The Venice Commission and Constitutional Dilemmas

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Abstract
The Venice Commission is experienced in giving advice on best practice in situations of constitutional crises. In the course of its work since the 1990s, it was confronted on several occasions with the deadlock or misuse of constitutional mechanisms and had to give guidance on how to overcome constitutional dilemmas. The article analyses the innovative approaches provided by the Venice Commission under very specific circumstances in Ukraine, Albania, Moldova and Kyrgyzstan and discusses in how far they might be helpful for the transition 2.0.
Keywords: Venice Commission, constitutional reform, transition, abuse of power, constitutional courts

I. The Challenge of the 'Transition 2.0'

Constitutional transitions may be complex or easy, foreseeable or unforeseeable, long-lasting or quick. No transition can be considered the last one; each period of stability can come to an end.

The first transition in Central and Eastern Europe concerned the transformation of socialist States into liberal constitutional States based on a market economy; this transformation was understood to be a *conditio sine qua non* for being fit for the accession to the European Union. It was followed by a 'retrogression' reintroducing elements of power concentration incompatible with the EU understanding of democracy and rule of law. The

transition 2.0 is a model not yet existing, but hoped for – the return to a model fully in compliance with the foundational ideas of European integration and the values enshrined in Article 2 EU Treaty. Thus, while there are intensely debated models for the second transition (Poland, Hungary, Romania), the turn-around to the past is, for the time being, hypothetical. The last elections in Hungary in 2022 have clearly confirmed the Orban-model of power concentration instead of bringing about regime change. Thus, the focus of the debate is concentrated on Poland and the elections in 2023.

The main problem of the presumed or hoped for transition 2.0 is that the constitutional systems of the respective States have been rebuilt during the anti-democratic backlash in a way that does not allow simply reforms to be rolled back. On the contrary, constitutional hurdles have been built up that are difficult to overcome. This is so because many of the constitutional mechanisms (e.g. lifelong appointment of judges, eternity clauses in constitutions, property protection, legal force of judgments) function – with a view to a re-change of the system – *à contresens* as they provide solid protection for all systemic changes including those incompatible with rule of law standards.

The Venice Commission has been created at the beginning of the 1990s in order to support the first transition from socialist to rule-of-law based, democratic and liberal constitutional models.[1] It has, however, over the decades been permanently confronted with (constitutional) changes that were considered as retrogression[2] and has advised against them.[3]

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1 Thomas Markert, 'Die Venedig-Kommission des Europarats – Vom Beratungsgremium zum Akteur der Verteidigung von Rechtsstaat und Demokratie (1990–2022)', EuGRZ 49 (2022), 602; Christoph Grabenwarter, 'Standard-Setting in the Spirit of the European Constitutional Heritage' in: Simona Granata-Menghini and Ziya Caga Tanyar (eds), *Venice Commission, 30th Anniversary 1990–2020* (Lund: Juristförlaget 2020), 257–327; Angelika Nußberger and Júlia Miklasová, 'The Venice Commission' in: Daniel-Erasmus Khan, Evelyne Lagrange, Stefan Oeter and Christian Walter (eds), *Democracy and Sovereignty: Rethinking the Legitimacy of Public International Law* (Leiden and Boston: Brill 2023), 269–287.

2 To name just a few famous examples: the dismantling of the judicial system in Poland starting from the transformation of the Constitutional Tribunal into a body loyal to the ruling party (Venice Commission CDL-AD(2016)001); the foreign-agents-legislation in Russia that was meant to curtail political freedoms of the society (Venice Commission CDL-AD(2014)025); Venice Commission CDL-AD(2016)020; Venice Commission CDL-AD(2021)027).

3 This was sometimes done in very strong terms; see Venice Commission CDL-AD(2016)001, para. 138: 'Crippling the Tribunal's effectiveness will undermine all three basic principles of the Council of Europe: democracy – because of an absence of a

At the same time, the Venice Commission was called upon to deal with the deadlock or misuse of constitutional mechanisms and had to solve the question of how to overcome dilemmas. Famous examples are the (mis)use of constitutional courts in order to topple political compromises achieved on the basis of negotiation. In other scenarios, the constitutional rules turned out to be dysfunctional because of unforeseen developments.

In this context, unorthodox solutions were identified. The respective proposals can be seen as part of what might be called pragmatic constitutionalism or emergency constitutionalism. It is worth studying those examples in order to identify innovative approaches that might be helpful for the transition 2.0.

II. Lacunae in the Constitutional Regulation

Constitutional provisions are often characterised by their vagueness and openness. This is, however, only true for human rights provisions and provisions fixing values or State goals. The regulations on State organisations, on the contrary, can be so precise that they do not leave any room for manoeuvre for interpretation. In such a situation, the constitutional process may be at an impasse if the respective rule does not 'work'. Well-known examples for this scenario can be found in the recent constitutional history of Moldova and Albania where the political actors asked the Venice Commission for help.

central part of checks and balances; human rights – because the access of individuals to the Constitutional Tribunal could be slowed down to a level resulting in the denial of justice; and the rule of law – because the Constitutional Tribunal, which is a central part of the Judiciary in Poland, would become ineffective.'; Venice Commission CDL-AD(2021)027, para. 91: 'As a result, [the recent amendments] constitute serious violations of basic human rights, including the freedoms of association and expression, the right to privacy, the right to participate in public affairs, as well as the prohibition of discrimination.'

