, in practice this recommendation of the Venice Commission was not complied with. As a result, the Venice Commission in 2013 analysed three different views of constitutional amendments in the sector of justice.

Despite the ambiguous perception of the draft law on amendments to the Constitution of Ukraine to strengthen safeguards for judicial independence (Reg. No.2522a of July 4, 2013) among domestic scholars and experts, the Venice Commission, when later issuing its Opinion on the first draft of amendments to the Constitution of Ukraine submitted to the Verkhovna Rada of Ukraine on July 2, 2014 by President of Ukraine


79 In June 2013, the Venice Commission issued its Opinion on draft amendments to the Constitution of Ukraine to strengthen guarantees of independence of judges in Ukraine, which had been developed by the Presidential Administration of Ukraine, and amendments to the Constitution of Ukraine on justice proposed by the Constitutional Assembly (CDL-AD (2013)014), while in December the same year - a separate Opinion (CDL-AD (2013)034) on the proposals on amending the draft amendments to the Constitution of Ukraine to strengthen safeguards of independence of judges, submitted by a group of 156 MPs of Ukraine for the draft law that at that time had been submitted to the Parliament by the President of Ukraine.

P. Poroshenko, noted that it "supported the draft amendments to the Constitution of Ukraine to strengthen guarantees of judicial independence rejected by the Verkhovna Rada of Ukraine," and regretted that such long-awaited and pressing reform had not been completed\(^1\).

**The current constitutional reform (2014-2016)**

Cooperation with the Venice Commission in the field of the constitutional reform after the Revolution of Dignity and the change of the country's government started with submission of the aforementioned Opinion on draft constitutional amendments initiated by newly elected President of Ukraine Petro Poroshenko (Reg. №4178a of July 2, 2014)\(^2\). This draft included amendments in terms of the government organization, prosecution, and local government.

The Venice Commission noted that the draft law took into account a number of earlier recommendations made by the Venice Commission, including those on abolition of the so-called "imperative mandate" and abolition of the general oversight function of the prosecution office. The Venice Commission also all in all positively assessed the amendments for local government as such that enable introduction of modern local governance in line with the principles and spirit of the European Charter of Local Self-Government.

However, the amendments proposed by the President of Ukraine, according to the Venice Commission, provide for significant enhancement of powers of the President of Ukraine, in particular as regards appointment and dismissal of a number of leaders and officials of the central government without the consent of the Parliament, appointment of representatives in regions with oversight functions over local governments.

It should be noted that after issuance of the preliminary Opinion of the Venice Commission upon the request of Ukrainian authorities (which was due to the need for urgent consideration of the draft law in the Parliament), the President of Ukraine expressed his statement on the need for revision of the draft - both subject to Council of Europe standards, and in order to ensure the political and social consensus on its provisions.

However, the issue of amending the Constitution of Ukraine in the part of the "power triangle" was no longer included into the political agenda. At least the President of Ukraine, who currently acts as the main engine and provider of constitutional amendments, has not announced the respective amendments as a priority for the Constitutional Commission set up by him. Another draft law to amend the Constitution of Ukraine, which was subject to analysis by the Venice Commission, also "disappeared" from the political agenda after its inclusion into the agenda of the Verkhovna Rada of Ukraine and referral to the Constitutional Court of Ukraine in February 2015. These are constitutional amendments in the part


\(^2\) http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_17?pt=3511=51513
of abolition of immunity of MPs of Ukraine and limiting immunity of judges. And while the aspect of the judicial immunity was resolved with adoption in July 2016 of the Law on Amendments to the Constitution of Ukraine on Justice, abolition of parliamentary immunity, once again, was not brought to a logical resolution. It should be noted that the Venice Commission in its Opinion\textsuperscript{83} opposed the full abolition of parliamentary immunity proposed in the draft law. The Commission pointed out that "inviolability can be an obstacle to the fight against corruption", but "the current state of the rule of law in Ukraine does not yet warrant a complete removal of inviolability of Members of Parliament." Instead, it was suggested to consider other mechanisms to limit parliamentary immunity, including the Italian model\textsuperscript{84}. But it was hardly the critical stance of the Venice Commission that appeared the key reason for suspending the process of constitutional amendments in this direction. For even after the said Opinion of the Venice Commission was issued, the President of Ukraine urged the Verkhovna Rada of Ukraine to adopt the respective draft law in the first reading\textsuperscript{85}.

