Department of Political Science

The Consolidation of Constitutionalism in Ukraine: The Role of the Constitutional Court and the Judiciary in the European Context

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Introduction

Almost 30 years have passed since the Soviet Union collapsed and Ukraine obtained independence. Once sovereignty was regained, Ukraine proclaimed its will to be integrated into the EU as the main official goal. Ukraine was the only post-Soviet state having started its state building by consensus among all powers. However, further events showed uncertainty of such compromise. Throughout its history, Ukrainian parliament has been constantly conflicting. Since 1990, Ukraine has tried to balance between Russia and the West.

The path of Ukraine was chosen in favor of democratic system of society, but each pro-Russian leader was bringing Ukraine back to the path of the liberalization of authoritarianism. On one side, Ukraine adopted the Constitution of Ukraine, became the member of the Council of Europe, signed the Association Agreement with the EU. On another side, Ukraine with wide-open geography, huge agricultural and industrial zones was always integrating to Russia. Thus, for centuries Ukraine has been under pressure of two regional powers – Russia and the EU. Such competition resulted in an extreme form today. The most intriguing thing in the history of Ukraine is the last presidential election in 2019, that proved Ukrainian democracy to be efficient and fair. The topic for thesis was chosen on the basis of these interesting but sometimes dramatic for Ukraine facts.

The first chapter will be dedicated to the review of Ukrainian constitutionalism, its building and main features, where one of them is transition character of society. The first step during transitional period was creation of the Constitution. It will be discussed crucial role of international actors all over the world in the draft of the Constitution of Ukraine. Reforms on judiciary was conducted together with the adoption of the Constitution, because autonomous judicial system was seen as the tool of effective realization of political plans. So, judicialization of politics was one of the main problems facing constitutionalism.

To continue discussion on judicialization, the second chapter is providing studying on judicial system wholly with special reference to the Constitutional Courts. To demonstrate commitment of being country with the European standards Ukraine first of all decided to create the Constitutional Court. Its task was to bring national legislation closer to the principles and practices of the EU, to ensure the rule of law and to protect human rights according to the constitutional norms. The Constitutional Courts was empowered to check all norms on their constitutionality. Studying on this issue is structured according to observance of the formal texts of legislation and quality of their implementation in real life. Ukraine as a post-Soviet state where the rule of law lacked correct understanding used to neglect written norms. Thus, it will be discussed the problem of implementation both domestic and international acts in Ukraine.

Having discussed Ukrainian background and the functioning of its institutions, the research will move on Ukrainian external dealings, particular its membership in the Council of Europe.

Partnership with Europe is known to have been started since Ukrainian independence. Ukraine has shown itself as a decisive country in the context of signing radical treaties, but often at the implementation stage taken responsibilities were not being met. In the third section case law will be taken into attention to detect additional challenges in Ukrainian state building and to examine the functioning of the judicial system.

Finally, comparative studying will help to understand why the Ukrainian constitutional system is different from the Russian one, and which decisions have turned Ukraine the other way. Russia, Ukraine, Moldova and Belarus will be taken into account. Russian judicial system is going to be examined under a magnifying glass. All in all, an analysis proved that Ukraine is an independent country that has matured for serious deeds.

1. Behind the Rise of Constitutionalism in Ukraine.

1.1 Constitutionalism and Human Rights in the Soviet Union

The constitutions cannot be evaluated from the question of a theoretical meaning about the nature and the role of constitutions. Instead, the constitutional progress in the post-Soviet states could be best explained in the context of the movement out of the preceding communist constitutional culture.

The Soviet system is characterized by the totalitarianism. What does it mean? Constitution-making in the USSR is best explained by the consequences of totalitarianism, and the specific nature of socialist law. Vladimir Bukovsky said, that unlike a dictatorship, where the ruling elite guilty of the regime's crimes was extremely small, a totalitarian regime set a whole class of rulers.[1] The Communist party claimed openly that there was nothing except the state. So, soviet law was created with the aim to provide socialism and to fight for socialism.

The New Economic policy was started in 1924, when the Soviet government permitted a renewal of capitalism, but it took all steps to develop Socialism at the same time. The main task was to strengthen the position of Socialism, to achieve the exclusion of the capitalist elements, and to make the win of the Socialist system as the basic system of the national economy. The first Constitution of the USSR was adopted on January 31, 1924, it became the fundamental law for the states comprising the single Soviet state.

This Constitution was entirely dedicated to the principles of building the socialist union on the basis of proletariat's dictatorship. Each state was given legally the equal rights, status, and the sovereignty. There were also approved the main national symbols: the National flag, the coat of arms. The approval and modifications to the fundamental values established in the Constitution were in the competency of the Congress of the Soviet Union. The member Republics will make changes in their Constitutions only in entirely conformity with the Constitution of the USSR. According to the Art. 7 of the Constitution "just one federal nationality was established for the citizens of the Republics comprising the Soviet".

When Josef Stalin started to control the USSR, the Communist Party of the Soviet Union declare off the illusion that the workers of the world would come together. Instead, Stalin focused on building socialism in one country by strengthening communism in the countries, that comprise the USSR, until the Communist system would become powerful enough to suppress capitalism.[2] It was clearly evident by passing a new constitution in 1936. At that time, it was the last phase of the New Economic Policy, the period of complete elimination of capitalism in all spheres of the

[1] Vladimir Bukovsky, Judgement in Moscow: Soviet crimes and western complicity, Kindle Edition, 2019

[2] David M, Olson and Gabriella, Ilonszki, Two decades of divergent post-communist parliamentary development, The journal of Legislative Studies, 2011

national economy. In fact, the complete victory of the Socialist system was achieved. The working class, the peasant class, and the intelligentsia remained, but it would be a fault to think that these social groups have not met changes. Proletariat of the USSR, mentioned before, has been transformed into new class. Working class has acquired new features, it liberated from exploitation, the like of which the history of humanity did not know before. It was Socialist type of economy, which did not know either crises or unemployment, neither poverty nor downfall, and which gave its citizens the chance to have cultured life[3].

All in all, the Marxian emphasis was applied: soviet human rights theory has always given superiority to economic and social rights over the political and civil rights privileged by democratic society. The Stalin Constitution guaranteed the citizen an economic and social rights, and offered a limited list of political and civil rights.[4] The 1936 Constitution granted broad list of individual rights: the right to work (Art. 118), the right to rest and leisure (Art. 119), the right to maintenance in old age (Art. 120), the right to education (Art. 121). According to the interests of working people, and in order to fortify the socialist system, the citizens of the Soviet Union were guaranteed by law: freedom of speech, freedom of the press, and freedom of assembly. (Art. 125). The citizens of the USSR were guaranteed also untouchability of the person. No person could not be arrested except the decision of a court or with the approval of a procurator. (Art. 127). The list of rights is hopeful, but these rights were nor enforceable for two reasons. Firstly, while broad rights were given, other constitutional provisions provided unsocial behavior unlawful. This term was widely defined. Under Criminal Code of 1922, crime was known as "every socially dangerous action or inaction that dangers the fundamental principles of the Soviet Union". Secondly, there was not court with the jurisdiction over constitutional questions. Separated of powers was not present, because the government powers were unified. The judiciary was subordinated to the political branches of government.

The third constitution of the USSR was adopted on 7 October 1977. The Brezhnev Constitution contained a separated chapter on the economic system. In this way Brezhnev wanted to outline the importance of the country's economy. The third Constitution made significant deviations from the previous constitution, property rights were legally established and divided into types. According to Article 10, "the fundament of the economic system of the USSR is socialist ownership of the ways of production in the form of state property (belonging to all people), collective farm and co-operative farm". Socialist property also covered the ownership of trade unions and other public organizations which they required to achieve the goals of their units. The state bodies guaranteed

[3] Blunden, Andy, The Collapse of the U.S.S.R. Available at www.marxists.org

[4] Lambelet, Doriane, The Contradiction Between Soviet and American Human Rights Doctrine: Reconciliation Through Perestroika and Pragmatism, Boston University International Law Journal, 1989

protection and provided conditions for its development. No one could not use socialist property for personal purposes.

Chapter 3 of the Constitution is dedicated to the social development and culture. In Article 20, it is written promising and unreal phrasing, that "the free development of each is the condition of the free development of all". State promised to follow the aim of giving citizens more real opportunities to make use of their originative energies and talents.

All in all, Brezhnev Constitution went down in history as the constitution of the developed socialism, because the main goal was to develop hugely socialist society and to form national state.[5] The third Constitution included new form of democracy – national discussion and referendums. New social rights were also prescribed: right for legal defense against invasion on honor and dignity and right to indicate the faults of state authority. Article 49 of the Constitution stated, that every citizen of the USSR has the right to submit proposals to state bodies and public organizations for criticizing defects in their work. Officials are obliged within established time framework to examine citizens' appeals, to reply to them, and to take appropriate decision.

Unfortunately, in circumstances of one-party (the guiding role of the Communists), many rights were no more than a formal statement. However, the Constitution brought the law closer to the standards of democracy.

It was an evidence of a struggle over competing designs of constitutionalism arising from the radical political passage taken by states.[6] States were moving from one constitutional culture to another, entirely different and unknown for them. It is important to tell, that the third Constitution had been seriously amended, rights and freedoms had been widened. The question whether human rights were real should be discussed additionally, because the Soviet Union did not go down in history as a democratic state, that protected and provided wide spectrum of human rights.

Human rights of the citizens in the USSR were hugely limited, because the population was united in support of the single State ideology. Afore 1991 the Soviet Union permitted one political party – the Communists, the members of which captured all key posts. Freedom of speech was restricted, and noncompliance was sanctioned. Political actions in contradict with the soviet ideas were not admitted, whether there were participation in free labor unions, religion organizations, or opposition political parties. The state proclaimed adhesion to the theory of Karl Marx, so rights of citizens to private property were restricted.

The regime retained in political power characterized by the deals of secret police, propaganda dispersed through the radio, TV, newspapers. All spheres of mass media were strictly controlled

[5] Shiman, David, Economic and Social Justice: A Human Rights Perspective, Amnesty International, 1999.
[6] Yevgenia Albats and Catherine A. Fitzpatrick, The State Within a State: The KGB and Its Hold on Russia – Past, Present, and Future, 1994.

by the state, so the mood of people's thoughts directly was under influence. There were also huge limitations on free discussion, political purification and persecution of opposition groups. It wholly contravenes the meaning of the articles in the Constitution of Lenin and the Constitution of Brezhnev. Article 125 of Lenin Constitution guaranteed freedom of speech and freedom of the press, but these rights were of no practical consequences as Soviet law stated also that "before these freedoms can be exercised, any proposal must be approved by a censor or a licensing bureau". These laws were created in order the bodies of censor could exercise ideological guidance.

Universal Declaration of Human Rights defines human rights as the basic rights and freedoms that belong to every person from birth until death", including the right to life, liberty, freedom of opinion, cultural and economic rights, the right to work, the right to education, and many more. These fundamental rights are based on the principles of fairness, equality, independence[7].

