Ukraine twenty years after independence
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The Constitutional Development of Ukraine

Amendment Procedures in Theory and Practice

Caterina Filippini

The first constitutional reforms in Ukraine made their timid appearance at the end of the Eighties, together with the implementation of the *perestroika* policy. They became far more evident, however, when Ukraine, the first of the Republics of the former Soviet Union, proclaimed its Declaration of State Sovereignty on 16 July 1990, and subsequently adopted the State Independence Act on 24 August 1991 (Kuzio, 2000; Martinyniuk, 1992). The principles set out in the foregoing declaration as a democratic country were introduced directly in the last Ukrainian SSR Constitution of 1978, becoming thereafter the subject of the many amendments gradually made up until the end of 1994 (Massias, 1999).

By adopting these amendments the Ukrainian Supreme Soviet implemented the procedure set forth by the Ukrainian Soviet Constitution of 1978. The new constitutional provisions, concerning human rights and freedoms, political pluralism and the separation of powers, were therefore introduced in the former Soviet Constitution of 1978 upon approval of the necessary two–thirds majority of the components of the Ukrainian Supreme Soviet. Considering that the State system was changed through the introduction of the foregoing amendments, it is possible to affirm that during this period the constituent power was exercised also in Ukraine, although in compliance with pre–existing rules, as was the case in many countries which had fallen under the Soviet influence.

However, given that over the years the numerous amendments made to the Ukrainian Constitution of 1978 had given rise to contradictory rules, some of which hampering the President's possibility to exercise his powers, Leonid Kuchma, after winning the presiden-

tial election of 1994, insisted (Bartole, 1999) on the need to enact a Law "On basic principles for the organization and functioning of State power and local self–government" (Filippini, 1997, 1998). This should represent a temporary Small Constitution like the Constitutional Law "On mutual relations between legislative and executive institutions and local self–government," adopted in Poland in October 1992. However, unlike Poland, in Ukraine the Law "On basic principles for the organization and functioning of State power and local self–government" was approved by the Verkhovna Rada on 18 May 1995 by simple majority. Accordingly it could not be qualified as a super–primary rule, for which a majority of at least two thirds of Parliament members was required. With the aim of giving the foregoing law the features of a super–primary rule and prevailing on the contradictory amended provisions of the Constitution of Ukraine of 1978, the so–called Constitutional Agreement between Ukrainian Verkhovna Rada and Ukrainian President related to the Law "On the basic principles for the organization and functioning of State power and local self–government in Ukraine, until the adoption of a new Constitution" was prepared, and adopted by the Verkhovna Rada on 7 June 1995. On 8 June 1995 it was signed by the President of Ukraine, the Verkhovna Rada Speaker and the Members of Parliament who had adopted same the day before. The Agreement expressly stated that the provisions of the "Law on the basic principles for the organization and functioning of State power and self–government" would prevail (even though not approved by a majority of two–thirds of Parliament members) over the provisions of the Ukrainian Soviet Constitution of 1978, at least until the enactment of a new Constitution. Although the Constitutional Agreement was immediately applied, it should also be pointed out that it also it had only been approved by a simple majority of Parliament members.[1] The particularity of the procedure for the adoption of the Constitutional Agreement was remarked by the President Kuchma himself, who on 7 June 7 1995, addressed Parliament, saying, "We must understand that this agreement will become a most important political–legal act that, in a non–traditional manner, will strengthen the relationship between the President and the Supreme Council and will create a new foundation for the organization of state

1. The Verkhovna Rada on June 7 voted 240–81 to accept the compromise.

power in the country (Kolomayets, 1995) ." At the same time, Oleksander Moroz, Chairman of the Verkhovna Rada, stated that: "Upon signing this Constitutional Agreement we can implement the law on power without the necessary constitutional majority but we do not have the possibility of entering the present Parliament. . . we should reach a compromise, even just to give our people hope and the opportunity to change for the better (1995)." Only the Communist faction in the Verkhovna Rada called the move a "constitutional coup (1995)." Although the adoption of the Constitutional Agreement could not be considered a constitutional coup, it is to "be acknowledged that there has been a rupture in the Ukrainian constitutional continuity, although only a transitory rupture, until the full legality of the regulatory order is restored by adopting of a new Constitution."[2] At the same time, the procedure whereby the Constitutional Agreement was approved, represented a clear image of the newly elected President's position vis–à–vis the other political players. Furthermore, it anticipated the standstill situation which would characterize the relations between the executive and law–making powers in the years to come. In conclusion therefore, the procedure followed in adopting the Constitutional Agreement showed that while President Kuchma was not in a position to force the situation (unlike his Russian counterpart did in 1991 when, by Presidential Decree No. 1400 enacted the "Regulations on federal power bodies during the interim period") Ukrainian Parliamentary members had also no power to block the Head of State.