Further work aimed at constitutional improvements headed towards constitutional amendments in the fields of justice and decentralization of power, they were developed under auspices of the Constitutional Commission established by the President of Ukraine\textsuperscript{86}. The Venice Commission was extremely actively involved in preparation and analysis of the relevant constitutional amendments. Member of the Venice Commission Hanna Suchocka was involved into the Constitutional Commission as an observer.

As for constitutional amendments aimed at decentralization of power, the Venice Commission, at the request of the Speaker of the Parliament of Ukraine and the Chairman of the Constitutional Commission V. Groisman, in June 2015 issued its Preliminary Opinion on a draft developed by a working group under the Constitutional Commission\textsuperscript{87}. The draft law was revised taking into account recommendations of the Venice Commission, and in July 2015 the President of Ukraine submitted it to the Parliament of Ukraine (Reg.No.2217a of July 1, 2015)\textsuperscript{88}. In October 2015 the Venice Commission adopted its final Opinion on the constitutional amendments regarding decentralization of power developed by a working group of the Constitutional Commission\textsuperscript{89}.


\textsuperscript{84} In Italy, the parliamentary minority (one third) can appeal to the Constitutional Court against an arrest or criminal proceedings initiated against a member of parliament, and then the respective procedures are suspended until the Constitutional Court passes its ruling.


\textsuperscript{86} http://zakon3.rada.gov.ua/laws/show/190/2015


\textsuperscript{88} http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pt3511=55812

At the same session, the Memorandum by the Secretariat of the Venice Commission was approved regarding compliance of the draft law included by the Verkhovna Rada of Ukraine into the session agenda and forwarded to the Constitutional Court of Ukraine with the recommendations issued in the Preliminary Opinion the Venice Commission. The Memorandum testified that key recommendations of the Venice Commission, as well as most of its other recommendations with few exceptions, had been taken into account.

One of the key recommendations of the Venice Commission on the draft constitutional amendments aimed at decentralization referred to the need to consolidate in the Constitution of Ukraine a provision under which “some categories of administrative/territorial units or special arrangements for or within administrative/territorial units may (only) be created by law”. In the opinion of the Venice Commission, “This formula, albeit neutral, would nonetheless enable future legal developments in line with the Minsk agreements”.

Actually, it was in order to take account of that recommendation of the Venice Commission that in less than two weeks (on July 15, 2015) the President of Ukraine replaced the previously submitted draft by submitting a revised draft law supplemented with the currently most controversial provision on regulation with a law of the specific features of exercise of local government in some districts of Donetsk and Luhansk Oblasts (paragraph 18 of the Final and Transitional Provisions of the Constitution of Ukraine). On July 30, 2015 the Constitutional Court of Ukraine in Judgment No. 2/2015 found this draft law such that complies with requirements of Articles 157 and 158 of the Constitution of Ukraine.

On August 31, 2015, the last day of the second session and a day before opening of the third session of the Parliament, the Parliament of Ukraine preliminarily adopted the draft law on amendments regarding decentralization (No. 2217); this was accompanied with tragic events under the walls of the Parliament.

A heated social and political debate focused on various aspects of this regulation, in particular the question of whether this provision is temporary or permanent. This discussion took place not only in Ukraine. The issue of "temporal action" of these provisions was raised at a meeting of legal experts of states participating in the Normandy format talks, which took place on August 20, 2015 in Berlin. In this regard, the Permanent Representative of Ukraine to the Council of Europe requested that the Venice Commission issued its Opinion on the period of validity of paragraph 18, the Transitional and Final Provisions, of the Constitution of Ukraine in case of adoption of the respective draft law. In its Opinion, which, incidentally, has been hardly covered in Ukraine, the Venice Commission clearly established that the respective provision is a permanent action regulation.