The conception of human rights in the Soviet Union differs from the ideas widespread in the West states. The socialist legal theory claims that the government bodies benefit from human rights which can be declared against the individuals, while Western law stated the controversial concepts.[8] The USSR system named itself as the source of human rights. However, it contravenes the fact, that the Soviet legal system created law as a weapon of politics and judiciary as an organ of the government. Vast extra-judiciary powers were in the hands of the secret police. The regime canceled such Western concepts: rule of law, defense of law and warranty of property which were thought as illustrations of the morality of the middle-class in the opinion of many soviet law scientists. The purpose of socialist courts was claimed by Lenin to be "not to liquidate terror ... but to establish it and validate in principle".

There is a very interesting real situation, when Sergei Kovalev with another prisoners attempted to refer to the legal base, using article 125 of the Constitution, in which all civil rights were listed.[9]As a result, the answer of the prosecutors was that the Constitutional privileges were given not for your good, but to show American Negros happy life of the soviet people. It should be noticed here the fact about "iron" curtains of the Soviet Union. The USSR was called internationally closed state, in which citizens were not aware of the life abroad, and the world also could not know about the real life of the soviet people. The goal of the leaders in the USSR was to inspire citizens to believe in their happy life, providing them all necessary goods (stable salary, job places, food, education, leisure).

[7] Myroslava, Hromovchuk, Human Rights for Life. The experience of Ukraine, Journal of Legal Studies, 2018
[8] Feldbrugge, Simons, Human Rights in Russia and Eastern Europe: essays in honor of Ger P. van den Berg, Kluwer Law International, 2002
[9] Appeal to the UN Commission on Human Rights, 20 May 1969 (8.10)". A Chronicle of Current Events, 2013.

The definition of crime was noticed before, but in the context of human rights it is reasonable to tell that a desire of people to receive a profit could be sanctioned too, it was a counter-revolutionary will. Even soviet legal scholars were punished and repressed, actually in the absence of guilt.

Martin Latsis, who served for the organization under Soviet regime for the investigation of counterrevolutionary activities, claimed, that it was not necessary to look in the context of facts incriminating a person.[10] As an alternative, it was essential to ask accused person about his background, his education, class of belonging, his profession. These questions should be raised to determine the destiny of the defendant.

According to the law, public trials were applied. Originally, public trials were invented to ensure fair trial, allowing the public to see the legal proceedings. The people, observing the judicial trials, were able to check whether justice system was functioning properly. On the contrary, the purpose in the Soviet Union was to provide another additional method for propaganda and agitation. Lawyers were obliged to take the guilty of their clients for granted. According to the Soviet Criminal Code the sanction for agitation or propaganda, that took place with the aim of stepping down the Soviet system, was for a term of 2–5 years; if it happened again for a term of 3–10 years[11].

Repression was used widely, because it was a system of persecution and prosecution of citizens, seen as enemies of the Socialism. Theoretically, it was studied by Karl Marx, who defined it in a work dedicated to class struggle. To illustrate, meaning of “terror” and “repression” were recognized to be officially working words, since the proletariat’s aim was to stop resistance of other social classes. All classes except that one of proletariat were considered by Marxist to be antagonistic. Repression was legally permitted; it was accompanied by adopting special articles in the codes. During Stalin, worsening of class struggle was promulgated.

The right to education was for all citizens, the number of scientists increased with the lapse of time. In the constitution each person was given the complex of right to develop his/her talents. Nevertheless, scientists of such disciplines as genetics, cybernetics, linguistics were repressed. A lot of important scientists were imprisoned, thought as enemies of the people. It is horribly to know, that they were making researches in the laboratories within the Gulag, a system of labor camps maintained in the Soviet Union from 1930 to 1955. On the whole, art, education, science, literature were controlled by state, it served strictly for the ideology of the proletariat. [12]

[10] В. И. Виноградов, А. Л. Зюбченко, Политические деятели России 1917. биографический словарь, Москва, 1993

[11] Pavlo, Pushkar, The reform of the System of criminal Justice in Ukraine: The influence of the European Convention of Human Rights, 2003, European Journal of Crime, Criminal Law and Criminal Justice, 2003

[12] A Country Study: Soviet Union (Former). Chapter 9 – Mass Media and the Arts. The Library of Congress. Country Studies

The right to faith was also restricted, because the Soviet Union followed Marxist-Leninist idea of atheism. With that aim, the Communists seized church property, thought religion to be absurd, troubled believers, and expanded atheism in the schools. A lot of religion followers were tortured, sent to prisons or camp. Orthodox supporters were also brought under control of hospitals, were subjected to experimentation with the aim to make them to forget their religious belief.

Christians were also limited with career's opportunities and membership in communist party and in the Komsomol. The Society of Godless was created as anti-propaganda of religion. All acts of churches (seminars, publishing) were stopped under the threat. Media, universities, communist organizations were under influence of atheism too.

Soviet political system was thought by the communist ideologists to be democracy, where soviets (work councils) represented the will of the working class. It should be said here, that constitutionalism has become recognized in a position of co-legitimacy with democracy.[13] The evolution of political institutions closely connected to the evolution of the development of constitutionalism. So, to understand better the soviet democracy, it was necessary to present a general outline of the development of constitutionalism.

Freedom of movement as a basic human right in another democratic countries were also prohibited, that also contravenes the article of the Constitution. For a long period of the USSR, citizens of law social status did not have internal passports, and they could not travel to another cities without permission. Many prisoners received so called "wolf" tickets, allowing them to leave a minimum of 100 km away from the borders. If they attempted to escape, the sanction would be an imprisonment from 1 to 3 years.

Soviet democracy is a political system in which the rule of the population (working class) represented by directly elected soviets (work councils). The soviets are directly responsible to their electors and are bound by their instructions. Such an imperative mandate is compared to a free mandate, that is bound only to the scope of his conscience. In contrast, imperative mandate holder act according to the prescribed official order and can be recalled at any time. In other words, delegates could be dismissed from their post.

Actually, the Constitution of 1936 underwrote direct universal suffrage with the secret voting. Voters were divided in basic units, such as the workers of a company, the residents of a district, or the soldiers of a caserns. Each group directly sent the candidates as public officials, which operate in a legislative body, government and courts simultaneously. On the contrary to the model of democracy described by Locke and Montesquieu, there was no separation of powers. Elections

[13] Richard Pipes, Communism Weidenfeld & Nicolson, 2001

were built upwards, and the levels were connected administratively.[14] The system was also characterized by delegations from one level to another higher level, it continues even at the state level – to the Congress of Soviets.

However, the soviet electoral system reflected also controversial context of the human rights prescribed by the Constitution. Robert Conquest studied the electoral system of the Republics in the Soviet Union, and he insisted on the fact, that soviet constitution was adopted in the worst period of promulgating human rights. According to the historian, in the state where existed only one candidate, voted 99 percent, and a parliament acts without opposition, there could not be any hopes for the protection of human rights and freedoms. Basically, the soviet democracy was twofold, practice differed from law. For instance, candidates applied for the posts in the Communist Party had been selected in advance, before democratization and supposed elections.[15]

Because of huge restrictions, absent of real rights for free expression, movement and religion, human rights movements began to emerge in 1960. People fought for the variety of human rights, it was also struggle for abolishment of any underground violent. Like other movements, activists were repressed: some lost their posts, jobs, some were sanctioned, sent to hospitals. KGB also took measures, sent warnings to the protestors.

As the result, human movements influenced on future processes in the Soviet Union. Dramatic changes took place from 1985 to 1991. So called "glasnost', adopted by Gorbachev, improved openness and transparency in the political institutions. During that period the history under Stalin was studied and re-considered, censorship was decreased, openness in media grew. International relations were also improved, citizens of the Soviet Union began to know about the quality of life in the USA and in the Western countries.

Limitations on political rights were placed in the article 6 of the Soviet Constitution, adopted in 1977. If the rest of the constitution in theory provided the freedom of speech, expression, the article 6 claims that the Communist Party was the leading and guiding power. During Mikhail Gorbachev Article 6 was amended in favor of multi-party political system, a system unknown for the Soviet world before.

1.2 Transitional perspective of post-communist constitutionalism

This section will be dedicated to the transitional processes hold during deviation from the Soviet system. Law making refers to that processes too, and it reflects the best all directions taken by post-soviet states. Transitional constitutionalism could be described as a constitutional

[14] A Country Study: Soviet Union (Former), Chapter 5, Trade Unions. The Library of Congress, Country Studies, 2005.

[15] L.Alexeeva, History of dissident movement in the USSR.

development leading to political changes eventually. It could be best explained through the prism of previous constitutional history.

What were the main constitutional principles in the Soviet Union? In that constitutional culture, there were nothing beyond the state, and if tell more precisely, there were nothing beyond the Communist Party.[16] Three constitutions described in the previous section were not a meaningful source adopted with the aim to provide a wide range of human rights, and to protect individuals. Ukraine as one of the post-soviet states adopted a constitution, attempting to make a step toward democratic principles. Overall, it was not only the fundamental law of the country, but it served as a methodological approach for the building of new democratic state.

In the previous constitutional culture, the law served to promote the totalitarian regime and to set the leading role of the Communists. And as a result, economy in the Soviet Union was also under control of the Party.

Generally speaking, the new Constitution was the basis for the transformation of all spheres: legal, political, cultural, and ideological. In spite of all hopes, the transformation was passing at a law speed, because an opposition has arisen. It was form from the different conservative forces, represented the communist ideas.

The states were in the difficult situation, because there were a lot of issues to solve, especially, in the field of economy (land reform, privatization). On the whole, legislation was ineffective and fragmented. Taking into consideration those facts, the government did not take strategic reforms, but emergence measures to avoid crisis.

The main feature of the legal system for that time was the absence of the official strategy with directions for achieving democracy. Legal infrastructure was dysfunctional, and the system of legislation was dispersed. The legislative body was more as a complex of regulations, than a legal system. The legal acts were being changed by the executive agencies. The Constitution did not have that superior legal meaning as legal experts expected to see. It was rather a simple legal document with special political status.

The problem of transition to the democratic state was a lack of professionals in economic, legal, political fields, first of all, those who was able to control processes of transition to the civil society based on the rule of law. Essentially, the insufficient level of professionals was caused by the high level of corruption. The main reason of this problem lied in the mentality of the Soviet society and the monopoly of state power.

The Soviet system authority was characterized by strong elite, which continued to be in power after the collapse of the union. It controlled the lives of the citizens, because previous politicians

[16] Thomas, Daniel C.,Human Rights Ideas, the Demise of Communism, and the End of the Cold War, Journal of Cold War Studies. 7 (2), 2005

held all key posts. If take into consideration Ukraine and Russia and compare elites of these states, Russian elite was stronger than Ukrainian one. It will be discussed in the next sections[17].

State power was exercised over economic activity, and it was resulted in huge corruption. System of administrative bodies was established to regulate private sector system. Individuals were bounded to pay quotas, licenses and other methods of controls.

Interests of the group that had access to the resources of the USSR were realized. However the interests of the post-soviet states were unfulfilled. Economy is suffered the most: maintenance of job places, stable salaries, pensions – all these were in crises situation. Education, science, medicine were also under threat. The main source of the economy during that period was tax collection.

Ukraine had its special issues: nuclear weapons, Chernobyl, Crimea, Russian language followers. All these conditions led to the "shadow growth" in the economy. Criminal activity was present, especially on the state level and in the East of Ukraine. All these facts influenced on the competition in the system of authority and between the different branches of power. All in all, Ukraine received weak government, that privileged corruption. It resulted in a such government, where responsibilities were overlapping, accountabilities were dispelled, conflict of interest was present, and civil society was not protected.