Moreover, events related to the signature of the Constitutional Agreement were only the beginning of a series of issues tied to the

2. "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" adopted by the Venice Commission, CDL(1995)040e–restr ,11 September 1995. In the french version of the Opinion Lavrinovitch added that «L'Accord constitutionnel n'étant pas un acte normatif du pouvoir législatif, son adoption ne peut être considérée sous l'angle des exigences de la procédure parlementaire. Il s'agit d'un acte conjoint des pouvoirs exécutif et législatif adopté selon une procédure spéciale. Outre des problèmes juridiques, l'Accord constitutionnel a réglé un dilemme politique important, en jouant un rôle de compromis dans le conflit entre les instances du pouvoir, qui reflétait objectivement la montée de la tension sociale due à une grave détérioration de la situation au sein des structures tant de l'Etat que de l'autonomie locale». Note of Lavrinovitch O. in "Avis sur la situation constitutionnelle actuelle en Ukraine à la suite de l'adoption de l'accord constitutionnel entre in to le Conseil suprême et le Président de l'Ukraine", adopté par la Commission de Venise, CDL(1995)040f–restr, 11 septembre 1995.

procedure, emerging during the constitutional evolution in progress to date. One year after the signature of the Constitutional Agreement the procedure used to adopt the first post–soviet Constitution (Nahaylo, 1992; Vorndran, 1997; Vorndran, 1999; Vorndran, 2000; Wolczuk, 1998; Wolczuk, 2001; Gönenç, 2002). became the subject of an intense debate. For a better understanding of the procedure agreed upon to adopt the new Ukrainian Constitution, we must first consider the pre–Soviet legal tradition. Indeed, all the Constitutions of the Soviet Republics envisaged the right of the Supreme Soviet to adopt a new Fundamental Law. Whereby the Soviet Ukrainian Constitution of 1978 established that the adoption of a new Constitution came under the Supreme Soviet's competence,[3] unfortunately no indications were given as to the quorum of Parliament members required for its adoption.

Consistent with the Ukrainian SSR Constitution of 1978, the "Constitutional Agreement related to the Law on basic principles for the organization and functioning of State power and local self–government until the adoption of a new Constitution" of 1995 established that the newly created Verkhovna Rada had the authority to ratify a new Constitution.[4] However, here too no mention was made to the approval procedure. From this point of view, the Constitutional agreement was even more ambiguous than the provisions of the Constitution of 1978 as in Part IV it was stated that "Until a new Ukrainian Constitution is adopted, neither party shall submit any questions for consideration via all–Ukrainian referendum, consultative referendum, or national poll, except for those matters which concern the adoption of a new Ukrainian Constitution, the text of which shall be agreed by both Parties." Due to the increasingly sharp contrasts between the executive and law–making bodies the then President Kuchma stated that the new Constitution project had to be submitted directly to vote of the entire nation and, considering the Verkhovna Rada's inertia, the President issued a decree "On holding a pan–Ukrainian referendum on the adoption of a new Constitution in Ukraine." Verkhovna Rada's reaction to this threat, was to vote on the project of the new

3. Art. 97 of the Constitution of Ukraine SSR of 1978.
4. Art. 17 of the Constitutional Agreement.

Constitution on 28 June 1996 [5] after a 26–hour meeting, unofficially known as "the constitutional night of 1996," with 315 ayes, 36 nays and 12 abstentions (Markus, 1996).

In conclusion the procedure followed to adopt the Ukrainian Constitution of 1996 was in line with Soviet tradition, since it had been approved neither by a constituent meeting convened for that purpose nor by a referendum, but by Parliament. On the other hand, Soviet Constitutions used to be approved unanimously, in view of the leading role of the sole party, whereas the new Constitution of Ukraine in 1996 was considered adopted only with 315 votes, thus bypassing the majority of two thirds of the members of Parliament, established by the Soviet Constitution of Ukraine of 1978, for the introduction of single amendments to the Constitution.[6] The particularity of the adoption of the first post –Soviet Ukrainian Constitution was also remarked by the Constitutional Court of Ukraine. Its decision taken on 11 July 1997 on the enactment of the new Constitution stated the following, "Adoption of the Constitution of Ukraine by Verkhovna Rada of Ukraine was a direct act of realizing people's sovereignty that only once authorized Verkhovna Rada of Ukraine to adopt it. Further confirmation thereof is found in Article 85.1 of the Constitution, which does not provide for the right of Verkhovna Rada of Ukraine to adopt the Constitution of Ukraine; in addition according to Article 156 of the Constitution a draft–law on introduction of amendments to chapters establishing fundamental principles of the constitutional order after adoption by Verkhovna Rada of Ukraine, is to be approved at an all–Ukrainian referendum."[7]