1. Deadlock in presidential elections – the Moldovan example

In Moldova, according to the wording of the Constitution[4] a 3/5 majority of the deputies of the Parliament was required for the election of the President. If such a quorum could not be attained in two rounds, the Parliament had to be dissolved and new elections had to be scheduled.[5] This regulation created a serious deadlock in the political process and led to an enduring constitutional crisis from 2009 onwards.[6]

According to the wording of the Constitution, it was impossible to exclude a vicious circle with a theoretically endless repetition of elections and dissolutions of Parliament, potentially always with the same candidates.[7] While in such a situation the best solution would have been a modification of the Constitution, the political majority failed to achieve this aim due to the low participation rate in the respective referendum;[8] it was declared invalid.[9]

In this situation, the Venice Commission did not advise to neglect a clear and unequivocal constitutional provision and to bypass it with an organic law, not even under exceptional circumstances:

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4 The current Constitution of Moldova was adopted on 29 July 1994 and amended eight times. The election of the President by a 3/5 majority of the Parliament was foreseen from 1997 to 2016.

5 Article 78 of the Moldovan Constitution at that time read: (1) The President of the Republic of Moldova shall be elected by the Parliament by secret ballot. … (3) The candidate who receives the votes of three-fifths of the elected deputies shall be elected President. If a candidate has not obtained the required number of votes, a second ballot shall be held between the first two candidates in descending order of the number of votes received in the first round. (4) If in the second ballot no candidate has received the required number of votes, a new election shall be held. (5) If, after the new election, the President of the Republic of Moldova is not elected, the incumbent President shall dissolve the Parliament and set the date for the parliamentary elections. (6) The procedure for the election of the President of the Republic of Moldova shall be regulated by an organic law.

6 In 2009, the candidate of the Communist party, Zinaida Greceanîi, did not attain the 3/5 majority and could thus not replace Vladimir Voronin. The Parliament was dissolved, and new elections were scheduled for July where the communist party lost the majority. However, the opposition was not in a position to elect the President; respective attempts failed in November and December of the same year.

7 Venice Commission CDL-AD(2011)014, para. 25.

8 See 'Moldovan referendum appears to flop on low turnout', Reuters, 5 September 2010, https://www.reuters.com/article/moldova-referendum-invalid-idUSLDE6840FD20100905.

9 See on the political background in Moldova at that time Venice Commission CDL-AD(2011)014, paras 10–12.

> 'For the Venice Commission, the question of the majority required to elect the President is a substantive issue, a fundamental criterion for the validity of the election, which is expressly stated in the Constitution and the organic law. As such, it appears to be one of the constitutional principles that should be respected even in this unprecedented situation.'[10]

The wording of the Venice Commission's opinion thus suggests a distinction between fundamental and non-fundamental constitutional provisions. Therefore, it holds a literal interpretation 'preferrable'.[11] The 3/5 majority is seen as an expression of the general aim of the Constitution to achieve a compromise between the main political forces of the country. Nevertheless, the Venice Commission finds a contradiction between the aim of guaranteeing a well-functioning constitutional system and the fact of allowing (or even making necessary) endless repetitions of presidential elections and dissolutions of Parliament. Based on comparative constitutional law the Venice Commission highlights the deficiency of the Constitution of Moldova of not having a default mechanism for repeatedly failing elections. Against this background, the Venice Commission calls for a 'functional interpretation' of the Constitution:

> 'As the Parliament is unable to elect a compromise candidate and thus cannot prevent the crisis from continuing, it might be wise to opt for a functional interpretation of the Constitution: in view of the Constitution as a whole and the specific purpose of Article 78, which is to ensure the proper functioning of the constitutional bodies, such repetitive events should be limited, so as to prevent the abuse of successive dissolutions and to provide the necessary guarantee of political stability. The political and institutional impasse in which Moldova finds itself must be resolved as soon as possible.'[12]

In the end, the Venice Commission thus promotes a pragmatic approach in the light of the overarching aim of preserving a well-functioning constitutional system.

The crisis was, however, not easily solved afterwards, and in the end, it was solved on the basis of politics, not law. Presidential elections held on 16 December 2011 failed and were repeated on 15 January 2012. They

10 Venice Commission CDL-AD(2011)014, para. 32.
11 Venice Commission CDL-AD(2011)014, para. 33.
12 Venice Commission CDL-AD(2011)014, para. 39.

were annulled as they were not secret. On 16 March 2012, Parliament finally succeeded in electing the candidate Nicolae Timofti with 62 votes out of 101 with the Communist party blocking the elections and some rebels of the Communist party supporting Timofti. He stayed President until 23 December 2016 thus ending the constitutional crisis.[13] Yet, a change of the text of the Constitution was necessary as otherwise, a similar crisis might have repeated itself. Thus, the 3/5 majority in Parliament was abolished in 2016 on the basis of a judgment of the Constitutional Court which declared the introduction of the 3/5 majority vote in 2000[14] unconstitutional and thus 'revived'[15] the original version of Article 78 of the Constitution.[16] Interestingly, the relevant part of the opinion of the Venice Commission is quoted at length in the judgment of the Constitutional Court.[17]

The background of the controversy is the swaying back and forth between pro-European and pro-Russian forces in Moldova.

2. Radical effects of vetting procedures – the Albanian example

A similar constitutional deadlock situation could be observed in Albania when the election of Constitutional judges was blocked for such a long time that the Constitutional Court became dysfunctional.

According to Article 125 of the Constitution of Albania, the Constitutional Court consists of nine members. The basic rules of the election reflect a model that is quite common in young democracies, but not only there: Three members are appointed by the President of the Republic, three members are elected by the Assembly and three members are elected by the High Court; thus involving the executive, the legislative and the judicial branch of power on an equal footing. The candidates have to be ranked by a special body, the Justice Appointment Council.