Depicting the current situation in Ukraine, the Financial Times editorial noted, that during Leonid Kuchma's presidency, constitutional procedures were abused, and corruption was flourished. Both kleptocracy and corruption kept control. Crucial elements of democracy were not established but postponed. Democracy has small roots. The presidency is too strong compared to the judicial branch. The law was too weak to control corrupted government, when it resulted in a financial crime.

Transitional period was present in each republic comprising the Soviet Union, but parliamentary development took different directions in that states. Parliaments varied from one another. Context of the constitutions, party system, legal system, civil society were dimensions of change.

Some scientists divide the development of parliaments into two decades[18]. The second decade differed from the first one, because only two dimensions were present in the context of parliaments: executive's autonomy and multi-party system. It is reasonable to take into consideration also such important factors as legislative system of the Communists and the international relations.

[17] Chapter 4 is dedicated to the comparison of Russian and Ukrainian elites, pp. 75-80

[18] David M, Olson and Gabriella, Ilonszki, Two decades of divergent post-communist parliamentary development, The journal of Legislative Studies, 2011

The first complexity with which faced political systems was communist constitution. The main problem was the guiding role of the Communist party. In the period of collapse the Communist system and building democratic system, the questions of promulgating party polarization and establishing new institutions were crucial.

First elections were the most complex for the state, but the easiest for the civil society. Why? Each candidate was undefined for the people, so they did not have grounds to hesitate to which candidate give his vote. The most difficult task was for the newly elected office, because it should define the relationship between the parliament and the executive. Additionally, for the post-soviet states it was significant to define their international status in the world.

In the developed countries constitutions were known to establish separation of powers or fusion of powers. In the most cases, were known such forms: the legislative-executive relationship in mixtures of presidential, semi-presidential, and parliamentary[19]. The history of post-communist parliaments demonstrated that semi-presidentialist constitution jeopardized the power, and, as a result, threatened democratic principles.

Countries situated in the Central Europe (Czech Republic, Hungary, Poland, and Slovenia) formed the government in the parliament. On the contrary, Russia built stable presidential power. Ukraine and Moldova were the countries with the changes, where the government status was modified not once.[20] For example, Leonid Kuchma in the beginning subordinated the government and established the strong presidential power. He had the right to appoint the prime minister and Cabinet with the consent of the legislative branch. So, the power was usurped by the president. Citizens of Ukraine used to have one leader in the country, who defined directions of the reforms in the all spheres of life. They did not know about the separation of power. So, they saw the president as the new leader of the country, but they could not foresee the effects of the strong presidential authority for that time. The president was observed by many scientists to be a representative of strong elite, came from the Soviet Union.

Parliaments also showed their different routes through the quantity of bills introduced and adopted. It depended on the procedures and the complexity of relationship between the parliament and the legislative, on the possibility of legislature to obtain parliamentary approval, without delay. The most complex was to adopt laws to meet EU standards. The legislative function of the parliament was realized in two ways. The first one, states decided to join the policy of the EU, so the national

[19] Trevor, Brown and Charles, Wise, Constitutional Courts and legislative-Executive Relations; The case of Ukraine, Political Science Quarterly, Vol. 119, No. 1, 2004

[20] Courtois, Stephane; Werth, Nicolas; Panne, Jean-Louis; Paczkowski, Andrzej; Bartosek, Karel; Margolin, Jean-Louis & Kramer, Mark, The Black Book of Communism: Crimes, Terror, Repression. Harvard University Press, 1999

jurisdiction was removed from a lot of topics. In the European countries improvisation was absent due to the patronage of the EU.

The parliament's legislative function for the new EU member states has been transformed in two ways. First, selected national policies have been shifted to the EU, thus removing the exclusive national jurisdiction of both governments and parliaments from those topics. Second, the parliaments took oversight responsibility, and they checked government negotiations with the EU. As in all, both governments have been modified, new institutions were set. Legislative review councils were created by the governments, and European Affairs Committees were set by the parliament.

The form of interaction on the EU meetings between the government and the parliament was invented in each post-soviet states. Decisions taken by the parliaments were reviewed in the context of the EU decision-making process. Parliaments of the countries that did not take European road were in conflict over the power and the constitution. Putin, the president of Russia, jeopardized power in both constitution and party majority.[21] As the result, the administration of Putin was able to discuss informally pending laws with parliamentary deputies, and then discuss the same legislation on formal proceedings and achieve a consent for the approval. So, in Russia legislation was fixed, the structure was clearly created. Otherwise in Ukraine, continue conflict between the powers worsened the situation, and the legislative work was temporary suspended.

Party system also varies in each post-soviet Republic. In the East the party system is concentrated, in the West – dispersed. In Moldova, for instance, in the constitutional text was claimed, that it was a presidentially led system acting through the presidential leadership in the dominant political party.

To sum up the types of the parliament, it could be said that three major types of the parliament were democratic, presidentially dominated, and conflicted. Unfortunately or fortunately, Ukraine was considered to be the last one. Ukraine was between two great fires (Russia and EU), and it reflected in its politics. Russia with its strong politics, more similar to the Soviet Union road, was thought to be a "brother" of Ukraine. Their territories are situated near to each other, it resulted in their narrow economic ties, friendship of political actors, common directions. Honestly speaking, it refers only to the Eastern part of Ukraine. On the West, population is closer to the European countries (Poland). So, the situation in the government depends on the candidates' territorial roots. After the collapse of the Soviet Union, Ukrainian pro-Russian directions were changed with pro-European one, and vice versa. Democratic parliaments of the states met vast rule revision. Committees were organized, driving power was created, procedures were standardized. Adopted

[21] Anton Antonov-Ovseenko Beria (Russian) Moscow, AST, 1999

and reorganized rules and stable system of bodies give steady ground for the political activity and future reforms that will affect development.

All things considered, the Central European countries changed the structures and applied laws to meet European standards and become members of the EU. On the contrary, post-Soviet states faced parliament-president competition. Ukraine and Moldova were characterized continual controversy, but the changes were made also. To illustrate this, The Reconciliation Council was created in Ukraine.

Internal structure of parties was also modified and took different trends. In Russia, for example, proportional formula for the party representation was abandoned, while proportionality was returned in Moldova. During elections in 2009 non numerous multi-party majority took place. So, possible conflicts were arisen because of such dimensions: government vs. parliament, government vs. opposition, parliament vs. president, as in Ukraine.

Additionally, parliament is not the only body that affect the destiny of its pending rules. Presidential decrees play a significant role in the procedure of adopting regulations of the parliament. Constitution consists not only from the articles giving the authority of the parliament, but to define the portion of its competence.

Whole the post-Soviet parliaments faced with the transition processes, the Central European parliaments felt radical changes, that were uncommon for the previous regime.[22] In the first case, the former elite continued to hold the key positions in legislatures. In the second case, reformist members were elected. The emergence of new parties proved the transition to new ideas, that brought by newcomer candidates.

Crother called that transition period as a “constitutional recalibration” because it was a turnover for the most members and leaders. The aim was to establish new government with the new members, ideas, that will lead the society to modern democratic values. However, in the post-Soviet parliaments this goal was achieved only theoretically. All in all, parliamentary systems in the Central Europe aimed to form leading interest groups, while the presidential systems in the post-Soviet states tended to promote their personal concerns using state power.

Background factors that could explain the way of building a state after the Soviet Union were transitions, inherited legislature, and international relations. As it was described before, some of the states took ‘turnover” transitions breaking with the past, some - decided to follow continuous transition.

Democratic parliaments in the Central Europe participated in the system transition. They made election changes, permitted multi-party system, given the chance to each candidate to make

[22] Serhiy, Holovaty, Ukraine in transition: from newly emerged democracy towards autocracy, Review of central and east European Law, No 3, Kluwer Academic Publishers, Netherlands, 2001

contribution in the building democratic state. The main divergence among two cases is the fact that Republics comprising the USSR became sovereign states not on their own. The reason was the breakdown of the Soviet Union.

To found democracy for the Central European states were easier, because they had their common plan to achieve that aim. They were able to check each other according to the scheme defined in advance. The main task for them was to choose the way of allocation the power. Surprisingly, the judicial system was not an important issue for them. What about the East way of constitutionalism? They began to improvise, because they collided with numerous problems simultaneously, and the civil society could not wait. Their regional status moved to the international one, "iron" curtains became transparent. The new form of statehood brought new problems for the government. It was predictable for the Est to make choice in favor of the presidential office. All things considered, in the parliament state decision was made by the modernist members, in the presidential – by the same members came from the Communist system.

Legacies also affected the destiny of the states. Post-soviet republics inherited communist legislature, that did not protect such human rights as development of personal talents, the right to freedom, expression, etc. Communist Party was the tool of the legislative activity too. The existence of the one-party influence on the disability of the state to organize open multi-party system. The Polish parliament was the most active, it set three organizational structure for each of its parliamentary parties. Amon these parties' negotiations on different issues were possible.

The first step made during the transition was the constitution-making. Essentially, all post-soviet states avoided the creation of the Fundamental Law with the special assemblies. They aimed to make it peacefully in ordinary parliamentary processes. It was challenged by the fact that constitution making as a process of transition had features of the Stalinist constitutions. Some republics postponed the date of adopting the constitution, but began to create new institutions, particularly, courts. Instead of new constitutional documents, in the East of Europe and on the territories of the former Soviet Union constitutional courts were created.

The reason can be best understood from the point of transitional perspective. The main task during that time was to go away from the prior constitutional legacy. The decision was to create new institutions. Judiciary needed to be reformed first of all, and the creation of the constitutional courts was the paramount, because the states were on the way of building democracy. As it was told before, democracy originally was associated with the constitution making. In turn, constitution making is directly connected to the promulgation and protection of human rights through the constitutional courts.

According to the new constitutional order, courts had possibility to engage in judicial review. It was provided to establish constitutional borders on law-making. To avoid collisions in laws,

Constitution was seen as a fundamental law, and other laws should be adopted in accordance with those constitutional principles. Constitution broke also the ties with the previous regime, because it limited the government and proclaimed the impossibility of usurpation of state power. For the most part, the constitutional court influenced on the creation of the new constitutional culture, characterized by separation of powers and definition of human rights.

The movement from the prior regime is seen in the context of delay from the enumerating human rights, and of establishing separation of powers with the list of responsibilities for each branch, and obviously of creating constitutional courts. For instance, Poland case illustrates the best intentions of the transition. Firstly, "Little Constitution" with the government structure was created, and secondly, the charter of human rights was adopted.[23] Such order explains the significance of the questions to be solved. In spite the fact, that human rights were listed in the Soviet Constitution, they were note exercised. So, the problem was in the way of realization norms. Nevertheless, the disagreement which right to include in the new constitution was also present. The first question was whether economic rights entitlements should be prescribed. Western scholars debated in these questions and could not come to the common decision.

The struggle in the former Soviet bloc to move from one constitutional culture to another can also be seen in the ongoing substantive constitutional debates over which rights to include in the new constitutions. The debate has been framed as a controversy over the extent to which the post-communist constitutions should include "aspirational" norms. And in this regard, Western constitutional scholars have differed over whether, as a prescriptive matter, economic rights entitlements should be included in the post-communist constitutions.