Therefore, as remarked by the Constitutional Court, the new Ukrainian Constitution of 1996,[8] which entailed the end (Markus,

5. Ukraine was the last of the Commonwealth of Independent States (CIS) to approve its first post–Soviet Constitution.

6. Art. 171 of the Constitution of USSR of 1978

7. Risheniia Konstytutsiinogo Sudu Ukraïni, n. 3–zp/1997g, in < www.ccu.gov.ua >.

8. Original text of "Konstitucija Ukraïni. Priinjata na p'iatii sesiï Verkhovnoï Radi Ukraïni 28 chervnja 1996", in *Constitutions of the countries of the world — Ukraine,* Gisbert H. Flanz ed., Oceana Publications, Inc, Dobbs Ferry, New York, Booklet 3 — Official Ukrainian Texts, Release 97–1, January 1997, pp. 1–72. English text of "Constitution of Ukraine adopted at the Fifth Session of the Verkhovna Rada of Ukraine on 28 June 1996", in *Constitutions of the countries of the world — Ukraine*, Gisbert H. Flanz ed., Oceana Publications, Inc, Dobbs Ferry, New York, Booklet 3 — English Translations, Release 97–1, January 1997, pp. 1–85.

1996; Futey, 1996), pp. 29–34) of all the legal effects of the Ukrainian Soviet Socialist Republic's Constitution of 1978 and of the 1995 "Constitutional Agreement" no longer affirms that Verkovna Rada has the right "to adopt a Constitution." However, like many contemporary Constitutions, it provides for two different procedures to amend the constitutional provisions, distinguishing between a severe and super–severe procedure (Mikhaleva, 1998). Both procedures provide for the intervention of the Constitutional Court to assess whether the proposed amendment limits citizens' rights guaranteed by the Constitution, or breaches the independence and territorial integrity of Ukraine. The severe procedure ends up with the approval of the proposed amendments by two–thirds of Verkhovna Rada members, while the super–severe procedure provides that same amendments voted by Verkhovna Rada are to be further submitted to the people's referendum (Venislavskii, 2010).

Pending the conflict about power sharing between the President and Parliament, and due to populist tendencies, the first attempt to modify the new institutional design did not abide by the procedure for introducing amendments into the Constitution established in 1996. Indeed, on 15 January 2000, President Kuchma issued a decree to hold a referendum on 16 April 2000 on six "constitutional" matters (Huge, 2005). Thus admitting the submission of four questions, the Constitutional Court in its decision of 27 March 2000 rejected the submission of matter No. 6[9] concerning the adoption of a new Constitution directly by popular vote (Wolczuk, 2002; Brown and Wise, 2004) stating that, "Confirming the exclusive right of the people to determine and change the constitutional order, the Constitution has established a clear procedure for introducing changes into the Constitution. The issue of the adoption of a new Constitution is put to an all–Ukrainian referendum without prior obtaining the people's consent on the need to adopt a new Constitution. It brings into doubt the very existence of the current Constitution, which may lead to weakening of the fundamental principles of the constitutional order and of the rights and liberties of people and citizens."[10] Despite this decision[11]

9. The Constitutional court also did not admit question No.1 about the right of the President to dissolve Parliament in case of a vote of no confidence by Verkhovna Rada expressed at an All–Ukrainian referendum.