92 See, e.g. http://gazeta.dt.ua/internal/sche-raz-pro-osoblivosti-osoblivostey-samoupravlinnya--_.html
and will remain in effect until it is amended by the Verkhovna Rada of Ukraine as prescribed in Section XIII of the Constitution of Ukraine (i.e. in the manner stipulated for amendments to the Constitution of Ukraine).

While the issue of the constitutional reform in the field of decentralization of powers has become a new priority for Ukraine’s cooperation with the Venice Commission, the constitutional reform of justice have long been key both in relations between Ukraine and the Council of Europe, and in cooperation with the Venice Commission. As well as in the previous case, the Venice Commission issued several Opinions on different versions of draft laws developed in the framework of the Constitutional Commission. The degree of accounting for recommendations of the Venice Commission in the text of the draft law submitted by the President of Ukraine to the Parliament in November 2015 (Reg. №3524), again, was reflected in a special Memorandum of the Secretariat of the Venice Commission adopted at its meeting in December of the same year.

The Memorandum stated that all recommendations of the Venice Commission, apart from the need to elect judges of the Constitutional Court of Ukraine and two members of the High Council of Justice, as well as the consent of a qualified majority of votes in the Verkhovna Rada of Ukraine for appointment and dismissal of the Prosecutor General of Ukraine, had been taken into account.

It is, however, necessary to point out that in January 2016 the President of Ukraine replaced the draft with an amended draft law, which contained only one but significant difference from the previous one, keeping provisions of the current Constitution of Ukraine on the possibility of no confidence vote for the Prosecutor General by the Parliament of Ukraine. This distinction is obviously not consistent with the position of the Venice Commission, which has consistently, particularly in its previous Opinions on the said draft law, noted: it welcomes the proposal to exclude the provision on the possibility of no confidence for the Prosecutor General voted in the Parliament (resulting in resignation of the Prosecutor General), because this proposal takes into account the repeatedly expressed earlier recommendation of the Venice Commission on the need to deprive the Parliament of such power, which is exclusively a political instrument (paragraph 12 of Opinion CDL-AD (2015)026).

Another fundamental provision of the adopted law on amendments to the Constitution on justice, obviously, was not subject to analysis of the Venice Commission, as it was contained not in the text of the Constitution of Ukraine, but only in the relevant law on amendments. This is about postponing for three years of entry into force of the provision on recognition of jurisdiction of the International Criminal Court. As known, amendments to the Constitution stipulate that Ukraine can recognize


95 http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57209

jurisdiction of the International Criminal Court under conditions stipulated in the Rome Statute of the International Criminal Court (p. 6, Art. 124 of the Constitution of Ukraine). However, paragraph I, Section II "Final and Transitional Provisions" of the already adopted Law stipulates that the respective provision shall take effect only after three years from the day following the day of publication of the Law. In its preliminary Opinion, the Commission very favourably assessed inclusion of the provision that allowed for ratification of the Rome Statute in Ukraine into the Constitution of Ukraine (see p. 12 of Opinion CDL-AD (2015)026). The postponed recognition of jurisdiction of the International Criminal Court caused negative reaction after publication of the draft law in the country, but the calls to revise the decision have not been heard\textsuperscript{97}. Currently, the concern regarding that the appropriate amendments will only come into effect in three years, not as fast as possible, as it was recommended, was expressed in its latest Resolution on Ukraine by the Parliamentary Assembly of the Council of Europe, which called for Ukraine and the Russian Federation to accede to the Rome statute of the International Criminal Court\textsuperscript{98}.

\* \* \*

The Venice Commission is an advisory body. All documents that it issues are the so-called \textit{soft law}. Unlike provisions of international treaties that are binding for the states that join them, documents of the Venice Commission do not have legally binding effect and are not directly applicable standards (in fact, they are not \textit{standards}), they are advisory in nature and a failure to comply with them does not entail any sanctions\cite{23}.