A little conclusion could be here, that when the main purpose of the creation of the constitution is a transition, constitutionalism could be called "critical". Critical concept was observed in the way of human rights understanding. This issue was solved due to the creation of constitutional courts. Transitional constitutionalism searched not only new texts, but new institutions. In this way the government attempted to close the gap between the rights in theory and the real life. Judicial review was introduced to New courts attempted to close the gap between paper rights and the real rights. Judicial review for enforcement of individual rights was introduced to allow courts to define a rule of law.

If focus on Ukraine during transition period, it was a long period to find a compromise among the main powers. Ukraine as other states face with such tasks: to build new sovereign state, national society, international relations, and to put in place democratic standards[24].

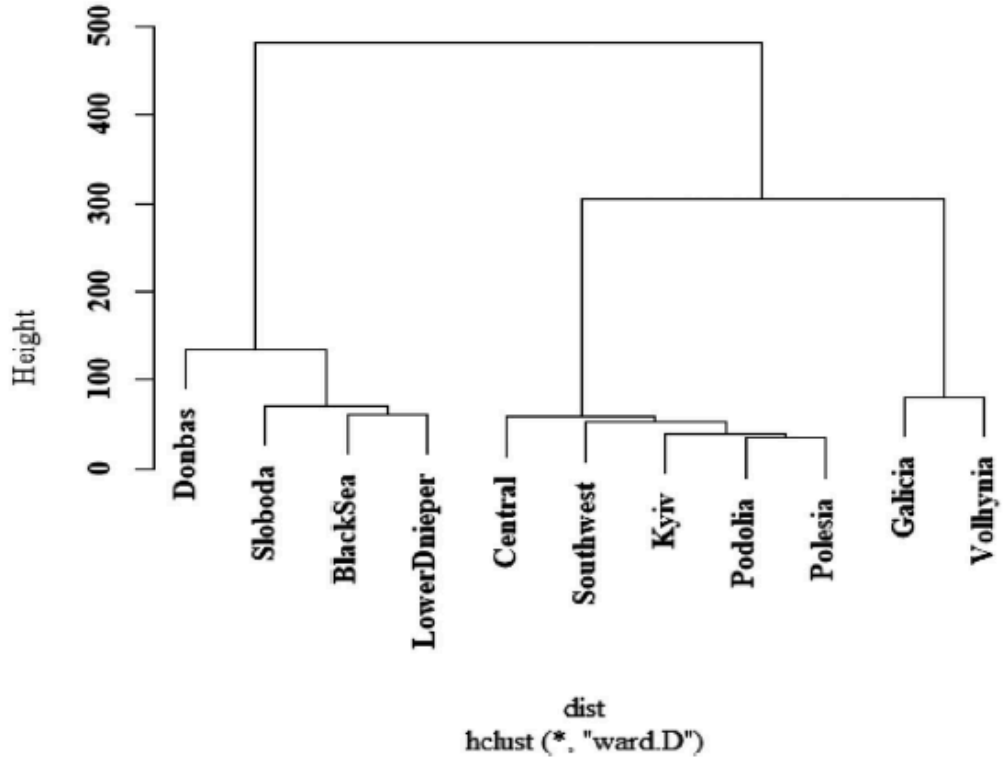
[23] The Soviet Form of Popular Government by V.M. Chkhikvadze, 1972.

[24] Olexiy, Haran, Ukraine: Pluralism by Default, Revolution, Thermidor, Russian Social Science Review, vol 54, No 3, M.E. Sharpe, Inc, 2013

Some scientists consider, that Ukrainian transition is characterized by the compromise. Since, the goal was to build democracy, and the responsibility was both on the national and international level, the compromise was unavoidable. All powers represented the government understood the obvious break with the fundaments of the Soviet Union. The additional problem of Ukraine lied in its diversity, so it kept monopolizing from happening.

The first president of Ukraine was Leonid Kuchma. He started his reforms from the economy. Privatization that took place in 1990, led to the appearance of the group of oligarchs. Almost all public spheres were under their control. Each TV channel, radio were owned by them. This tendency was followed also by Russia. Political spheres were also monopolized, parties and political fractions were controlled the same.

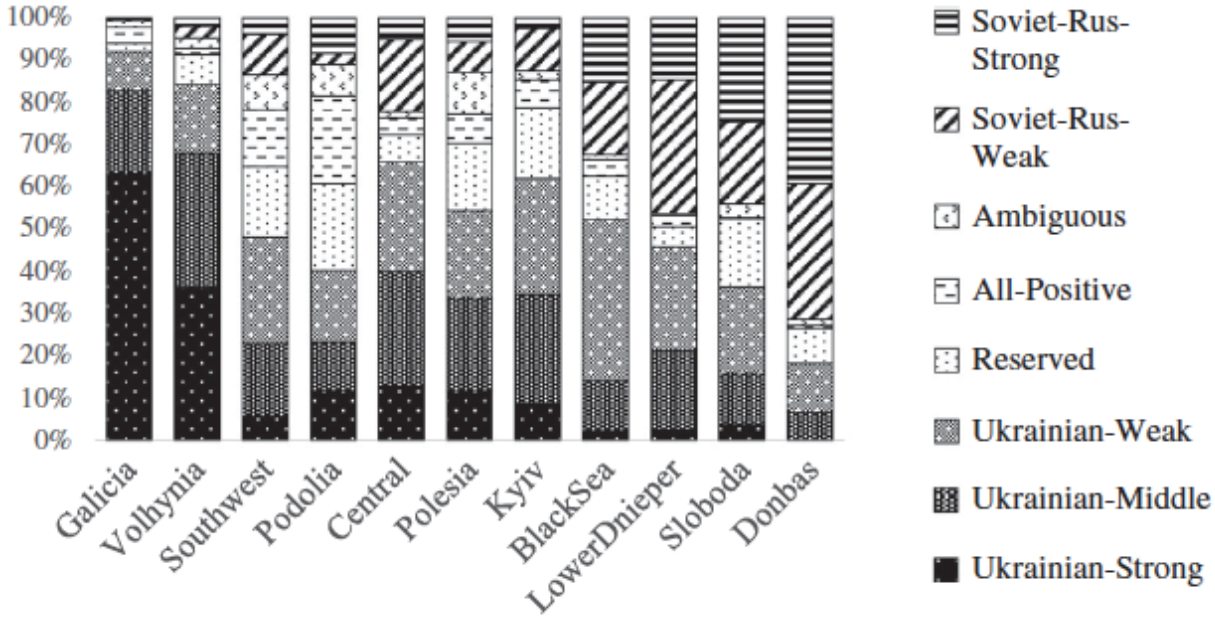
Competition among the main powers took place during long period. In 2000 Kuchma decided to use democratic way of expression – referendum in his own aims[25]. The President wanted to endow himself with the authoritarian power. The interesting fact was happened: the Constitutional Court proclaimed the referendum to be unconstitutional, because it did not meet all requirements. One of the rule that was violated was the approval of two-thirds of the parliament.



Transition period in Ukraine took a lot of time, because it was followed by the national problems, such as linguistic problem. 30 percent of the citizens regarded Russian as their native language. In the constitution it was promulgated the sole national language – Ukrainian. All spheres of cultural

[25] К.О. Павшук, До проблеми проведення конституційного і законодавчого референдумів в Україні, Проблеми Законності, 2013

life were also affected. In spite of this fact, TV channels, newspapers, teachers at school used Russian language. Linguistic boundaries are blurred, because almost all citizens became bilingual, especially children born after the collapse of the Soviet Union. To illustrate, children, living in the family speaking Russian, go to school where Ukrainian is mandatory. Instead, people, living in the west and speaking Ukrainian, watch TV news, shows in Russian. All these factors ended in Ukrainians' bilingual skills. In the illustration presented before[26] it is possible to see divergences in traditions among regions in Ukraine. Donbass (eastern part of Ukraine) is the most distant point for Volhynia (western part of Ukraine). The East always conquers with the West. Such competition is present on all levels of society: as among ordinary people, as among top officials. The graph below also illustrates the divergence in Ukrainian society, but in the context of national views[27].



During the presidency of the Yanukovich, it was an attempt to declare Russian a national language. But Yanukovich realized that it was impossible, because he lacked the majority in the parliament, and changing the national language required the consent of the people through the referendum. All in all, raising the question of the national language would lead to the polarization of the civil society. The Autonomous Republic of Crimea was the only region in the Ukraine, where more than a half of citizens spoke Russian language. Tatars number estimated 15 percent of the Crimean inhabitants.[45] It is necessary to know that Tatars were deported, and the fact, that Crimea historically was the part of the Russia. Later being a legal part of Ukraine, all key financial and political bodies were situated in Kiev, the capital of Ukraine. Theoretically, "Ukrainization" threatened Russian speakers in Crimea, but honestly, Ukrainian needed to be supported there). In

[26] Taras, Kuzio, Russian and Ukrainian elites: A comparative study of different identities and alternative transitions, Communist and Post-Communist Studies, 2018
[27] Serhiy, Kudelia and Taras, Kuzio, Nothing personal: explaining the rise and decline of political machines in Ukraine, Post-Soviet Affairs, 2014

addition to this Russian-Ukrainian competition in Crimea, there were violations of legal acts by Russia. For instance, Russian consulate issued Russian passports to the Ukrainian citizens, while Ukrainian Constitution forbid dual citizenship[28]. Crimea was considered by Russia to be a political tool, with which foreign policy was manipulated. Domestic policy was also affected by the Russian possibility to influence Crimea.

Transition period of Ukraine is continuous period, that took place from one presidential elections to the next one. Presidential elections in 2004 was a turnover moment in the history of Ukraine. Candidates were Yanukovich and Yuschenko. Yanukovich was from the East of Ukraine, his criminal past was a weak point. Nevertheless in the opinion of Putin and Kuchma (the first president of Ukraine), convictions of Yanukovych were in favor of pro-Russian activities. Their aim was to appoint a weak candidate to promote their interests. In contrast, Yuschenko was from the West of Ukraine, promoting national interest of Ukraine, and attending to choose European way of transition. Yuschenko promised to decrease corruption, improve justice, to conduct reform according to the EU. The East campaign influenced on the mood of people, emphasizing the East inhabitants in their "industrial" opportunities as a proof of the strength against the West politics. As a result, such actions polarized the population. Independent exit polls indicated that Yuschenko won the elections, but official national results were in favor of Yanukovych. Votes are considered to be falsified. After that people want out to the streets, protesting against such results. History named these protests as the Orange Revolution. The Supreme Court of Ukraine settled that elections should be returned to the second round because of huge violations. Simultaneously, the team of Yanukovich and Kuchma degreed on introduction amendments to the Constitution to improve their positions, but to restrict the competency of the future president.[29]

The Orange Revolution is considered also to be a consequence of domestic problems. People were waiting for the reasonable modifications in political freedoms, mass media and elections. Because of Yuschenko's weak political skills, there were conflicts inside the team. It resulted in complexity to implement reforms.

This transitions actions ended up to the Ukraine by constitutional reforms for the president, weakening his role, and for the prime-minister, forcing him to rely on the parliament[6]. The government had to be responsible before the parliament, and the president could not resign the prime-minister. Orange revolution held in the name of democratic freedoms was used pro-Russian politicians in favor of their interests and against the future president. It made easier for the Yuschenko team to be criticized by the opposition, using mass media.