13 See Alexander Tanas, 'Moldova breaks political deadlock, elects president', 16 March 2012, https://www.reuters.com/article/us-moldova-president-idUSBRE82F19M20120316.

14 Law no. 1115-XIV of 5 July 2000 amending the Constitution of 1994.

15 The word is used in the judgment of the Constitutional Court, see para. 8 of the operative part.

16 Judgment nr. 7 from 4 March 2016 on constitutional review of certain provisions of the Law no. 1115-XIV of 5 July 2000 amending the Constitution of the Republic of Moldova (modality of electing the President) (Complaint no. 48b/2015), https://www.constcourt.md/ccdocview.php?l=en&tip=hotariri&docid=558.

17 See e.g. para. 180 of the Judgment of the Constitutional Court which refers to para. 39 of the VC opinion.

While this system seems to be solid and well thought through, it could not cope with specific developments in Albania.

Due to the high level of corruption in the country, it was agreed to introduce large-scale vetting procedures for judges. This process was, however, not swift and smooth, but long-lasting and complicated. What was worse, it had the effect of paralysing the justice system as a whole. All but one of the judges of the Supreme Court either left voluntarily or were dismissed.[18] As a result, the Supreme Court was no longer able to play its role in the election of the constitutional court judges. Furthermore, it was unclear how to apply the constitutional election rules in the case of early resignments of judges as there was no clear explanation about the order in which the election process would have to proceed. The crisis was aggravated by the fact that – due to the controversy over the interpretation of the constitutional norms – two judges were elected for the same vacancy, one by the President and one by the Parliament. The President of Albania refused to take the oath of the judge elected by Parliament and suspended the election procedure although the Constitution did not provide for such a measure.

The Venice Commission was once again called upon to advice on solutions for a deadlock where the literal interpretation of the Constitution did not show a way out. Interestingly, the Venice Commission took into account the extent to which the difficulties were the result of bad faith or the consequence of a legal vacuum. Concerning the President's refusal to swear the judge in it held:

> 'While such suspension is not explicitly envisaged by the Law on the Constitutional Court, it could be consistent with a default mechanism meant to deblock a situation in case of malicious or wilful inaction on the part of one of the actors involved. If there is neither malicious nor wilful inaction, but rather a legal vacuum to be filled, the ratio legis of a default mechanism would not apply. As a consequence, there must be the possibility to interrupt the – otherwise automatic – functioning of the default mechanism. On the basis of a teleological interpretation of the legal provisions, it could therefore be justified to accept the belated appointment of a second candidate by the President. It, therefore, seems

18 See the comment of the Venice Commission CDL-AD(2020)010, para. 85: 'The unforeseen difficulties and delays in the vetting of the judges sitting on the High Court specifically resulted in its paralysis for over two years. The Commission's delegation learned that there are few candidates for appointments to the High Court and that this would also be due to the rigour of the vetting procedure.'

> justified that the President refused to accept the oath of the judge allegedly appointed by default.'[19]

On the contrary, the solution provided by the Parliament – the adoption of a new procedure replacing the swearing-in by the President – was deemed not to be in line with the Constitution as it would create 'uncertainty as to the legitimacy of members starting to work at the Constitutional Court'.[20]

Furthermore, the Venice Commission proposed another pragmatic solution concerning the inability of the High Court to appoint judges and stated that 'it should make its outstanding appointments as soon as it is functional again.'[21]

The decisive message of the Venice Commission in such a situation of conflict was, however, the following:

> 'Finally, the Venice Commission reiterates the absolute need for dialogue and loyal cooperation among State institutions. The mandate and powers of State institutions must be respected in order for them to fulfil their legitimate institutional objectives, always seeking the best benefit for the citizens of Albania.'[22]

While the Venice Commission always stresses the prerogative of the national constitutional court, it takes over its role, as in the Albanian case, whenever the constitutional court is non-existent or blocked in its decision-making power. The Commission uses the whole panoply of constitutional interpretation rules but dares to go against literal interpretation if otherwise the constitutional problems cannot be solved.

The direct effect of the opinion of the Venice Commission was that the most controversial appointment by the Parliament not confirmed by the President was considered null and void. Yet, the Venice Commission's recommendation of quickly compromising on new appointments was not implemented. After the difficult phase in the winter of 2019 where the conflict between Parliament and Government broke out and the Venice Commission was asked for its opinion it lasted until December 2020 before the next new judge was appointed; two more appointments followed in

19 Venice Commission CDL-AD(2020)010, para. 98.
20 Venice Commission CDL-AD(2020)010, para. 100.
21 Venice Commission CDL-AD(2020)010, para. 104.
22 Venice Commission CDL-AD(2020)010, para. 108.

December 2022. By now (March 2023) the court works again in full composition.[23]

III. Abuse of Power by Constitutional Courts

While the constitutional crises in Albania and Moldova were caused by the interplay of internal and external factors, the constitutional stalemate in Kyrgyzstan, Ukraine and Moldova were direct consequences of the (evident) abuse of power by constitutional courts.