10. Risheniia Konstytutsiinogo Sudu Ukraïni, n. 3–rp/2000.

11. The Constitutional Court also affirmed that the referendum on the other four ques-

Kuchma still did not desist from modifying the Fundamental Law, and instead of submitting a new Constitution text to a Pan–Ukrainian referendum, during his Presidency in conformity with the Article 156 of the Constitution he decided to pass a series of drafts on the introduction of amendments into the Constitution of 1996 directly to Verkhovna Rada. Of the three main projects on constitutional amendments submitted by the President to Verkhovna Rada between 2003 and 2004 (Kuzio, 2005) the one which best deserves our attention is project No. 4180. This constitutional draft was approved in the first reading (Christensen, Rakhimkulov, Wise, 2005) and obtained the favourable opinion of the Constitutional Court before the Presidential elections in 2004. It was re–approved by Verkhovna Rada with the required quorum in a second reading, held between the second session of Presidential elections and the repetition of same, the winner being Yushchenko.[12] However, it was intended to formally validate the political agreement on the allocation of powers entered into between the two principal competitors for presidency, Viktor Yanukovych and Viktor Yushchenko (Flikke, 2008). Following the events of the Orange Revolution (Katchanovski, 2008) the constitutional project approved in the second reading by Verkhovna Rada revealed some differences compared to the first version approved. Nevertheless, it was not considered necessary, as provided for by Article 159 of the Ukrainian Constitution, to resubmit same to the Constitutional Court's assessment of constitutionality (Hale, 2006) and on 8 December 2004 (Nußberger and Von Gall, 2010) the project was registered under Law No. 2222 "On introduction of amendments into the Constitution of Ukraine (Bos, 2010)." Failure to solicit the Constitutional Court's opinion when drawing up the Law No. 2222 was subject to criticism also by the Parliamentary Assembly of the Council of Europe (Hülshörster, 2008) which remarked in its Resolution No. 1466 of 2005, "The Assembly expressed its concern about the fact that constitutional changes were adopted without any prior consultation with the Constitutional Court, as envisaged by Article 159 of the Ukrainian Constitution and interpreted

tions could have only advisory character. Therefore pursuant to the referendum results a corresponding draft on constitutional amendments had been submitted to the Verkhovna Rada. The Parliament anyway rejected the draft underling the conflict with the President.

12. The Constitution of Ukraine, 1996 (as Amended to 2004), in *Constitutions of the Countries of the world: Ukraine*, Wolfrum R., Grote R. Eds., Oceana Publications, Release 2006–3, Issued April 2006, pp. 1–60.

in the Constitutional Court of Ukraine's decision of 1998. Therefore the Assembly urges the Ukrainian authorities to address these issues as soon as possible in order to secure the legitimacy of the constitutional amendments and their compliance with European standards."[13] At the same time some concern about the new constitutional rules was expressed (Nußberger, 2008; Nußberger, 2009) by the European Commission for Democracy through Law (better known as Venice Commission). [14]

President Yushchenko seriously pushed for new constitutional reforms after Law No. 2222 came into effect on 1 January 2006 (Simon, 2009; Medushveskii A., 2010). He also tried to deviate from the procedure established by the Constitution (Lange, Reismann, 2009) on introducing amendments. Although the Fundamental Law did not foresee this, on 27 December 2007 Yushchenko entrusted a Constitutional National Assembly with the task to draft new wording of the Constitution as a first move. Secondly, following the first meeting of the Constitutional National Assembly, which took place on 20 February 2008, the President affirmed that if the new wording of the Constitution written by the National Constitutional Assembly was not adopted by the majority of two/thirds of the members of Verkhovna Rada he would with no hesitation submit the project to an All–Ukrainian referendum (Yushchenko, 2008) .

Yushchenko had shown his tendency towards the adoption of the Constitution by means of a referendum as early as 26 January 2006, when he affirmed that in 2004 "the constitutional reform took place without the participation of citizens... and I believe that the people should have their say concerning the amendment (Rakhmanin, 2006)." Therefore, given that since 1996 there had been no constitutional

13. Resolution No.1466 (2005) "Honouring of obligations and commitments by Ukraine", adopted by the Assembly on 5 October 2005 < www.coe.int >

14. The Venice Commission underlined that "The Law on amendments as adopted in December 2004 reflects many of the Commission's comments in its previous opinions on this matter. Nevertheless, a number of provisions, such as the rights of legislative initiative conferred on both the Cabinet and the President, or the President's role in foreign and defence policy might lead to unnecessary political conflicts and thus undermine the necessary strengthening of the rule of law in the country. In general, the constitutional amendments, as adopted, do not yet fully allow the aim of the constitutional reform of establishing a balanced and functional system of government to be attained", in "Opinion on the amendments to the Constitution of Ukraine of 8.12.2004" adopted by the Venice Commission CDL–AD(2005)015, 10–11 June 2005.