[28] Richard C.O. Rezie, The Ukrainian Constitution: Interpretations of the Citizens' Rights Provisions, 1999
[29] Ukrainian parliament reinstates 2004 Constitution, Interfax-Ukraine, 2004

The party of Regions created by the Yanukovich formed a coalition and was accepted by the Yuschenko. So, it was legitimized. The party of Regions decided to violate the Constitution, passing amendments to the Verkhovna Rada to permit individual deputy from other fractions to join a parliamentary coalition. In the Constitutional Article 83, there was a rule that coalition could be formed only on the basis of parliamentary factions. One year earlier, the Constitutional Court defined that a collation could be created from the parliamentary factions. In contrast, the same judges during the period of the Party of Regions claimed the opposite. It proved that the corruption flourished, and that judicial branch was not independent.

The Party of Regions also influenced on the system for electing local councils, proportional representation was changed by a mixed one. This method was criticized by the European Parliament and the Council of Europe. Ukraine refers to the Parallel system, where to sets of elections are separated from each other, so disproportionality cannot be compensated as in the proportional system. The main disadvantage of the parallel system is unproportional, and that parties having won necessary number of votes could be excluded from the representation. Elections in 2006-2007 demonstrated, that Ukrainian parliament was organized along main party forces.

All those circumstances, such as unexperienced young Ukrainian government with post-Soviet elite, pro-Russian forces, on the one hand, and European tensions to build democratic state, on the other hand, resulted in continuous transition period. As a result, no real reform was done, corruption was flourished, access to justice was ineffective.

The last point was adoption of the new tax code. Citizens began to criticize it and organize protests. Yanukovych decided to revise the code, but the situation was already at its peak. In November 2010, small entrepreneurs went out on the streets of Kiev, and organized huge protests on the main square of Kiev (Maidan). The authority did not expect such result, so Yanukovych had to veto the tax code, postponed the changes, such as judicial proceedings against the small business.[30]

The next was made by the presidential administration was conducting administrative reform. People were waiting for the anticorruption actions, but it was ended by conviction of the prime-minister Julia Timoshenko, who was blamed for corruption deals. Members of Timoshenko government were also charged. The European Union called such reform to be selective justice. Yanukovych again conducted that kind of reform which served for his own benefit.

1.3 Problems facing constitutionalism: Judicialization of politics and the politicization of the judiciary

[30] Sanshiro, Hosaka, Hybrid Historical memories in Post-Euromaidan Ukraine, Europe-Asia Studies, 2019

This section will observe particularly judicial branch of the post-Soviet states. Topics above described the main features of the Soviet system with the aim to understand the incentives of the government and hot it was reflected on the mood of the citizens. It was told before, that judicial reform was needed to conduct, the reason would be discussed here.

Judicialization of politics means passing power from responsible decision-makers to the judges. Judicial intervention in politics is known across the world, it took place in various political regimes. Soviet regime differs from other its own politics, system of government, such as absent of separation of powers, and its own ideology, as the belief in the Communist party. All these factors affect the post-Soviet transition and the creation of the reform of the court system. Courts in the post-Soviet countries are known to be involved in pure politics. What does it mean?

Firstly, courts in post-Soviet states were seen as political tool, so they were politically empowered. It was seen through the cases, when judicial decisions played important role in key political issues. In the section on transition period, it was discussed an example, when Yanukovych put the Constitutional court under pressure, violating the article of the Constitution. The Court proclaimed decisions and gave official comments in the way required by the President. It will be reasonable to compare the decision making on political issues of the post-Soviet courts and the courts in democratic countries.

"Judicialization" as a political term lacks definition, it should be differed theoretically. Scholars insisted that this term is used in policy-making spheres around the world. It could be placed also in the context of judicial review.

Judicialization is a paradoxical term. On the one hand, it threatens the democratic practice, on the other hand, it helps to establish democracy in the state.

Legal scientists insist on the fact, that judicialization could be best explained through the cases on countries, where the judicial branch is not wholly independent. Judicialization tended to be implemented in the countries where judges were given the power previously belonged to the political power.[31] It was common for the states where judicial power was formal and served as a tool for the politicians. Civil society was deceived, because they saw creation of judiciary as a democratic instrument.

Secondly, judicialization could not be established in such systems, where political actions don't reflect the incentives of the civil society. It could be best understood through the observing the features of the court empowerment and judicial involvement in the post-soviet states.

The first question is whether those courts were empowered before? Scholars look at the post-soviet courts, as disempowered courts, because they did not have even judicial power. It is paradoxically

[31] Kim, Ratushny, Toward the Independence of Judges in Ukraine, Saskatchewan Law Review, vol. 62, no. 2, 1999

true, because all decisions reflect only the wish of the politicians. So, it was usual in the post-Soviet states, that the law on paper differs from the practice.

The border between the formal empowerment and the valid one is very noticeable, so it is not necessary to convince society in the judicial irrelevance. In post-Soviet states people do not rely on courts. Originally, constitutional courts were created to limit a state power. There is anecdote, explaining the empowerment of the judges. An important American lawyer Ginsburg argued, that politicians needed strong courts only in that case, when they do not want to stay in power for a long period. Indeed, the states came from the Soviet Union chose the strong courts with the aim of staying in power forever. The term "strong court" here plays role not for the people, but for the politicians. Courts with the strong power exist as in the democratically weak countries, as in the autocratic regions of Russia. Judiciary is characterized forceful competency, because they play a great role in politics. For example, in Russia the Fist Russian Court was created in 1991, and it became the most powerful tribunal. The competence of the court was widely prescribed, the courts had possibility for concrete and abstract review of both national (presidential, governmental) and international laws, acts. It also was empowered to promulgate impeachment of the officials and suspend the political parties. Russia adopted experience of German judicial system, and gave the court possibility to review constitutional complaints. The judiciaries were also allowed to initiate legislature to fulfill the gap in the acts. The court also could give binding interpretations of the Constitution. All in all, the model of Russian judicial system was very complex, the competency was overbuilt extensively, that even the court was unable to bear its weight[32].

In comparison, constitutional court of Ukraine was built in 1992. The tribunal was created with the aim of "reaching power". The tribunal never came into force, because it was postponed to the date of the adoption of the Constitution. It is reasonable to notice, that all post-Soviets except Turkmenistan crated Constitutional court. It also proves the political necessity, but not the civil one. It would be a magic to believe in good intentions of the government right after the breakdown of the Soviet Union, where the priority of human rights was absent.

The comparative review confirms the judicial empowerment. Constitutional courts were shown to have not only wholly judicial competence but also entirely political (to review disputes among the powers of the government, to proclaim impeachment, to solve disputes on the referendums, decide on the constitutional conformity of the parties). The USA as s state of the influential and independent constitutional court qualified the mechanism of the post-Soviet states to be political originally, in appliance with the possibility to establish doctrines by judicial precedents. The post-Soviet judicial system is known to restrict the principle of "stare decisis".

[32] Alexei, Trochev, Patronal politics, judicial networks and collective judicial autonomy in post-Soviet Ukraine, International Political Science Review, 2018

As the real significance of judicial restraint is absent in post-Communist states, the judicialization of politics is institutionally prescribed there. For example, In Russian Federation, the Constitutional Court cannot allow itself to be apart from reviewing the constitutionality of military actions in Chechnya. In the same way, the Ukrainian Constitutional Court cannot keep from the dissolution of the Parliament, initiated by the President. As a result, the court damaged its reputation and decreased the trust of the people[33]. Even after the empowerment of the constitutional courts, their independence was doubtful. To illustrate, the Constitutional Court of Russia was suspended by the President, when the court decided to confront Yeltsin. This case proved the fact of threatening the courts by the politicians. Kazakhstan was also taking the same route: during the presidency of Nazarbayev, the Constitutional Court was quitted because of the decision against the official. Belarus also illustrated the same, when judiciaries had to resigned, because they declare the act of the President to be unconstitutional. The last example here, but not in life, was Kyrgyz Constitutional Court, supported the protests against the president. It was finished by the court's suspension. All in all, none of the constitutional courts in the post-Soviet states was not created and generously given the vast list of the competency with the aim of promoting democracy. Courts are the subject to serious violations from the side of political power. There is also opinion, that the degree of judicial independence equals the degree of democracy in the country. As it was discussed in the section dedicated to the evolution of constitutions in the Soviet Union, the degree of democracy could not even be calculated because the states were more authoritarian. No one of the states was not crated democratically and with the will of the citizens. It is essentially to remember always that the main reason of the emergence was the collapse of the Soviet Union. The republics were not qualified as free states. Some of them were considered to be partially free: Ukraine, Moldova, Georgia, Armenia, and Kazakhstan. Ukraine was seen free during the presidency of Yuschenko from 2004 to 2009, because he took European way of reform. But under pro-Russian president Yanukovych Ukraine was returned to the status of partially free state.

The courts' independence was actual while the judicial proceedings were not about the important political issues. The scholars distinguish such terms as "pure politics" and "mega-politics" according to the degree of political intervention.[34] Such political issues as elections, economic planning, national security were under the control of the legislative branch and prescribed by the law. Really the sphere of judicialization of "pure politics" is almost invisible, because it depends on the will of political power. For example, judicial involvement took place often when the subject

[33] Richard C.O. Rezie, The Ukrainian Constitution: Interpretations of the Citizens' Rights Provisions, 1999

[34] The Council of Judges of Ukraine, On the State of Enforcement in the Nation of the Constitution and Laws of Ukraine Regarding the Provision of Autonomy of the Courts and the Independence of Judges, statutes and Decisions, vol. 44, no.1, 2009

was about the uncertainty of the elections. It leads to the conclusion, that judicial involvement was incidental, when it was needed for the crucial politics. Another situation of the court intervention was seen, when politicians used judicial proceedings in their personal strategic goals. Political exploitation was a common occurrence for the post-Soviet judicial system[35]. It is possible to claim, that moving from political power to the judges was formal.

To conclude, all cases proved the political intervention and manipulation in all judicial proceedings that had politically important questions. When the competition for political power took place, the judges were asked to help to reach power. Judicial empowerment was no more than an illusion. In fact, it was a dependent institute of power, obeying the political officials. Pattern of building the judicial branch in the post-Soviet states was called judicialization during political disorder. It was earlier studied by Robert dahl, who insisted on the fact, that when transitional period exists in the country, and old community was struggling with the new one, the Supreme Court became the project of dominant power.[36] In this case, the court was powerless to promote the interests of the citizens but supported the dominant directions of the main political authority.

Results of avoiding the manipulation of the political elites showed the absence of the alternative way for the courts. The only exception could be, if the politicians faced the complex realistic situation. So, the level of judicial independence directly depends on the level of political struggle. The more troublesome situation happens in policy, the more independent courts come to force[37].

It reasonable also to notice that the courts have their strategic actions too. Judicial behavior is based not on the principle of justice, because they act in their own interest too. The political winner could be predicted, so the courts are likely to cooperate with the strong part, while they support another party too. So, the decisions in the most cases are flexible. However, in the situations of high doubts about the winner, the power of judge is high.