1. The reversal of constitutional amendments – the case of Kyrgyzstan

Contrary to other central Asian countries Kyrgyzstan was open to democratic forms of governance not only on paper but also in reality. It was, however, a painful path with ups and downs that ended abruptly in 2021 with the adoption of a model authoritarian constitution.[24]

In the early 2000s, there was, however, still hope for a democratic development. President Akajev who had become more and more authoritarian was forced to resign in the so-called Tulip Revolution. In 2007, the Parliament adopted a new version of the Constitution soon to be followed by yet another one; the second one entered into force in January 2007. In September of the same year, however, the Constitutional Court declared that both new versions of the Constitution had been adopted in a formally incorrect procedure and declared them null and void. This allowed the new President Bakiev, to put a third version of the Constitution to a referendum,[25] this time concentrating much more power in the hands of the President, i.e. in his hands.[26]

The action of the Constitutional Court that resembled a legal coup d'État had to be respected by the Venice Commission, albeit it criticized it with clear words:

23 See https://www.gjk.gov.al/web/Composition_90_2.php.
24 Venice Commission CDL-AD(2021)007.
25 The text of this Constitution is documented by the Venice Commission, see https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2007)127-e.
26 On the background of the opinion of the Venice Commission see Markert (n. 1), 628.

> 'It is indeed highly unusual, if not unprecedented, that a Constitutional Court declares the full text of an acting Constitution to be unconstitutional. As a general rule, constitutional courts have to take their decisions on the basis of the Constitution valid at the moment of their decision. Former versions of the Constitution are irrelevant. This means that the Court could take this decision only if the text of the Constitution adopted on 30 December 2006, and which was supposed to have entered into force on 15 January 2007, was invalid ab initio. There might be doubts as to whether the 2003 Kyrgyz Constitution envisaged such a possibility. Furthermore, it has to be stressed that such an interpretation would have important consequences. All the actions based first on the Constitution of 9 November 2006 and then on the Constitution of 15 January 2007 would be without a legal basis. That would also apply to any election of constitutional judges taking part in the relevant decision.'[27]

Despite this criticism, the Venice Commission provided a neutral analysis of the provisions of the new Constitution and thus, implicitly, accepted their validity. In line with the task it was given it avoided any further general comments and concentrated on the substance of the new regulation.

In 2010, there was another turn-around, once again after turmoil and bloodshed, this time with an interim President. The newly adopted Constitution was seen by the Venice Commission as an 'effort of the Provisional Government and the Constitutional Assembly of Kyrgyzstan aimed at drafting a new Constitution that is fully in line with democratic standards.'[28] Yet, as already stated, the present Constitution does not confirm the path towards a truly democratic model, but led to an authoritarian backlash.[29]

In following the constitutional development in Kyrgyzstan, the Venice Commission showed a pragmatic approach and was reluctant to comment on the context of the adoption of the new versions of the Constitution.

2. The reversal of constitutional amendments – the case of Ukraine

Constitutional history in Ukraine was even much more complicated. In 2004 after the so-called Orange Revolution presidential power was cur-

27 Venice Commission CDL(2007)128, para. 10.
28 Venice Commission CDL-AD(2010)015, para. 64.
29 See the text of the new Constitution adopted by referendum on 11 April 2021 https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2023)009-e.

tailed. Six years later, in 2010, the Ukrainian Constitutional Court declared those changes unconstitutional because of procedural irregularities. As a consequence, the former Constitution, albeit with certain changes, was revived.

This was an unprecedented act of a Constitutional Court. It was so badly argued that the Venice Commission was forced to mention the major deficiencies, even if it claimed not to criticize judgments of Constitutional Courts. Thus, it observed 'a certain inconsistency' in the case-law of the Constitutional Court as the findings on which the judgment was based were incompatible with what the Constitutional Court had decided just four months earlier. On the one hand, the Constitutional Court had argued that constitutional amendments, once they entered into force, became 'an integral part of the Constitution', even if they were not based on an expert opinion of the Constitutional Court, on the other hand, it had held that the lack of an expert opinion by the Constitutional Court was a reason for the invalidity of reform provisions. This obvious inconsistency was not even addressed in the Court's judgment.

The Venice Commission commented as follows:

> 'The Commission also noted, with some surprise, that the 30 September Judgment does not refer to the Decision of February 2008 and does not explain the difference between the petition of 2007, and the petition of July 2010. It also considers highly unusual that far-reaching constitutional amendments, including the change of the political system of the country – from a parliamentary system to a parliamentary-presidential one – are declared unconstitutional by a decision of the Constitutional Court after a period of 6 years. The Commission notes however, that neither the Constitution of Ukraine nor the Law on the Constitutional Court provides for a time-limit for contesting the constitutionality of a law before the CCU.'[30]

As a consequence, the Venice Commission laments on the legitimacy problems linked to the Constitutional Court's legal coup d'État:

> 'As Constitutional Courts are bound by the Constitution and do not stand above it, such decisions raise important questions of democratic legitimacy and the rule of law. It is clear that a change of the political system of a country based on a ruling of a Constitutional Court does not

30 Venice Commission CDL-AD(2010)044, paras 34–35.

> enjoy the legitimacy which only the regular constitutional procedure for the constitutional amendment, and preceding open and inclusive public debate can bring.'[31]

The Venice Commission finds therefore problems with the acceptability of the judgment and legal certainty. It argues that the Ukrainian Constitutional Court should have observed the principle of proportionality and at least have included 'unambiguous transitory norms' in its judgment.[32]

What is of interest in the context of the present analysis are the consequences of such a deficient judgment that is not only wrong but seems to be adopted 'for ulterior purposes'.[33] While the Constitutional Court speaks out explicitly in favour of the reinstatement of the pre-existing legal contents of the 1996 Constitution, the Venice Commission identifies a lot of issues where this solution plainly does not work. One major problem is created by the unclarity as to the length of the parliamentary term, as the parliamentarians were elected on the basis of the 2004 Constitution for a five-years-term whereas the Constitution of 1996 provides for a parliamentary term of only four years. As in the case of other constitutional dilemmas where no solution can be found in the text of the Constitution, the Venice Commission pursues a double strategy: admonishing cooperation and pragmatic actions to overcome the crisis and developing potential solutions:

> 'The Commission strongly hopes that the CCU, as the only authority competent to give the official interpretation of the State Constitution, will take its decision on this matter very soon and preferably before the end of the year, thus contributing to ensuring the rule of law and the stability of the country in a difficult moment of its constitutional history.'[34]

The other problem was that it was necessary to bring the existing legislation in line with the former and new Constitution. This was done hastily, neglecting procedural rules, thus repeating the mistakes that led to the nullification of the Constitution in the first place.