provisions concerning the possibility of adopting a completely new wording of the Constitution, a new appeal was made to approve some through popular vote. Nevertheless, President Yushchenko, unlike his predecessor Kuchma, appealed directly to the Constitutional Court of Ukraine to obtain an official interpretation of the provisions of the Constitution of 1996 on *referendums* and the procedure for amending the Fundamental Law.[15] On 16 April 2008, referring to its previous decisions of 2000 and 2005, the Constitutional Court stated that "Provisions of Article 72.2 of the Constitution viewed in a systematic relation to Article 5 of the Constitution should be understood as the people of Ukraine being the bearers of sovereignty and the only source of power in Ukraine may exercise their exclusive rights to determine and change the constitutional order in Ukraine at an all–Ukrainian referendum upon popular initiative by means of adopting the Constitution pursuant to procedure which is to be determined in the Constitution and in the laws of Ukraine."[16]

Following this decision, which in effect banned the President's initiative to hold a binding referendum on the adoption of a new wording of the Constitution, on 31 March 2009, Yushchenko decided to submit to Parliament a draft law on the introduction of amendments into the Constitution.[17] Although the Yushchenko's draft law was submitted 25 August (as in the Soviet era) to a popular consultation, it was definitively removed from the Agenda of Verkhovna Rada on 22 October 2009. The same day, Parliament also ceased to deal with the alternative draft law[18] of BYuT and the Party of Regions (Sidorenko and Kutscherk , 2009) but the constitutional reform issue was raised again after the presidential elections of January–February

15. The Constitutional Court was required to give an official interpretation of Articles 5.2, 5.3, 69, 72.2, 74, 94.2 and 156.1 of the Constitution.

16. Risheniia Konstytutsiinogo Sudu Ukraïni, n. 6–rp/2008.

17. The English version of the draft law of Ukraine amending the Constitution presented by the President of Ukraine is recorded in Opinion CDL(2009)068 adopted by the Venice Commission, 16 April 2009.

18. Between 1996 and 2006 efforts to change the text of the Constitution were aimed essentially to modify the relationship between the President, Government and Parliament envisaged by the original text of the 1996 Constitution. After 2006, all efforts to introduce constitutional amendments or to adopt new wording of the Ukrainian Constitution were essentially aimed at changing the form of government introduced in Ukraine pursuant to the law on the amendments of the Constitution of Ukraine No. 2222.

2010 (Herron, 2010) by the new president Viktor Yanukovych (Silitski. 2010).

The aim of Yanukovych (Dörrenbächer and Oliinyk, 2011) was, as prior to his election, to change the institutional relationship between President, Government and Parliament. However, at the beginning, in order to change the Government structure, the President and his supporters, neither proposed the holding of an Pan–Ukrainian referendum nor the introduction of amendments in line with the procedure set forth in the Constitution, but rather only tried to change the meaning of Art. 83 Const. which provided for a decisive role of the coalition of deputy factions in the appointment of the Prime Minister (Massias, 2008). Since Law No. 2222 became effective in January 2006 under Art. 83 of the Constitution, the President could in fact put forward a candidate for the office of Prime Minister to Verkhovna Rada on the basis of a proposal of a coalition of deputy factions, representing the majority of the members of Parliament (the coalition of deputy factions had to be formed within 30 days and had to submit to President a proposal for appointment as Prime Minister within 60 days following regular or special parliamentary election or from the date when activities of the coalition of parliamentary factions in Verkhovna Rada are terminated). The need to form a coalition consisting of only parliamentary factions representing the majority of Verkhovna Rada members was also remarked on 17 September 2008 by the Constitutional Court. In its official interpretation of Art. 83 Const. stated that: "The subjects forming a coalition of deputy factions are deputy factions. Hence, whereas a deputy faction is a group of People's Deputies of Ukraine elected from the election list of their respective political parties (election bloc of political parties), the coalition of deputy factions consists of deputy factions that, according to the results of election and reconciliation of political positions, formed a coalition of deputy factions." [19]

Therefore, considering the difficulty to reach the two/thirds majority of Parliament members required to directly amend Art. 83 Const., President Yanukovych (Dörrenbächer and Oliinyk, 2011). first proposed to amend Art. 59 of the Statute "On the Rules of Procedure

19. Risheniia Konstytutsiinogo Sudu Ukraïni, n. 16–rp/2008. For a summary of the decision see also "Ukraine. Cour constitutionelle", Bulletin de jurisprudence constitutionnelle, Editions du Conseil de l'Europe, 3 (2008), pp. 581–582.