Another important point about the judicial branch is its role in promoting the separation of powers. First of all, the creation of the judicial branch has already witnessed the division among powers. The constitutional review was also a step toward its independence from the policy. It led to the emergence of a mixed presidential-parliamentary system with a constitutional court. The courts are expected to restrain the parliament through the constitutional provisions. While the Constitutional Court of the USA is unfamiliar with the judicial review, the constitutional courts in Ukraine, Russia and in other post-soviet countries had the power to promulgate laws unconstitutional. IN Russia, for example, the Constitutional Court could examine acts on their

[35] Alexei, Trochev, Patronal politics, judicial networks and collective judicial autonomy in post-Soviet Ukraine, International Political Science Review, 2018

[36] Butler, William Elliott, Soviet law (2nd ed.), Stoneham, Massachusetts: Butterworths Legal Publishers, 1988

[37] Taras, Kuzio, Russian and Ukrainian elites: A comparative study of different identities and alternative transitions, Communist and Post-Communist Studies, 2018

constitutionality, and if they were found unconstitutional, they would lose their power. But the transition from the state power of being united to the separation of powers is a problem for the states came out from the authoritarian regime. There is still a great tendency toward the combined state power. It can be seen in the states with the huge presidential competency. Strong leadership is present in Russia. The presidential office in Russia consists of the executive, legislative, and judicial scope of rights. The president is given the law-making possibility, he could issue directives and edicts. According to the Russian Constitution, the president is the guardian of the Constitution, first of all. And to provide this clause, he has the right to control the execution and the creation of laws. In addition, interim judicial power was also in his competency. All these factors bear witness to the extreme presidential power or to the abuse of the presidential authority, in other words.

2. Law and justice in post-soviet Ukraine

2.1.Constitutions and the Rule of Law

To start discussion about the drafting of Ukrainian Constitution, it is reasonable to remember the about 350 years of colonial servitude, the communist past, and the recent independence gained the state. It led to the difficulties in creating new democratic institutions, including the independent judiciary, based on the rule of law[38]. In the beginning of its independence, Ukraine joined the Council of Europe, and took responsibility to adopt a constitution, civil code, to reform judicial branch, and conform the national legislation to the European standards.

The will of Ukraine to adopt a new constitution was welcomed by the Council of Europe. When the process of establishing the constitutional act was started, the first challenge was to choose the model: should it follow the way of creating a democratic society as in Europe or to take the directions of emancipation from the Soviet Union as it was started by Gorbachev during the period of glasnost. Scholars because of the lack of professionality and experience were not able to propose the most effective way of transition. So, the methods to build democratic constitutional fundament were not found.

Ukrainian way to the deliberation was made step by step. The first stage was initiated in 1990, when the Declaration of the State Sovereignty of Ukraine was adopted by the Supreme Soviet of the Ukrainian SSR. It gave rise to the national sovereignty, providing the right to the self-determination and the possibility to secession from the USSR. Economic independence, legislative supremacy of the Ukrainian jurisdiction were also declared

All these facts pushed Ukraine toward the creation of its own constitution. The next move was the creation of Parliamentary Constitutional Commission, the task of which was the to adopt the conception of the constitution. As it was told before, it was the most difficult problem. The commission choose the second way of constitutional transition. Moscow saw the reform movement in Ukraine to be a great damage. All in all, the constitutional route was in line with the previous Gorbachev's reforms in 1990. That choice was probably the most important moment for the future development of democracy in Ukraine. When the conception was defined, Verkhovna Rada of Ukraine dropped the Act proclaiming independence of Ukraine in 1991. According to text of this act, the reason for the independence was lied in the coup d'état that hugely threated Ukraine. It was also mentioned the right to self-determination, unwritten in the UN Charter, as the legal basis allowing Ukraine to liberate. Since the moment of official promulgation of this act the Constitution of Ukraine and laws of Ukraine became the only legislative resource for Ukraine.

[38] Henry, Hale, Formal Constitutions in Informal politics: Institutions and Democratization in Post-Soviet Eurasia, World Politics, vol. 63, no. 4, 2011

The Act was a crucial moment, claiming official deviation from the soviet dependence. While the conceptions of the Western constitutions were not allowed, the commission was able to act only through the Soviet paradigm. After the promulgation of this act, the constitutional commission was free to choose the instruments of Western constitutions.[39] Nevertheless, the whole departure had not been achieved yet. The final move was the conduct of the first Ukrainian referendum on independence in 1991. The main aim was to receive the consent of the whole Ukrainian society. In fact, 90 percent voted in favor of independence. After that, Ukrainian Parliament began to accomplish all crucial legislative changes. First of all, the annulation of the Union Treaty of 1922 took place.

The Constitutional Commission was under constraint, members had to draft the new document as fast as possible. They should include all requirements proving democratic directions of the country such as pluralism, the rule of law, supremacy of the constitution. [40]All these rights were borrowed from the western experience. The forts draft of the Constitution was sent to the western scholars in Germany, France, Britain, and also to the experts in the USA and Canada. Two seminars dedicated to the text of the Ukrainian Constitution were held. The forts took place in Prague, and the second one was in Washington. Then the Commission took into consideration all comments and presented the second draft of the constitution. Western scientists explained their points with the vast degree of skepticism. Nevertheless, the commission reassured that all recommendations were applied. So, the final result was defined by the outputs of long discussions around the world. It is reasonable to notice the differences in building constitutionalism between Western and Soviet paths to understand better the reason of battle in Ukraine[41]. Western constitutions are characterized by the principle of the rule of law, representative government, and the task of limiting state power. The Soviet constitutions differ dramatically in the context of limited government. The Soviet legal system was known to invent its own terms and interpretations. For example, such terms as “property”,” parliament”, “democracy” obtained special meaning because of the leading role of the Communist party in the USSR. In the opinion of the representatives of the Soviet regime, law and constitutions were strategic tools of the ruling elite. The law was thought by Lenin to be a political measure. To conclude, Western meanings were incompatible with the Soviet one, because the constitution in the Communist regime was no more than a formal act. Despite the vast list of human rights in the Soviet Constitution was unwritten, such rights could be exercised only in the interests of the Communists. Western and Soviet constitutional differences were lied in their

[39] Update: Return to 1996 Constitution strengthens president, raises legal questions, Kyiv Post, 2010

[40] Верховенство права. Доповідь, схвалена Венеційською Комісією на 86-му пленарному засіданні. (Венеція, 25–26 березня 2011 року), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-ukr

[41] Richard C.O. Rezie, The Ukrainian Constitution: Interpretations of the Citizens' Rights Provisions, 1999.

ideology. The question was whether the Constitutional Commission could escape the dogma of the Marxist-Leninist theory. The answers could be found by a studying the drafts of the Constitution.

As it was observed before, there were four drafts of the constitution, and all of them were discussed by the scholars all over the world. The analysis by the experts were made only on the basis of the English translations provided by the Ukrainian Legal foundation. Sometimes it was the result of the independent formulation. The choice of Ukraine was in favor the Western constitutional style. Canadian judge revising the first draft told that it was intending to create the democratic state, where the government subject to the bill of rights. Generally, all experts were surprised by the drafting text, which reflected the Ukrainian background. Petro Martinenko, who was one of the members of the Commission, insisted that the draft was presented for the new democratic society. The proof of this was also promised socialist-oriented market economy, that was a strong deviation from the former Soviet regime. Scholars criticized the length of the constitution. Some told that the second draft was very detailed, and articles were ill-structured, characterized nonprofessional style of writing. It was caused by the lack of experience of the drafters. The drafting constitution concluded the article on the rule of law and lacked any article on the socialist legality[42]. The West worried about the formal conception of the principles, adjudicated in the text of the draft. However, absence of social context was the most significant achievement made by the drafters. Additionally, it was the main condition to build democratic state went in line with the Western principles. Article 9 was also wholly unknown, because it was established, that any ideology would not be recognized a governmental one. Such articles promulgating separation of powers, ideological pluralism, superiority of civil rights and freedoms also proved that the path of constitutional transition was wholly democratic. It fulfilled the perspectives of the Western legal experts.

One of the most difficult challenge was to define the structure of the state power. The choice was made in favor of a parliamentary-presidential system. France with its extremely strong presidential power was an example which drafters decided to follow. Significant scope of the competence was given to the Office of the President and the legislative body. Both the President and the Parliament were elected by the populace, and the government was appointed by the President.

Legislative Power is represented by the National Council or Verkhovna Rada. It was a long debated about the need to create a bicameral legislature. The doubts were raised because of the fact that the Rada of Territories (the second house) would be given a small list of legislative competency, such as an appointment of judges, approve of acts on the regional level, expiry of the

[42] Верховенство права. Доповідь, схвалена Венеційською Комісією на 86-му пленарному засіданні. (Венеція, 25–26 березня 2011 року), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-ukr

authority of local self-government. The west criticized the article concerning the power of legislative to conduct modifications of the Constitution. It took an experience of America, allowing the public (of 300,000 voters) to draft the legislature. According to the prescribed procedure, the public, the President, executive, and the National Council could jointly initiate a legislature. But in Ukraine the President could use the veto power and send the bill to be reread. The question in this context was about the necessity to use public initiative for drafting an ordinary law. Some articles on the legislative power were seen by the West to be excessive. To illustrate, there was an article that restricted a deputy to carry out mandate in case of a court sentence has come into force. It could be regarded also in context of traffic violations, and in many other administrative convictions, for which the they could be fined, but not terminated.

Executive power had also debatable questions. The candidate pretending to be the president of Ukraine had to live in Ukraine at least 10 years, spoke Ukrainian fluently. So, it was caused by the process of Ukrainization. The office of the President was hugely empowered, despite authoritarian experience of Ukraine during the Soviet Union. Nevertheless, the West considered such provisions to be efficient in Ukraine. Firstly, the President could increase the number of reforms. Secondly, a weak presidency could lead to the emergency of numerous parties and movements. The disadvantages of the strong presidency could be the dependency on the President of all other branches and a jam among the President, Prime Minister and the cabinet of Ministers. The most questionable article was about the right of the President to declare emergency laws on the whole territory of Ukraine or in particular areas and present it to the National Council in two days. The Western scholars argued about this right, because of the absence of the Constitutional Court in these procedures. It raised the question of constitutionality of the presidential initiative in such cases. The President could use this prerogative in favor of its own interests and could usurp the power. Despite the vast list of the presidential competency, an accountability was also provided. The president was. Accountable to the legislature. In fact, the National Council had a possibility to limit the power of the President. For example, the National Council could check the presidential healthy and decide whether he could continue to hold an office. It was also prescribed the norm requiring the parliamentary approval to appoint or to terminate the Prime Minister. This article was adopted, and in 1993 it led to the political jam, when the Parliament denied the decree of the Prime Minister on the economy and then interfered her resigning by the President.