In its conclusions the Venice Commission is very outspoken about its negative take on the constitutional developments in Ukraine. It warns

31 Venice Commission CDL-AD(2010)044, paras 36–37.
32 Venice Commission CDL-AD(2010)044, para. 38.
33 See Art. 18 European Convention on Human Rights (ECHR).
34 Venice Commission CDL-AD(2010)044, para. 53.

against the creation of an 'excessively authoritarian system'[35] and calls for a comprehensive constitutional reform.

All that means that the Venice Commission criticizes, but does not put into question the validity of the fake (or faked) process of replacing one constitution with another one. Rather, it looks into the future and requests fundamental changes.

3. Self-interested decisions of the Constitutional Court – the case of Ukraine

The 2010 scandalous judgment was not the only one. In 2020, the Ukrainian Constitutional Court annulled large parts of an anti-corruption law,[36] the implementation of which was considered by international donors as a *conditio sine qua non* for the granting of loans.[37]

What made the judgment so piquant was that the Ukrainian President had filed a motion in the proceedings to declare four of the fifteen judges, including the chairman, biased. The background to this was a direct conflict of interest, as proceedings were pending against these judges themselves on the basis of the very anti-corruption law whose constitutionality they were to judge. However, these motions of bias were simply not decided upon. In addition, the judgment declared legal regulations null and void, which had not been challenged by the applicants, without giving any reasons for this. In general, the reasoning was erratic, lacked subsumption under the norms and cited international norms only incompletely, even if conclusions were drawn from them. In addition, the annulment of the norms was, unlike usually, ordered with immediate effect and not for a later date.[38]

The Constitutional Court's move was considered to be unacceptable by the Ukrainian public and international donors alike. The Ukrainian President reacted to the storm of indignation with a bill declaring the judges'

35 Venice Commission CDL-AD(2010)044, para. 64.

36 Judgment of the Ukrainian Constitutional Court (27 October 2020), n°13-r/2020, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2020)078.

37 The background of the case is explained in Venice Commission, CDL-PI(2020)019, para. 7 ff.; see also the analysis of the judgment in Angelika Nußberger, 'Was ist Willkür? Auf der Suche nach europäischen Standards', JZ 76 (2021), 965–973.

38 See the analysis of the Venice Commission, CDL-PI(2020)019, paras 17 ff.

decision null and void.[39] The reason given was that the ruling 'was issued in the private interest of the judges of the Constitutional Court, is arbitrary and unfounded and contradicts the rule of law, as well as disregards the European and Euro-Atlantic directional decision of the Ukrainian people.'[40] The law also ordered the revalidation of the norms declared unconstitutional, as well as the removal of all judges of the Constitutional Court and a new election of judges.

This measure caused the President of the Venice Commission and the President of the anti-corruption agency GRECO to intervene. They warned Zelensky in a letter that terminating the judges' mandates would be a blatant breach of the Constitution and the principle of separation of powers.[41]

> 'We urge you nonetheless to consider the adverse, profound and long-term implications for your country of a possible rushed decision to dismiss the constitutional justices. We encourage you to explore possible alternative ways of ensuring that the fight against corruption in line with international standards remains a priority for your country.'

Zelensky agreed to request an expert opinion from the Venice Commission, which confirmed the inadequacy of the Constitutional Court's argumentation as it had 'serious shortcomings' and fell 'short of standards of clear reasoning in constitutional court proceedings'.[42] At the same time, the Venice Commission proposed a series of measures for improving the function of the Constitutional Court for the future.[43]

Even in light of its findings that the controversial Constitutional Court judgment did not live up to the standards of argumentation to be requested from a Constitutional Court, the Venice Commission defended the strong position of constitutional courts in the architecture of democratic States. It stressed that constitutional court judgments are final and binding, even

39 Draft Law No. 4288 'On renewal of public confidence in constitutional proceedings', in Ukrainian, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70282.

40 The first Article of the law is cited in Venice Commission, Urgent Opinion No. 1012/2020 on the reform of the Constitutional Court, CDL-AD(2020)039; see the comment Markus Akeret, 'Selenski versucht einen Befreiungsschlag gegen die Verfassungsrichter', Neue Züricher Zeitung, 3 November 2020, https://www.nzz.ch/international/ukraine-selenski-auf-konfrontationskurs-mit-verfassungsgericht-ld.1585081.

41 See https://www.venice.coe.int/files/2020_10_31_UKR_JointGRECOVeniceCommissionLetterSpeakerVerkhovnaRada.pdf.

42 Venice Comission, CDL-PI(2020)019, para. 21.

43 Venice Commission, CDL/Pl(2020)019.

if they are wrong. While subsequent changes of the legislation (and the Constitution) are possible they must not repeat the contents of the invalidated laws. The Venice Commission also requested restraint in criticizing constitutional courts. Based on these reflections, it held that a Constitutional Court 'cannot be "punished" for its decisions, but its working can be improved'.[44]

The Venice Commission furthermore defended a conservative line of reasoning with regard to the comprehensive powers of constitutional courts. It spoke out against removing completely their autonomy in adopting their own rules of procedure and did not argue in favour of a stronger influence from outside in dismissing or disciplining constitutional court judges, a power in Ukraine left entirely to the Constitutional Court itself. However, it requested more transparency in this regard.