However, activities of the Venice Commission in general and the array of legal documents issued by it, sure, have a significant impact on formation of the common "European constitutional heritage" and the legal systems of individual Member States. Moreover, assessment of constitutional and legislative acts by the Venice Commission is a true indicator of whether the path chosen by the state is in line with European standards and values.

Analysis of the Opinion of the Venice Commission made on Ukraine, in particular during the recent three years, and their implementation status prove the need for speedy quality comprehensive analysis of the recommendations issued, revision of the relevant laws or legislative initiatives (with subsequent re-examination by the Venice Commission), and their adoption by the Verkhovna Rada of Ukraine.

Equally important is the continued and permanent dialog of Ukraine with the Venice Commission towards elaboration and improvement of legislation, above all laws to implement new


\textsuperscript{98} http://news.liga.net/news/politics/13142341-istoricheskaya_rezolyutsiya_pase_po_rossii_polnyyTekst.htm
constitutional provisions on justice, drafts of which have already been developed or are in the process of developing, as well as unconditional compliance and enforcement of these laws is not only *de rigore juris*, but also in the spirit of the law. It also makes sense to use forms of cooperation new for Ukraine. In particular, requests to the Venice Commission by the Constitutional Court of Ukraine for expert Opinions *amicus curiae* to be followed with further accounting for the respective positions in its judgments would significantly increase the level of public trust in the institution and would allow to prevent political speculations.

As demonstrated in this study, activities of the Venice Commission are not only about Opinions on individual pieces of legislation of member states, but also about development based on comparative studies of common approaches to understanding democracy, protection of human rights and freedoms, and the rule of law - that is, formation of a "common European constitutional and legal space" and "transnational legal order" [24] in these areas. Use of reports, guidelines, and other general documents of the Venice Commission should for the Ukrainian legislator be the source on which they should ground their approaches to drafting relevant legislation.

Finally, it should be noted that the Venice Commission is a reliable and time-tested partner of Ukraine. Although frequently expressing critical Opinions and comments, the Commission is guided by the sole objective - to bring Ukraine to true European democracy through law. But the Venice Commission cannot pass this way without us or for us. Ukraine must not stop or step away from the path chosen and proclaimed in Article I of the Constitution of Ukraine towards a democratic and legal state, and the Ukrainian authorities must with all their actions confirm their commitment to European values.

* * *

*At the time of publication of this study on January 25, 2017 the Parliamentary Assembly of the Council of Europe adopted another Resolution 2145 (2017) “On functioning of democratic institutions in Ukraine”. The Resolution states, inter alia, the need for amendments in the “lustration law,” cancellation of the amendments made in 2016 that allow political parties to early terminate powers of MPs of Ukraine, the necessity of submitting for examination by the Venice Commission of the adopted Law of Ukraine On the High Council of Justice, on the need for the constitutional reform, including in the field of separation of powers.*
References


5. Dürr, Rudolf Schnutz. Quoted.


15. The European democratic achievements in the field of the election law: materials of the Venice Commission, the Parliamentary Assembly, the Committee of Ministers, the Congress of Local and Regional Authorities of the Council of Europe. - P. 16.


21. It ensured the democratic development of Ukraine. Address by the Speaker of the Verkhovna Rada of Ukraine V. Lytvyn on the Constitution Day of Ukraine. Holos Ukrainy. 2009.06.27.