Ukraine because of its large territory collide also with the problems of self-government[43]. According to the draft, it was divided into 24 oblasts, the Autonomous Republic of Crimea, and the City of Kiev. It should be told, that self-government was limited, despite the state bodies were

[43] Trevor, Brown and Charles, Wise, Constitutional Courts and legislative-Executive Relations; The case of Ukraine, Political Science Quarterly, Vol. 119, No. 1, 2004, 143-169

restricted to interfere. The power of the President was also extreme on the regional level. The President could exercise its responsibility to annul the acts of local government, if they have not met the constitutionality. The challenge was actual, because there was not the definition for the unconstitutionality. The Cabinet of Ministers was also allowed to control the work of the local authority. To conclude, the drafters had a desire to avoid the decentralization. (It is possible to make a remark here, that the decentralization moving is still an ongoing process in Ukraine). Crimea is an exception in the context of decentralization.[44] It was given an autonomous status. The draft proposed Crimea to be an independent republic comprising Ukraine. Crimea had its own Constitution, territorial organization, and government. The draft did not indicate the exact status for Crimea. It was something between the oblast and the Republic. The powers of Crimea and state powers were closely connected and mixed. The West considered that it was made to avoid the secession of Crimea in future. The conflicts between the Crimean government and the central government took place and led to the political instability too. Western scientists recommended to find a consensus concerning the status of Crimea.[45] They saw two solutions: to find consensus or to live with the continuous pro-Russian pressure. (To run ahead, Ukraine choose the second variant, and it was ended by the secession of Crimea). So, the draft of the Constitution rejected the idea of federalization. In fact, the country needed not a federalization, but improvement od the self-government and directions toward decentralization. All drafters were talking about this, but when the Constitution was adopted, and the power was achieved, the promises were forgotten. In practice, regional councils were subordinated to the central authority, which controlled them. Going deeply, the main reason for this was to control a distribution of finances and flourished corruption.

Judicial power took the path of the civil law countries. Criminal, civil, constitutional courts and the Supreme court on non-constitutional questions at the highest level were set apart from each other. Prosecutor's office played important role in the judicial system, if compared with the role of an advocacy. Several articles gave courts independence and affirmed 2their subordination to the law.[46] It is significant to mention the fact that during the meetings on the drafts held in 1992 some members of the commission had doubts about an independence of the judges. They argued, that as previous judicial system was under pressure, the new one could not be built without control too. They wanted to keep this through the Parliamentary guidance. Secondly, they commented that

[44] Marguerite, Marlin, Concepts of "Decentralization" and "Federalization" in Ukraine: Political Signifiers or Distinct Constitutionalist Approaches for Devolutionary Fderalism, Nationalism and Ethnic Politics, 2016

[45] Закон України "Про затвердження Конституції Автономної Республіки Крим" від 23 грудня 1998 року № 350 – XIV, Відомості Верховної Ради України., 1999

[46] Section 2.2 of the Chapter 2 is dedicated to the power of judges, pp 35-42

the judicial appointments were made by the former political elite, who were corrupted. Last critic point was because of the question about replacement of previously appointed judges.

The status of the Constitutional Court had features of the German court and of the European centralized model of constitutional adjudication in general, where only the Constitutional court is empowered to give a remedy in case of unconstitutional acts[47]. An exception was made in Crimea. The draft had articles which empowered the Court of general jurisdiction to rule on the constitutionality around the Republic.

The way of establishing human rights was also influenced by the practice from abroad. Almost 90 articles were dedicated to the civil rights. drafter claimed that the way of promulgating human rights went in line with the international standards, such as the International Covenant on Civil and Political rights, adopted in 1966. Such liberties as the right to the private property, the right to private enterprise, the right to travel freely, and many other illustrated the deviation from the soviet norms. Gael Graham, the scholar of the Central European University, thought that the provision of human rights in the Ukrainian Constitution was more as a will of drafters to satisfy the West, than a desire to guarantee them in practice. The long list of human rights just gave rise to the doubts. The draft constitution included non-justiciable rights or the rights written in the soviet style[48]. For example, the right to free expression was promulgated, but it also included the clause limiting this actuality: "restriction of this right could be established in case of protecting the interests of the state and rights of other individuals.

The drafts of the Constitutions also did not include the norms protecting private owners. The status of the business was not defined exactly. It led to the deficit of farmers, failure in the privatization, and unwillingness of the foreigners to invest in Ukraine.

Doubts about the limitations prescribed in the Constitution was caused by the Soviet past. The constitutions of all countries have limitations, because the law cannot be without restraints, but the requirements for Ukraine were quite strict. Some scientists recommended Ukrainian drafters to take into consideration the Canadian Charter of Rights and Freedoms, where limitations were also set. To illustrate, the first section of the Canadian Charter is about limitations, allowing governments to justify infringements of certain rights prescribed in Chapter. Infringements could be used in case of government actions that are known in free society as urgent and important. For example, hate speech could be lawfully restrained. So, Canadian example proposed to promulgate that the rights were not absolute, because in democratic society some circumstances could led to the limitations of rights. But the most important condition was about constitutionality of such

[47] Mykola, Inshyn and Yurii, Miroshnichenko, and Yurii, Paida, Protection of Constitutional Cultural Rights and Freedoms of citizens by the Constitutional Court of Ukraine, Baltic Journal of Economic Studies, Vol. 4, No.4, 2018

[48] Keenan H, Hohol, The draft Constitution of Ukraine: an overview, Review of Constitutional Studies, vol.1, no. 2, 1994

restrictions. In Canada the judicial branch was responsible for defining the constitutional incentives of such limitations.

The problem of Ukraine lied in the absence of the correct understanding of "reasonability", which set the borders for the application of human right limits[15]. All in all, such factors as questioned independence of judges and a big scope of limitations undermined the Western scholars to call Ukrainian human rights to be guaranteed.

When the long discussion of the draft was finished, the next step was to ratify the Constitution. It was also debatable issue. The main task was to decide which organ would ratify. Western experts insisted on the completely new order of adopting the Constitution. Gregory Stanton represented the USA proposed the Constitution to be legitimized by the people. So, the referendum was chosen to be the main form of adopting the Constitution. The scholar also suggested such condition for the efficient start of the Ukrainian state as a constitutional one: the conducting of the parliamentary elections, constitutional commission is elected by the new parliament, and a referendum to ratify the constitution.

To conclude, the Ukrainian Constitution was a tool putting ends with the Soviet regime. It presented Ukraine as a democratic and constitutional state on the international arena. It was the first step which permit the western principles to be a part of Ukrainian development. Obviously, it reflected the problems of revolutionary constitutions. It resulted in the numerous articles, contradictory and justiciable conditions. For example, a lot of article used references, such as "in accordance with the law", but there was not defined where the law could be found. The challenge concerning the separation of powers was also unsolved. The conditions prescribed in the constitution could cause the jam in political procedures especially during the most significant and crucial moments. Among the main challenges for the democracy of the constitution were socialist clauses and the questionable independence of the judiciary. The Constitution empowered the Parliament and the Constitutional court to close the gaps in the legislation, but the way of fulfilling was unclear. Additionally, it was critics toward the level of judicial subordination to the legislative and executive branch.

Finally, the Constitution was adopted on June 28, 1996. The new transition was started. Venice Commission saw this event to be a historic and turnout event for Ukraine, stepping on the way of democracy and independence. The fundamental principles reflected in the Constitution were: the highest force of the Constitution, a separation of powers, legality, access to justice. However, today the Constitution still faces the complexities. In the next sections, judicial branch and its interactions with legislature and executive will be studied.

The existence of the Constitution allowed people and the experts from the West to qualify the efficacy of the highest legislative act[49]. The status of this act permitted scholars to be severe critics, because performance of the Constitutional provisions influenced directly on the performance of all democratic institutions in the country. The most difficult task was to implement all constitutionally prescribed norms. One of them was the principle guaranteeing the Rule of Law.

The problem of implementation took place, because the Constitution had the high degree of generality, and additional legislative regulation was not created. According to these, the Courts were not able to protect human rights given by the Constitution. The Venice Commission denoted that the post-Soviet countries has a tradition to establish a long list of human rights[26]. Nevertheless the Commission wanted to believe that the situation has been changed because the procedure for securing human rights was in the hands of the judicial system. So, if the courts were able to prove their efficiency, the risk would be evident.

The rule of law was prescribed in the article 8 of the Constitution. The former elite was unfamiliar with this term, because previously the term "rule of laws" were effectively used. The West saw the great difference between these two definitions. But the Communist legislature branch confused the rule of law with the rule of laws.[50] They also raised the question concerning the relationship between the supremacy of the Constitution and the rule of law. In the USSR, the rule of laws was known as all legal acts adopted by the Parliament. It was possible to use this term, because there were not a separation of powers and an accountability among all branches of the government.

Since 2005 the Centre for Democracy and the Rule of Law was created, its aim was to support movements towards development of Ukrainian legal society. The members of CEDEM check the legislative activity and react on the adoption of norms, if they contravene the constitutional human rights. They also influenced on the transparency of officials through opened Parliamentary sessions, access to the information, etc. People were able to write petitions and participated directly in legislative processes.

In 2018 the rule of law was thought to be improved according to the Rule of Law Index, but Ukraine is still among the countries with the weakest judicial system. The Index was calculated in the basis of the level of limitation of the government, corruption, transparency, human rights and their secure, access to justice. According to the report, Ukraine possess itself as the country with the weakest rule of law, because of flourished corruption, especially in such spheres: courts, policy and military[28].

[49] Serhiy, Holovaty, Ukraine in transition: from newly emerged democracy towards autocracy, Review of central and east European Law, No 3, Kluwer Academic Publishers, Netherlands, 2001

[50] Верховенство права. Доповідь, схвалена Венеційською Комісією на 86-му пленарному засіданні. (Венеція, 25–26 березня 2011 року), Available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-ukr

The Rule of law is by the judges to be a legal doctrine that no one can be above the law, everyone is equal before the law, no one can be punished otherwise than in the order established by law and only in the context of this violation. The rule of law implies that all laws and enactments are subject to the law, and they cannot contravene the law. According to the natural law theory, the rule of law requires that all normative legal acts (including the constitution and legislation) and all activities of state power be subject to the protection of dignity, freedom and human rights. The state in which the rule of law is implemented can be called as the legal one. The concept of the rule of law has been known since ancient times, when the ancient Greek philosopher Aristotle wrote, that "the law must rule the state".

2.2.Independence of Judges

The level of the rule of law equals to the level of the judicial independence. According to the Article 6 of the Constitution, state power is divided equally among legislative, executive and judicial power. Separate Chapter 6 includes the meaning of the justice. According to this clause, justice is a term, meaning an organization of the judicial branch in Ukraine. According to some experts, it is better to use the term "judiciary" as in many other constitution all over the world. In fact, the term "justice" explained better the destiny of the Ukrainian courts, such as exercising legal proceedings to solve political conflicts[51]. The term "judiciary" originally should play an important role in other two pillars of state power in the way of accounting them for their actions, and in case of legislature to ensure that the ratified laws are enforced. Thus, they should be in compliance with the Constitution and the higher law (the law of the European Union). To accomplish its role, the judicial system must be autonomous and was not connected to any irrelevant influence by other bodies.

The Constitution promulgates the independence of the judiciary, but practice showed the opposite. First of all, the Ukrainian courts continue the tradition of Soviet Courts. So called telephone law is still present in Ukraine, it means that such persons as politicians, businessman, and other influential people, can call judges and give instructions to the final decisions of the judicial proceedings. It is reasonable to notice that the Law "On the judiciary" was created on the basis of the Stalin's Constitution adopted n 1937. As a result, it was difficult to believe in noticeable changes even after the promulgation of the so-called democratic Constitution of Ukraine, because the judicial branch continued to be politically dependent.