of Verkhovna Rada" whose original wording under Art. 83 of the Constitution required that a coalition had to consist of deputy factions only. On the contrary, Art. 59 of Verkhovna Rada Procedural Rules as amended on 9 March 2010 permitted a coalition of not only deputy factions but also of individual deputies, thus spoiling all efforts made as part of the Orange Revolution to avoid deputies switching from one party to another (Herron, 2002; Pankevich, 2009) even though this was opposed by legal scholars and international organizations. Thus, after a vote of no confidence in the Prime Minister Tymoshenko, it was possible to form a new parliamentary majority coalition, supported not only by the deputy factions of the Party of Regions, of the Communist Party and of the Popular Party, but also by Parliament members who left the NuNs and BYuT deputy factions. The formation of the new coalition was also approved by the Constitutional Court. On 6 April 2010. The Constitutional Court, departed from its earlier interpretation of Art. 83 Const. and in the new official interpretation of Art. 83 Const. and Art. 59 of the Law on Rules governing Verkhovna Rada stated that, "As far as constitutional appeals are concerned, the provisions of Article 83.6 of the Constitution, and Article 59.4 of Ukraine's Verkhovna Rada Procedural Rules approved by the Law "On the Rules of Procedure of Ukraine's Verkhovna Rada" No. 1861–VI dated February 10, 2010, considered in a systematic relation with Articles 1, 5, 15, 36, 38, 69, 76, 79, 80, 81, 83.5, 83.7, 83.9 and 86 of the Constitution, and Articles 60 and 61 of Rules of Procedure the Ukraine's Verkhovna Rada shall be understood as allowing the People's Deputies of Ukraine, in particular those who are not members of the deputy factions, which started the coalition of deputy factions in Ukraine's Verkhovna Rada, to participate in the formation of the coalition of deputy factions in Ukraine's Verkhovna Rada. " [20] The Court justified this on the grounds that its judgment of 2008 gave an official interpretation of Article 83 Const. only without considering the Rules of Procedure governing Verkhovna Rada, as at that time they had only been approved by a Parliament decree and not by law as required by the Constitution. Otherwise in its judgment of 2010 it would have given an official interpretation not only of Art. 83 Const. but also of Art. 59 of the Rules of Procedure of Verkhovna Rada, as

20. Risheniia Konstytutsiinogo Sudu Ukraïni, n. 11–rp/2010.

these were adopted by law on 10 February 2010. Therefore, in Ukraine the meaning of Art. 83 of the Constitution was modified by an informal change (Ganino, 2009), at the beginning of 2010, i.e. by the amendments of a primary law and by an official interpretation of the Constitution given by the Constitutional Court.

Finally the Constitutional Court of Ukraine played a conclusive role in the shaping of the Ukrainian Government system, as between 2008 and 2010 it also changed its mind about the constitutionality of the constitutional amendments enacted in 2004 during the Orange Revolution (Mazmanyan, 2010) in their entirety.

In February 2008 (5) the Constitutional Court, following the constitutional appeal filed by 102 deputies who claimed that the Law No. 2222 had violated the procedure for its review and adoption, as it had been approved in December 2004, without receiving the mandatory opinion required from the Constitutional Court of Ukraine regarding its compliance with Articles 157 and 158 of the Constitution , stated that when the Law No. 2222 took effect on 1 January 2006, its provisions and clauses became an integral part of the Constitution, while the Law itself lost its legal validity.[21] The Court therefore rejected the appeal, based on its non–compliance with the constitutional appeal requirement, under Article 39 of the Constitutional Court Law.

On the other hand, in its judgement of 30 September 2010[22], the Constitutional Court, to which a new constitutional appeal was made by 252 deputies, who claimed again that the Law No. 2222 had infringed the procedure for its review and adoption, did not reject the application and stated that "The Verkhovna Rada of Ukraine adopted Law No. 2222 without observing the procedure of its consideration and approval, established by the Constitution of Ukraine, whereby it violated the provisions of its part 2 of Article 6, part 2 of Article 19, point 1 of part 1 of Article 85, Article 159." The Court also ruled that "The Constitutional Court of Ukraine proceeds on the basis that the recognition as unconstitutional of Law No. 2222 in connection with a violation of the procedure of its consideration and approval means the renewal of the previous wording of the norms of the Constitution of Ukraine, which were amended and excluded by Law No. 2222. This

21. Uchvala Konstytutsiinogo Sudu Ukraïni, n. 6–y/2008.
22. Risheniia Konstitutsiinogo Sudu Ukraïni, n. 20–rp/2010.

ensures the stability of the constitutional order in Ukraine, guaranteeing of constitutional rights and freedoms of man and citizen, the integrity, inviolability and continuity of the Constitution of Ukraine, its supremacy as the Fundamental Law of the State throughout the entire territory of Ukraine."[23]

Therefore, although in 2008 the Constitutional Court of Ukraine had refused to decide on the constitutionality of the foregoing amendments, on 30 September 2010 it ruled that they were unconstitutional (Zaikin, 2010) [24] due to their failure to comply with the provisions of the Constitution and restored the Constitution to its original version.[25]

The re–introduction of the original text of the Constitution of 1996(Luchterhandt, 2010) led to the adoption of amendment of the laws governing the organization and the activity of constitutional bodies.