**Annex 1. Key reports and studies of the Venice Commission**

<table>
<thead>
<tr>
<th>Democratic institutions</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Constitutions</strong></td>
<td></td>
</tr>
<tr>
<td>Protection of children's rights: international standards and domestic institutions</td>
<td>CDL-AD(2014)005</td>
</tr>
<tr>
<td>Stocktaking on the notion of “good governance” and “good administration”</td>
<td>CDL-AD(2011)009</td>
</tr>
<tr>
<td>Constitutional provisions on amendments of the constitution</td>
<td>CDL-AD(2010)001</td>
</tr>
<tr>
<td>Constitutional referendum</td>
<td>CDL-INF(2001)010</td>
</tr>
<tr>
<td>Constitutional implications of the ratification of the statute of the International Criminal Court</td>
<td>CDL-INF(2001)001</td>
</tr>
<tr>
<td><strong>Rule of law</strong></td>
<td></td>
</tr>
<tr>
<td>Rule of law: Report</td>
<td>CDL-AD(2011)003rev</td>
</tr>
<tr>
<td>Rule of law: checklist</td>
<td>CDL-AD(2016)007</td>
</tr>
<tr>
<td><strong>State formation</strong></td>
<td></td>
</tr>
<tr>
<td>Settlement of ethno-political conflicts</td>
<td>CDL-INF(2000)016</td>
</tr>
<tr>
<td>Self-determination and secession in constitutional law</td>
<td>CDL-INF(2000)002</td>
</tr>
<tr>
<td>Consequences of state success on citizenship</td>
<td>CDL-NAT(1996)008rev</td>
</tr>
<tr>
<td><strong>Federalism</strong></td>
<td></td>
</tr>
<tr>
<td>Federated and regional entities and international treaties</td>
<td>CDL-INF(2000)003</td>
</tr>
<tr>
<td>Federal and regional state</td>
<td>CDL-INF(1997)005</td>
</tr>
<tr>
<td><strong>Parliament</strong></td>
<td></td>
</tr>
<tr>
<td>Exclusion of offenders from parliament</td>
<td>CDL-AD(2015)019</td>
</tr>
<tr>
<td>Scope and lifting of parliamentary immunities</td>
<td>CDL-AD(2014)011</td>
</tr>
<tr>
<td>Role of the opposition in a democratic Parliament</td>
<td>CDL-AD(2010)025</td>
</tr>
<tr>
<td>Imperative mandate</td>
<td>CDL-AD(2009)027</td>
</tr>
<tr>
<td>Women’s representation in political systems</td>
<td>CDL-AD(2009)029</td>
</tr>
<tr>
<td>Right of legislative initiative</td>
<td>CDL-AD(2008)035</td>
</tr>
<tr>
<td>Role of the second chamber</td>
<td>CDL(2006)059rev</td>
</tr>
<tr>
<td><strong>Judiciary</strong></td>
<td></td>
</tr>
<tr>
<td>Restrictions on freedom of expression and freedom of association of judges</td>
<td>CDL-AD(2015)018</td>
</tr>
<tr>
<td>Implementation of international human rights treaties in domestic law and the role of courts</td>
<td>CDL-AD(2014)036</td>
</tr>
<tr>
<td>Independence of the judicial system – Part I (judges)</td>
<td>CDL-AD(2010)004</td>
</tr>
<tr>
<td>Independence of the judicial system - Part II (the prosecution service)</td>
<td></td>
</tr>
</tbody>
</table>
Based on official materials on the website of the Venice Commission:
http://www.venice.coe.int
<table>
<thead>
<tr>
<th>Topic</th>
<th>Report/Document Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial appointments</td>
<td>CDL-AD(2007)028</td>
</tr>
<tr>
<td>Remedies to excessive length of proceedings</td>
<td>CDL-AD(2006)036rev</td>
</tr>
<tr>
<td>Execution of judgments of the European Court of Human Rights</td>
<td>CDL-AD(2002)034</td>
</tr>
<tr>
<td><strong>Other</strong></td>
<td></td>
</tr>
<tr>
<td>Report on the relationship between political and criminal ministerial responsibility</td>
<td>CDL-AD(2013)001</td>
</tr>
<tr>
<td><strong>Protection of fundamental rights</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Security, terrorism and human rights</strong></td>
<td></td>
</tr>
<tr>
<td>Report on Democratic oversight of the security services and Report on Democratic oversight of signals intelligence agencies</td>
<td>CDL-AD(2015)006</td>
</tr>
<tr>
<td>Counter-terrorism measures and human rights</td>
<td>CDL-AD(2010)022</td>
</tr>
<tr>
<td>Private military and security firms and erosion of the state monopoly on the use of force</td>
<td>CDL-AD(2009)038</td>
</tr>
<tr>
<td>Civilian command authority over armed forces</td>
<td>CDL-AD(2008)004</td>
</tr>
<tr>
<td>Video-surveillance in public places</td>
<td>CDL-AD(2007)014</td>
</tr>
<tr>
<td>International legal obligations in respect of secret detention facilities and interstate transport of prisoners</td>
<td>CDL-AD(2006)009</td>
</tr>
<tr>
<td>Human rights in emergency situations</td>
<td>CDL-AD(2006)015</td>
</tr>
<tr>
<td>Possible revision of the Geneva Conventions</td>
<td>CDL-AD(2003)018</td>
</tr>
<tr>
<td><strong>Fundamental freedoms</strong></td>
<td></td>
</tr>
<tr>
<td>Legal personality of religious or belief communities – Guidelines</td>
<td>CDL-AD(2014)023</td>
</tr>
<tr>
<td>Freedom of association – Guidelines</td>
<td>CDL-AD(2014)046</td>
</tr>
<tr>
<td>Blasphemy, religious insults and incitement to religious hatred</td>
<td>CDL-AD(2008)026</td>
</tr>
<tr>
<td><strong>Minority rights</strong></td>
<td></td>
</tr>
<tr>
<td>Dual voting for persons belonging to national minorities</td>
<td>CDL-AD(2008)013</td>
</tr>
<tr>
<td>Preferential treatment of kin-minorities by their kin-state</td>
<td>CDL-INF(2001)019</td>
</tr>
<tr>
<td><strong>Constitutional justice</strong></td>
<td></td>
</tr>
<tr>
<td>Individual access to constitutional justice</td>
<td>CDL-AD(2010)039rev</td>
</tr>
<tr>
<td>Composition of constitutional courts</td>
<td>CDL-STD(1997)020</td>
</tr>
<tr>
<td>Execution of constitutional court decisions</td>
<td>CDL-INF(2001)009</td>
</tr>
</tbody>
</table>
### Elections