Furthermore, it insisted on the importance of a selection procedure that would guarantee the high quality of the personal composition of the court and advocated international cooperation in this respect.[45]

Concerning the question of the reopening of procedures the Venice Commission showed a nuanced approach, fully aware of the dilemma constitutional courts would be faced with in such circumstances:

> 'Such a possibility could be provided for in the Law on the Constitutional Court in cases where the Constitutional Court has failed to abide by the laws and procedures applicable to itself – in particular, where judges have participated who should have been excluded because of conflicts of interest. The problem with such a provision would be that due to the final and binding nature of the decision of the Constitutional Court, it would be for the Court itself to come to the conclusion that it failed to abide by the law.'[46]

The final conclusions of the Venice Commission stress the exceptionality of reopening a case and limit its consequences:

> 'The Venice Commission, therefore, does not recommend instituting a possibility for a Constitutional Court to re-open its proceedings, in general. That could easily be abused for exerting pressure on the Court to re-open its proceedings for political reasons. Such a possibility could

44 Venice Commission, CDL-PI(2020)019, para. 38.

45 See as a follow-up to this aspect the Venice Commission's opinion on the improvement of the procedure on the election of judges CDL-AD(2022)054-e.

46 Venice Commission, CDL-PI(2020)019, para. 86.

> however be opened when the criminal liability of a judge relating to that case (e.g. bribe-taking) has been established. In any case, a re-opening of the decision cannot lead to the reinstatement of a law that has already been annulled. That would change the nature of the Court from a negative to a positive legislator.'[47]

It, therefore, seems that the Venice Commission's approach is much less radical than the one of the European Court of Human Rights. This will be discussed below.

As a follow-up to the opinion the law announced by President Zelensky to annul the Constitutional Court decision and dismiss and re-elect all judges of the Constitutional Court was withdrawn. But the crisis was by no means over. The Ukrainian Parliament passed the anti-corruption law that had been declared unconstitutional, a short time later for a second time.[48] Zelensky suspended the president of the Constitutional Court – who had been appointed by his predecessor Yanukovych – first for two months, then for another month. On 27 March 2021, he annulled the original appointment decree as well as that of another judge, as they posed a threat to the State independence and national security of Ukraine, and he was thus required by the Constitution to intervene.[49] Action beyond the law was thus justified as serving to protect the law. The legal debate became a political one with a friend-foe polarisation in the sense of Carl Schmitt.[50]

The fight between President and Constitutional Court continued until the beginning of the Russian aggression against Ukraine. The Constitutional Court declared the President's decree annulling the appointment of the president of the Constitutional Court by Yanukovych incompatible with the Constitution; it refused to swear in the new judges appointed by Zelensky

47 Venice Commission, CDL-PI(2020)019, para. 89.

48 Euronews, 'Ukraine's parliament defies court ruling and restores anti-corruption legislation', 4 December 2020, https://www.euronews.com/2020/12/04/ukraine-s-parliament-defies-court-ruling-and-restores-anti-corruption-legislation.

49 Presidential Decree No. 124/2021, 27 March 2021 on 'Certain questions concerning Ukraine's national security', in Ukrainian: https://ips.ligazakon.net/document/view/U124_21?utm_source=jurliga.ligazakon.net&utm_medium=news&utm_content=jl03&_ga=2.255099919.628368149.1622024495-727478107.1622024495. After the start of the war the former President of the Ukrainian Constitutional Court Olexandr Tupyzkyj was spotted in Vienna although he would not have been allowed to leave the country, see https://www.derstandard.de/story/2000134472045/chef-des-ukrainischen-verfassungsgerichts-wurde-in-wien-gesichtet.

50 Carl Schmitt, *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien* (9th corrected edn, Berlin: Duncker & Humblot 2015), 25.

'until vacancies appear'. Sergiy Holovaty acts as interim president. The Venice Commission was once again involved in assessing a new procedure for the election of the judges of the Constitutional Court.[51] More questions remain open than could be regarded as solved. The Venice Commission takes a critical view of how constitutional justice in Ukraine continues to develop.

4. Politically motivated constitutional court judgments – the case of Moldova

In the case of Moldova, the Venice Commission was also asked several times to adopt opinions because of political turmoil caused by Constitutional Court decisions.[52] The decisions considered to be the most scandalous ones were the decisions of 8 June 2019 to dissolve Parliament. This seemed to be motivated by the endeavour to keep the party of the oligarch Plahotniuc in power as the Parliament elected on the very same day a new government composed of the representatives of the opposition.[53]

In this case, national and international pressure was so high that the Constitutional Court revoked its decisions a few days later. As explained in a letter dated 17 June 2019 from the President of the Constitutional Court of Moldova to the Venice Commission Secretariat, the revocation of the contested series of decisions was meant to be 'a source of social peace, rule of law, democracy, as well as a safeguard of a proper framework of human rights protection, by combating a political crisis of great magnitude'.[54] Here again, it can be said that the solution to the crisis was rather political than legal. While the President of the Constitutional Court referred to legal principles enshrined in the Constitution he did not give any legal grounds for the reversal of the judgments of the Constitutional Court; there was neither an argument about the legal basis for this bold step nor an assessment of what was wrong in the former judgments. Rather, it was clear that the Constitutional Court reacted to pressure from outside and inside the country.