First of all, in October 2010, the Law "On the Procedural Rules of Verkhovna Rada" was amended for the second time after its adoption. The provisions regulating the compulsory creation of a coalition of parliamentary groups in charge of designating a candidate to the office of Prime Minister, were removed from the Procedural Rules of Verkhovna Rada.

Later on, in December 2010 the Law "On the Government of Ukraine" was amended, stating this time that the Prime Minister still had to resign, when a new President of the Republic had been elected.

Subsequently, in December 2011, Verkhovna Rada changed its electoral system for the fourth time since the Ukrainian Independence.[26] In the first parliamentary election after independence in 1994, the unicameral legislature of 450 deputies was elected, as in the Soviet period, from one–member constituencies (Birch, 1995; Pammet, 1996; Birch, 1998; Kuzio, 1995) with, eventually, double ballot. After 1994 the Ukrainian Parliament adopted a mixed electoral system, where under half of the 450 seats in Verkhovna Rada had to be elected through

23. English translation of the Judgment of 30 September in "Opinion" No. 599/2010 adopted by the Venice Commission, CDL(2010)116, 18 November, 2010.

24. Zaikin S., "Monitoring konstitutsionnych novostei — Ukraina –", « Sravnitel'noe konstitutsionnoe Obzrenie », 79.6 (2010) p. 152.

25. The Constitution of Ukraine (as Reinstated in 2010), in *Constitutions of the Countries of the world: Ukraine*, Wolfrum R., Grote R. Eds., Oceana Publications, Realease 2011–1, January 2011 [2C2?]www.oceanalaw.com[2C3?].

26. See "Opinion on the Draft Election code of the Verkhovna Rada of Ukraine" adopted by the Venice Commission, CDL–AD(2010)047, 17–18 December 2010.

proportional representation in a single nation–wide constituency with a 4% threshold, and the other half had to be elected in one round in single–member constituencies. This mixed electoral first past the post/proportional system was applied in the 1998 (Birch and Wilson, 1999; Wilson and Birch, 1999; Kubicek, 2001; Makhorkina, 2005) and 2002 (Durkot, 2002; Birch, 2003; Kuzio, 2003; Herron, 2004) parliamentary elections. In 2005 the Ukrainian Parliament moved from the mixed first past the post/proportional system to a pure proportional system with a closed list. Therefore in the 2006 parliamentary election (Hesli, 2007) and in the 2007 extraordinary election (Göckeritz, 2007; Copsey, 2008; Herron, 2008; Jacunskaja, 2008) all seats were filled by means of a proportional representation, with nation–wide closed lists and a three per cent threshold for representation. Finally, in December 2011, the Rada re–introduced a mixed electoral first past the post/proportional system (Jilge, 2012). However, there are some differences compared with the mixed electoral system applied in 1998 and in 2002. In the new mixed electoral system, the electoral threshold in the nationwide district increased from 3% to 5%, the provision on the possibility to vote against all candidates and against all parties was removed, and the participation of blocs of parties was banned. Now, only parties can nominate a list of candidates in the nationwide district, while candidates in single mandate districts can be nominated by parties or through self–nomination. Moreover, the Constitutional Court stated that the same candidate could not simultaneously contest the election in the nationwide districts and in the first past the post constituencies.[27] It is clear that Court ruling and also the afore–mentioned provisions of the new version of the electoral law were aimed to support large parties at the parliamentary election of 28 October 2012 when Verkhovna Rada would be elected again for a five–year period, because on 3 February 2011, 1996 Constitution was further amended by increasing[28] the term of office of Parliament from four to five years (Zaikin, 2011).