**Code of good practice in electoral matters and its interpretative declarations**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stability of the electoral law – interpretative declaration</td>
<td>CDL-AD(2005)043</td>
</tr>
<tr>
<td>Women’s participation in elections – interpretative declaration</td>
<td>CDL-AD(2006)020</td>
</tr>
<tr>
<td>Participation of persons with disabilities in elections – interpretative declaration</td>
<td>CDL-AD(2011)045</td>
</tr>
</tbody>
</table>

**Electoral process**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electoral law and electoral administration in Europe – synthesis study on recurrent challenges and problematic issues</td>
<td>CDL-AD(2006)018</td>
</tr>
<tr>
<td>Europe’s electoral heritage</td>
<td>CDL(2002)007rev</td>
</tr>
<tr>
<td>Measures to improve the democratic nature of elections in Council of Europe member states</td>
<td>CDL-AD(2012)005</td>
</tr>
<tr>
<td>Timeline and inventory of political criteria for assessing an election</td>
<td>CDL-AD(2010)037</td>
</tr>
</tbody>
</table>

**Specific issues**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Misuse of administrative resources during electoral processes: Report and Guidelines</td>
<td>CDL-AD(2013)033</td>
</tr>
<tr>
<td>Funding of electoral campaigns – opinion on the need for a code of good practice</td>
<td>CDL-AD(2011)020</td>
</tr>
<tr>
<td>Imperative mandate and similar practices</td>
<td>CDL-AD(2009)027</td>
</tr>
<tr>
<td>Choosing the date of an election</td>
<td>CDL-AD(2007)037</td>
</tr>
</tbody>
</table>

**Electoral systems**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proportional electoral systems: the allocation of seats inside the lists (open/closed lists)</td>
<td>CDL-AD(2015)001</td>
</tr>
<tr>
<td>Thresholds and other features of electoral systems which bar parties from access to Parliament: Comparative report (I) and Report (II)</td>
<td>CDL-AD(2008)037 CDL-AD(2010)007</td>
</tr>
<tr>
<td>Electoral systems – overview of available solutions and selection criteria</td>
<td>CDL-AD(2004)003</td>
</tr>
</tbody>
</table>