In this situation, the Venice Commission was not confronted with the question of assessing the consequences of obviously wrong yet binding

51 https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2022)054-e.

52 For an overview see Markert (n. 1), 628.

53 Markert (n. 1), 628.

54 Cited in the opinion of the Venice Commission, CDL-AD(2019)012 (n. 11).

constitutional court decisions. On the contrary, it was free to analyze those decisions from the ex post perspective.

Therefore, the Venice Commission gave up its usual restraint in assessing Constitutional Court decisions. It harshly criticized the procedure of the adoption of the respective court decisions which were rushed (five judgments within three days, partly on weekends) and violated basic procedural principles. In the Venice Commission's opinion, it was a clear case of collusion between political forces and the Court, a 'coordinated action at lightning speed of the Democratic Party and the Constitutional Court'.[55] The Venice Commission also criticized the 'inconsistent argumentation'. The reason given for not summoning the Parliament to the proceedings was that it had already been dissolved, whereas the parliamentarians who brought the respective cases to the Constitutional Court were considered to still have *locus standi*. Furthermore, the Venice Commission argued that it was not justifiable to treat differently complaints concerning basically the same matter, conferring the status of 'extreme urgency' on some, but not on others.

In substance, the Constitutional Court's decisions could not be based on the Constitution as they were neither compatible with the wording of the relevant constitutional provisions nor with their telos.

By way of conclusion, the Venice Commission took a bold step in defining the limits of the power of constitutional courts:

> 'The Venice Commission reiterates that in a State governed by the rule of law, it is essential that constitutional bodies decide within the parameters of their legal authority and responsibility, lest the robustness of State institutions in the country in line with the Constitution, be seriously undermined and the democratic functioning of State institutions be irreparably compromised. Only in such a situation will the Venice Commission exceptionally accept to assess the judgments of a Constitutional Court.'[56]

While the findings of the Venice Commission are clear the question remains why the same principles were not applied to the judgment of the Ukrainian Constitutional Court which was also full of inconsistencies and obviously not within the parameters of its legal authority. What is lacking

55 Venice Commission, CDL-AD(2019)012, para. 34.
56 Venice Commission, CDL-AD(2019)012, para. 56.

is a clear standard of arbitrariness where what seems to be "the law" should no longer be considered to be "the law".

It should be accepted as general standards that there is a red line when constitutional court judgments have the function of a legal coup d'État. But the arbitrariness of a judgment must be obvious, leaping into the eyes of every objective observer.

IV. Lessons Learnt for Transition 2.0

The question is what can be learnt from those responses given to constitutional dilemma situations for re-developing legal systems in the transition 2.0.

1. Characteristics of transition 2.0

As explained above, transition 2.0 is hoped to happen. It is, however, not yet a reality. Unlike in the first transition, there is no longer a constitutional 'clean slate' where everything can be made new. In the late 1980s and early 1990s it was clear that the legal system built up during the time of socialism – with centralization instead of separation of powers, with judges fulfilling the party's will instead of being independent, with a sometimes formalist, sometimes instrumental understanding of 'the law' instead of rule of law, with the subordination of people's will to State ideology instead of political human rights – was to be given up and replaced by something completely new.

During the period of constitutional backlash, with or even without a change of the Constitution democratic institutions were captured and transformed into something different from what they were meant to be, but still function under the same or a similar heading. This is most evident with the Constitutional Court of Poland which – on the surface – continues working after 2015 as before. Nevertheless, it has lost its function of being a neutral arbiter in the constitutional process. The most important of its judgments reflects its loyalty – or what is more – its collusion with the Government in fundamentally changing the legal system, distancing it from European influence and enforcing a complete turn-around in controversial societal questions. Thus, the Constitutional Tribunal declared Article 6 ECHR in the interpretation given by the European Court of Human Rights

inapplicable in Poland,[57] a finding that was fiercely contradicted by all the former judges of the Constitutional Court.[58] It also declared the abortion law null and void thus restricting the possibility of abortion even more.[59]

Constitutional architects in such a situation do not have the possibility to re-design everything but are confronted with the question of what to do with existing institutions considered to be flagships in democratic States and safeguarded by important constitutional guarantees.

Furthermore, the transition 2.0 might suffer from the fact of being 'one too much'. While for the first transition, there might have existed enthusiasm, it might be difficult to convince people that within a relatively short period of time another fundamental transformation is necessary.

Last but not least, the transition 2.0 might be incomplete and unfinished. As it would be the reversal of the work of specific political forces, it is clear that it will be confronted with many obstacles. In so far as such obstacles cannot be fully overcome, reforms will often need to be based on compromises and thus not be as far-reaching as they would be intended to be.

2. Anti-deadlock mechanisms

The main question is what to do with the heritage of the constitutional backlash. In so far as it is based on binding constitutional judgments innovative approaches are needed to open the avenue for reforms.

The Venice Commission was often confronted with the task to find a way out of constitutional deadlock situations when Constitutional Court

57 Judgment of the Polish Constitutional Tribunal, 24 November 2021, Case K 6/21, https://K 6/21trybunal.gov.pl/en/hearings/judgments/art/11709-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny; the Polish Constitutional Tribunal challenged Article 6 ECHR a second time in its Judgment, 10 March 2022, Case K 7/21, https://trybunal.gov.pl/en/hearings/judgments/art/11820-dokonywanie-na-podstawie-art-6-ust-1-zd-1-ekpcz-przez-sady-krajowe-lub-miedzynarodowe-oceny-zgodnosci-z-konstytucja-i-ekpcz-ustaw-dotyczacych-ustroju-sadownictwa-wlasciwosci-sadow-oraz-ustawy-dotyczacej-krajowej-rady-sadownictwa.