On the basis of the judgement of the Constitutional Court, which resumed the text of the Constitution of 1996, thus providing again

27. Risheniia Konstytutsiinogo Sudu Ukraïni, n. 8–rp/2012.

28. Verfassungsänderung: Fünfjährige Legislaturperiode für das Parlament — Dokumentation, « Ukraine–Analysen », n. 86, 08–02–2011, pp. 12–13.

the President of Ukraine formally qualifies as "Head of State" (and not Chief of the Executive), nevertheless entrusted with important duties in the field of the executive power (Sconfietti, 1999). First of all, he can directly appoint the Prime Minister with the subsequent approval of Verkhovna Rada (Nordberg, 1998) the proposal submitted by a coalition of deputy factions, being no longer necessary. The President can also unilaterally revoke the Prime Minister and the other ministers who can also be voted out by Verkhovna Rada Feldbrugge, 2000; Protsyk, 2006). However, Parliament can be dissolved by the President only in the case where it fails to hold a plenary meeting within 30 days of the beginning of its session (Wise and Brown,1999). Therefore the wording of the Ukrainian Constitution formally continues to depart from the Russian Constitution because first of all the President is obliged to accept the resignation of the Prime Minister if he is vetoed out by Parliament; secondly, the possibility for the President to dissolve Verkhovna Rada is very limited. However, the horizontal checks and balances continue to be weak as well (Beichelt, 2004) therefore the comprehensive arrangements on the separation of powers proved to be unstable (Wolczuk, 1997) and could possibly lead to a concentration of powers, as seen in the past, under the same text of the Constitution during the Kuchma Presidency (Ishiyama, 2001; Protsyk, 2003; Protsyk 2005; Way, 2005a; Lambroschini, 2008).

In other words, a non well–balanced allocation of powers among the constitutional bodies might undermine the correct implementation of the principle of the power separation, not to mention the respect for human rights and pluralism, and the assertion of the form of a democratic and constitutional State (Kubicek, 2009).

Therefore, it would appear that Ukraine has not yet reached a steady constitutional law system (Tudoroiu, 2007) since, as previously discussed, during its 20 years of independence, the procedures adopted to change the Constitution to a certain degree, were not in full compliance with the procedure set forth by the first post–Soviet Constitution, and the constitutional agreement in force over time appears to be incapable of withstanding the political (Way, 2005b) and economic pressures.

Finally, on 24 August 2010, Yanukovych, after having abolished the National Constitutional Council created by the previous President Yushchenko, signed a new decree "On support to an initiative for the

creation of a Constitutional assembly" that envisaged the formation of a Scientific expert group on Constitutional assembly preparation led by Leonid Kravchuk, first President of Ukraine. The Constitutional assembly, as specified on 21 February 2011 in decree No. 224 "On the concept paper on the establishment and functioning of a Constitutional assembly" should be a "consultative–advisory body" to the President[29] and began to operate, composed of 95 members nominated by the President, on 20 June 2012. The constitutional laboratory of Ukraine seems really never ending.

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29. The Parliamentary Assembly and the Venice Commission of the Council of Europe welcomed the initiative to implement a new constitutional reform but at the same time they underlined that it was necessary to observe the amending procedure to the current Constitution. The Parliamentary Assembly underlined that "the decision of the Constitutional Court of Ukraine of 1 October 2010 that declares as unconstitutional Law No. 2222 amending the constitution in 2004… should now prompt the Verkhovna Rada to initiate a comprehensive constitutional reform process with a view to bringing Ukraine's constitution fully in line with European standards" while "the current Constitution should be amended instead of entirely new Constitution being adopted", in Resolution "On Functioning of democratic institution in Ukraine", No. 1755(2010), 5 October 2010. The Venice Commission affirmed that "It is clear that the current constitutional framework based on a ruling of the Constitutional Court does not enjoy sufficient legitimacy, which only the regular constitutional procedure for a constitutional amendments in the Verkhovna Rada can ensure", in "Opinion on the constitutional situation in Ukraine" adopted by the Venice Commission, CDL–AD(2010)044, 17–18 December 2010. Finally directly referring to the Concept paper the Venice Commission said that: "The propose constitutional assembly in Ukraine appears to be a preparatory constitutional assembly, which will draft a reform package, to be presented to the President, with the proposal that it should then be submitted to the Verkhovna Rada for the adoption according to the existing procedures, as laid down in section XIII of the current Constitution (point 12 of the Concept Paper). This guarantee for the respect of the existing constitutional amendment procedure is strongly commanded", in "Opinion on the concept paper on the establishment and functioning of a Constitutional assembly of Ukraine" adopted by the Venice Commission, CDL–AD(2011)002, 25–26 March 2011.

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Caterina Filippini