**Right to vote**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voters residing de facto abroad</td>
<td>CDL-AD(2011)022</td>
</tr>
<tr>
<td>Abolition of restrictions on the right to vote in general elections</td>
<td>CDL-AD(2005)011</td>
</tr>
<tr>
<td>Remote voting and electronic voting – compatibility with the standards of the Council of Europe</td>
<td>CDL-AD(2004)012</td>
</tr>
</tbody>
</table>

**Affirmative action and similar measures**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Women</td>
<td>CDL-AD(2009)029</td>
</tr>
<tr>
<td>Impact of electoral systems on women’s representation in politics</td>
<td>CDL-AD(2006)020</td>
</tr>
</tbody>
</table>
### National minorities

<table>
<thead>
<tr>
<th>Topic</th>
<th>Report Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dual voting for persons belonging to national minorities</td>
<td>CDL-AD(2008)013</td>
</tr>
<tr>
<td>Electoral rules and affirmative action for national minorities’ participation in decision-making process in European countries</td>
<td>CDL-AD(2005)009</td>
</tr>
<tr>
<td>Electoral law and national minorities</td>
<td>CDL-INF(2000)004</td>
</tr>
</tbody>
</table>

### Election observation and assessment

<table>
<thead>
<tr>
<th>Topic</th>
<th>Report Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Declaration of Global Principles for non-partisan election observation and monitoring by citizen organizations and Code of Conduct for non-partisan citizen election observers and monitors</td>
<td>CDL-AD(2012)018</td>
</tr>
<tr>
<td>Timeline and inventory of political criteria for assessing an election</td>
<td>CDL-AD(2010)037</td>
</tr>
<tr>
<td>Figure based management of possible election fraud</td>
<td>CDL-AD(2010)043</td>
</tr>
<tr>
<td>Cancellation of election results</td>
<td>CDL-AD(2009)054</td>
</tr>
<tr>
<td>Guidelines on an internationally recognised status of election observers</td>
<td>CDL-AD(2009)059</td>
</tr>
<tr>
<td>Guidelines on Media Analysis during Election Observation Missions</td>
<td>CDL-AD(2009)031</td>
</tr>
<tr>
<td>Internationally recognised status of election observers - Summary of Recommendations</td>
<td>CDL-AD(2009)026</td>
</tr>
</tbody>
</table>

### Referendums

<table>
<thead>
<tr>
<th>Topic</th>
<th>Report Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Code of good practice on referendums</td>
<td>CDL-AD(2007)008rev</td>
</tr>
<tr>
<td>Referendums in Europe – an analysis of the legal rules in European States</td>
<td>CDL-AD(2005)034</td>
</tr>
<tr>
<td>Tables summarising the replies to the questionnaire on referendums</td>
<td>CDL-AD(2005)034add</td>
</tr>
<tr>
<td>Tables summarising the replies to the questionnaire on local and regional referendums</td>
<td>CDL-AD(2005)034add2</td>
</tr>
</tbody>
</table>

### Political parties

<table>
<thead>
<tr>
<th>Topic</th>
<th>Report Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Political party regulation – Guidelines</td>
<td>CDL-AD(2010)024</td>
</tr>
<tr>
<td>Code of Good Practice in the Field of Political Parties</td>
<td>CDL-AD(2009)021</td>
</tr>
<tr>
<td>Method of nomination of candidates in political parties</td>
<td>CDL-AD(2015)020</td>
</tr>
<tr>
<td>Prohibition of financial contributions to political parties from foreign sources</td>
<td>CDL-AD(2006)014</td>
</tr>
<tr>
<td>Participation of political parties in elections</td>
<td>CDL-AD(2006)025</td>
</tr>
<tr>
<td>Financing of political parties – Guidelines and report</td>
<td>CDL-INF(2001)008</td>
</tr>
<tr>
<td>Prohibition and dissolution of political parties and analogous measures – Guidelines</td>
<td>CDL-INF(2000)001</td>
</tr>
</tbody>
</table>