58 Statement by Retired Judges of the Constitutional Tribunal on the Constitutional Tribunal Judgment in case K 7/21, Verfassungsblog, 14 March 2022, https://verfassungsblog.de/statement-by-retired-judges-of-the-constitutional-tribunal-on-the-the-constitutional-tribunal-judgment-in-case-k-7-21/.

59 Judgment of the Polish Constitutional Tribunal, 22 October 2020, Case K 1/20, https://trybunal.gov.pl/en/hearings/judgments/art/11300-planowanie-rodziny-ochrona-plodu-ludzkiego-i-warunki-dopuszczalnosci-przerywania-ciazy.

decisions blocked the way forward or constitutional provisions could not be applied because of very specific circumstances.

Generally, the approach of the Venice Commission can be called pragmatic, but not revolutionary. It never advised to openly neglect Constitutional Court judgments, even when they were obviously wrong, but rather showed a way to avoid committing the same errors in the future. Neither did it support the idea to openly neglect specific provisions of the Constitution, but rather tried to show teleological interpretations that might overcome hindrances. The principles the Venice Commission upheld in its opinions are thus mainly legal certainty and respect for institutional competences.

From the perspective of human rights, the European Court of Human Rights adopted a much more radical approach in its judgment Guðmundur Andri Ástráðsson v. Iceland,[60] where it stressed the subjective aspect of State organizational decisions in so far as they had an effect on the composition of tribunals. While the Court emphasized 'that the finding of a violation … may not as such be taken to impose on the respondent State an obligation under the Convention to reopen all similar cases that have since become res judicata' the possibility of requesting a reopening for those concerned by judgments of not correctly composed tribunals is undeniable. Such a possibility would not exist when 'only' the political process and not a subjective right is concerned. The violation of Convention rights can, however, be a very effective mechanism for reversing reforms. This was evidenced in the case Advance Pharma sp. z o.o v. Poland where the Court held that it was an 'inescapable conclusion' that the National Council of the Judiciary responsible for judicial appointments had to be changed.[61]

Nevertheless, with an 'only subjective' approach based on the jurisprudence of the European Court of Human Rights many of the features changed in the constitutional backlash would remain intact.

V. An Outsider's Role in Deblocking Constitutional Impasses

The Venice Commission is not a court that builds up binding case-law comparable to one of the European Court of Human Rights. Nevertheless,

60 ECtHR (Grand Chamber),*Guðmundur Andri Ástráðsson v. Iceland*, judgment of 1 December 2020, no. 26374/18.

61 ECtHR, *Advance Pharma sp. z o.o v. Poland*, judgment of 7 May 2021, no. 4907/18, para. 365.

it is involved in many constitutional crisis situations, especially in the new democracies in Central and Eastern Europe and has responded to many – always different – questions concerning dilemma or deadlock situations where a literal interpretation and application of constitutional provisions did not provide a solution to intricate problems. In these situations, the Venice Commission's role is that of a pragmatic problem-solver.

The question is how far the Venice Commission's solutions can be used for elaborating models for overcoming potential problems in the transition 2.0. Some preliminary conclusions may be drawn:

In so far as the personal (partisan) composition of specific State institutions, above all the Constitutional Court, is concerned the Venice Commission does not provide any ideas on how to bring about change. In all its opinions, even in those where it had to confirm abuse of power on the part of the constitutional courts, it concentrated only on future improvements and guarantees for a selection of constitutional court judges fulfilling high quality standards. At the same time, it excluded any form of 'punishment' for wrong decisions and warned against undue influence on constitutional courts and criticism that would weaken their authority. Yet, it proposed new models for the future and accepted intensive vetting procedures. A change of the personal composition of courts including the Constitutional Court seems, however, possible under the jurisprudence of the European Court of Human Rights under Article 6 ECHR.

On the contrary, the Venice Commission gave advice on how to overcome institutional dilemmas, i.e. the dysfunction of a specific State institution due to unforeseen circumstances. In this context, it argued for a 'functional approach' allowing to deblock institutions on the basis of an 'only teleological' interpretation of the Constitution going beyond its wording. In this context the Venice Commission advices to take into account the idea of the Constitution as a whole – which is meant to make the State system function smoothly and not to create unnecessary difficulties – and finding a solution on that basis.

All in all, the Venice Commission is rather reactive than active. It has managed to build up consistent standards, for instance for elections according to the rule of law, but not in all fields. While it keeps quoting its own opinions it is only in the first phase of building up precedents; too often there are no opinions the Commission could build on. What is lacking is

a clear definition of arbitrariness[62] which might be very helpful in defining red lines in the transition 2.0.

In general, the Venice Commission emphasises the good cooperation and dialogue between all public authorities in order to overcome difficulties. To rescue the Constitution by violating it remains a dangerous endeavour. Yet, European standards and institutions might help when such steps are necessary to re-establish constitutional democracy.

62 Angelika Nußberger, 'The Notion of Arbitrariness in European Law' in: Christina Deliyanni-Dimitrakou, Hélène Gaudin and Eugénie Prévédourou (eds), *Le droit européen, source de droits, source du droit. Mélanges en l'honneur de Vassilios Skouris* (Le Kremlin-Bicêtre: Mare & Martin 2022), 433–444.