The independence of judges is considered in the developed countries to be the guarantee of the constitutional provisions, including the fundamental principles, protection of human rights,

[51] Stuart, Wallace and Conall, Mallory, Applying the European Convention on Human Rights to the Conflict in Ukraine, 2018

stability of the civil order and a stability in country overall[52]. The fundamental truth of the modern constitutionalism lies in the independence of judges and in the independence of the whole judicial system[2]. It is seen as the most important guarantee to establish a fair trial, proclaimed in the European Convention on Human Rights of 1950. Among the main principles of the judges are judicial independence and impartiality, which are the most significant elements for the functioning of the justice. The category of independency does not exist alone, it consists of many other components. The Law "On Judicial System and Status of Judges" adopted in 2016 point out such comprising elements of the autonomous judicial system. The definition of the independence of courts is defined in the Article 6 of the Law on Judicial System. It is proclaimed there, that courts are independent from any illegal influence. The influence on judges in any way with the purpose to bring into discredit the court and damage the principle of impartiality lead to the non-performance of the judicial decision and is bounded by the law. State bodies and any officials are restrained from interference in the responsibilities of judiciaries, any actions that undermine this clause are seen as violations. Judicial self-government is prescribed by the Law. It us guaranteed through such rights: the right to have special order of elections, to have symbols of the Judiciary, special rules on judicial proceedings, the right to keep secrecy of the judicial decision-making, to obtain special benefits, to be secured and to receive a safety for their families. The list of guarantees is endless, but as any list of rights in the post-Soviet Countries it was questionable in the context of realization[26]. It is a very interesting fact, that the scholars insisted on the notion, that country could not be independent, if the judicial branch was not independent.

The chair of the Council of Judges of Ukraine Petro Pylypchuk in the report dedicated to the provision of autonomy of the courts and the independence of judges[53], claimed that during many years the will of judges to have opportunity to take its strong position in the system of state bodies was disregarded by politicians. The chair also acknowledged the fact that political actors use courts in their political goals, making the judicial system to violate prescribed principles[30]. The situation emerged during elections in 2006-2007 forced judges to declare that the influence of politicians threatened their core fundaments, and Ukraine found itself to be unsecured by the court.

In the report it was told also that a justice minister, being a party of a court case, expressed his opinion about the court decisions that have not been established yet. It also influenced on the court decision-making process of the all instances (appellate and cassation courts). Many examples could be brought also in the context of elections, appointments and dismissals of the judges. Before

[52] Kim, Ratushny, Toward the Independence of Judges in Ukraine, Saskatchewan Law Review, vol. 62, no. 2, 1999
[53] The Council of Judges of Ukraine, On the State of Enforcement in the Nation of the Constitution and Laws of Ukraine Regarding the Provision of Autonomy of the Courts and the Independence of Judges, statutes and Decisions, vol. 44, no.1, 2009

2010 the legislation on the appointment was not written in way of non-competitive and transparency procedure.

While the Law on Justice have not been modified, the competition procedure for judges was characterized by formal questions, and could not be regarded as based on law, because the result was defined on the consent and according to the wish of the court chair. So, the changes of the legislation on the competitive procedure of judicial appointment was must. The work conditions were also worsened because of decreasing funding, permanent risks and lack of prestige of the profession. In 2007 the courts were full of vacant places, it accounted 946 unfilled vacancies. It was caused by the legislative and executive invasion in financial independence and guarantees of judges. To illustrate, according to the law dedicated to the State Budget in 2007, the Supreme Council of Ukraine dropped the financing of judges and of administrative employees in the courts. Besides, other factors also influenced on the profession of judge and on the function of the judicial system on the whole. The High Council of Justice is a mandatory organ, taking part in the appointment of judges. One must admit, that this body is politicized, and it intended to assign judges that would promote politically beneficious goals. In the report noticed before the chair Petro Pylypchuk also undermined the cases, when the High Council of Justice made unreasonable decisions in a few days or hours and dismissed judges on the basis of complaints about the judicial breach of oath.

The existence of the Hugh Council of Justice is seen to be important according to the European standards. The Consultative Council of European Judges considered, that for the countries that did not have reliable democratic systems, it was reasonable to have an independent authority established by judges themselves. Nowadays in the most European countries (France, Italy, Poland) such independent bodies are set. One must be told, that in Ukraine, as for the country with unstable democracy, this organ should be a mechanism ensuring independency. But to have this function in practice, The Council of Justice should have protection from the influence of other branches of power. In fact, this provision is absent in Ukraine, and the Council is still under the control of politicians.

It would be unfair not to mention that fact that when the problem of interference is raised, the judges also assisted and exacerbated the situation. Such factors as abuses of the judicial status, an unjust decisions, review the case brought to the court, when the claim does not relate to the competence, submission of the case filed with the person who did not have a legal right, corruptive acts, do not increase the trust of the people to the judicial system and obviously threaten the principle of the judicial independence. Which seems to confirm the idea, that judges consider the principles guaranteed by the constitution not as benefits for the civil society, but as their own advantages.

Nowadays Ukraine is on the way of making judicial system in compliance with the national and international requirements. The last significant step was made on June 2016, when the judicial reform was conducted. The reform was named "modern" as the sign of diminishing of all remaining Soviet traditions.

The first issue to discuss will be the Constitutional Court. The status of the Constitutional Court is regulated by the separate Chapter 7 of the Constitution. The name of this chapter is "the Constitutional Court of Ukraine, a tendency was taken from the experience of the foreign countries (Italy, Spain, France). In Ukraine, the competence of the Constitutional Court, its order of appointment procedure, and the procedure of the appeal are prescribed in the Constitution. Additional rules dedicated to the functioning of the Constitutional Court are seen as constitutional in Ukraine. But in Ukraine the rules are not divided on organic or constitutional, all of the laws are thought to be ordinary. An example of such law regulating the Constitutional Court of Ukraine is the Law "On Constitutional Court of Ukraine" adopted on June 2017. In this law it is unwritten that the Court had a possibility to adopt the Rules of Procedure during a special plenary session. [54]So, this document refers to the internal documents of the body, and it could be adopted by the Court itself. The President cannot veto this right, such actions will be considered as interventions. So, the Constitutional Court operated independently. Some scholars even argue about the fourth branch power such as the Constitutional Court. It is another question which demands long discussion. The position of adopting Rules autonomously was supported by the Venice Commission. In the opinion of the Commission, the Constitutional Court plays different role in the hierarchy of laws on the domestic level. Obviously, on the top of the hierarchy is the Constitution, where the jurisdiction of the court is established. Laws on the constitutional courts add detailed norms. And finally, the Rules of Procedure adopted by itself consist of procedural details of the everyday practice. Venice Commission noticed that such Rules should be drafted by the court itself, because the constitutional courts must have autonomy, but in the framework of the constitution prescriptions[18]. So, it was an example of statutory independence of judges of the Constitutional Court.

Functional aspect of the independence of the judges of the Constitutional Court is also present, it means that the court accomplishing constitutional review of legislation is the only body of constitutional jurisdiction overseeing the balance between the branches of state power[19]. According to the Venice Commission, the Constitutional Courts must have independence towards other different groups and be attentive to the pluralism in society. The Ukrainian legislation provided norms guaranteeing the independence of the Constitutional Court. It is reasonable to

[54] Ukraine court to rule on wider presidential powers, Kyiv Post, 2010

compare Venice recommendations with the privileges established by the Ukrainian legislature. Firstly, the term of the judges of the Constitutional jurisdiction cannot equal the term of the Parliament. In Ukraine, parliamentary term is 5 years, and the term of the judges of the Constitutional Court is 9 years.

	Kuchma's Ukraine (1994–2005)	Yushchenko's Ukraine (2006–2010)	Yanukovych's Ukraine (2010–2014)	Poroshenko's Ukraine (2014–2017)
Appointing Higher Council of Justice	Yes	Yes	Yes	Yes
Appointing judges	Yes, for an initial 5-year term	Yes, for an initial 5-year term	Yes, for an initial 5-year term	Yes, for an initial 5-year term
Appointing Supreme Court judges	Yes, for an initial 5-year term	Yes, for an initial 5-year term	Yes, for an initial 5-year term	Yes, for an initial 5-year term
Dismissing judges	Yes	Yes	Yes	Yes
Reorganizing the courts	Broad	Limited	Broad	Broad
Informal powers	Very strong through patronage, perks, intimidation	Strong through patronage, perks, intimidation	Very strong through patronage, perks, intimidation	Strong through patronage, perks, intimidation

The table above illustrates the institution of appointing by the President.[55] Each president of Ukraine is known to appoint the Higher Council of Justice, judges, Supreme court judges. Consequently, the procedure of the Constitutional judges' appointment in Ukraine is conducted by the President, the Verkovna Rada, the Congress of Judges. Each body appoints 6 judges. Thus, the Ukrainian procedure has a procedure allowing to avoid the recommendation of the Venice Commission. The second rule given by the Venice Commission was establishing strict rules allowing to dismiss the judge in case if incompatibility trough the outside the courts activities. This aspect found its place in the Article 148 of the Ukrainian Constitution. It is said that the judges of the Constitutional Court of Ukraine cannot be a member of the political parties, trade unions, participate in policy, obtain mandate, and hold another paid office.[47] They are able to perform only scholarly, teaching and creative activities. Thirdly, in case of putting disciplinary sanctions and dismissing the judges, the decision should be made through the voting by the court itself. The Constitutional amendments adopted in 2016 caused the changes in the formation of the Constitutional Court of Ukraine. The first innovation was about the process of elections of the candidates. It was established that the procedure must be conducted on the competitive basis. The second innovation determined the rules for the termination of judges without special decision. According to the Constitution of Ukraine the reasons for this are an expiration of the term, attainment of 70 years, ending the citizenship of Ukraine or obtaining citizenship of another

[55] Valentina, Feklyunina, Soft power and identity: Russia, Ukraine and the "Russian worlds", European Journal of International Relations, 2016

country, recognition the judge by the Court to be missed, guilty verdict against the judge, death of the judge. When the amendments to the Constitution were ratified, the grounds for the termination were written in the next way: 1) impossibility to hold the post of the judge because of health reasons; 2) violation of the incompatibility requirements; 3) committed disciplinary offence, neglecting the requirements unwritten to the status of judge; 4) voluntary resignation. The important condition is that fact that the decision should be made with the voting procedure by the Court itself (no less than 2/3 of the votes). The fourth modification was noticed that the Constitutional Court should have sufficient number of judges; and it was also permitted judges to reject the individual complaints that do not undermine seriously the guarantees of the Constitution.[19] Sufficient number of judges was mentioned with the aim of to avoid the congestion of the court. These two principles were taken together with the aim to bring courts closer to the standards of a balanced, independent, and fair trial. With the adopting of the constitutional amendments, the term "constitutional complaint" was defined. The reason to refer to the Constitutional Court was the final decision in the case breaching the norms of the Constitution. So, the main conditions were the next:

1) exhausted all judicial remedies of the national system;
2) respected time framework of 3 months after the final judicial decision entered into force.

Probably, the most important change was exclusion the function of the Constitutional court to interpret the laws. It was accomplished with the aim to keep the original interpretation of the law and to avoid its diverse interpretation on the requirement of political forces[56]. One should not forget that the judicial system in Ukraine is politicized, and the Constitution Court is not exception. The problem of the last explained modification is that none of the constitutional complaint was not considered by the Constitutional Court. On the other hand, positive effect is also present in the context of verification of the referendum questions that must be in compliance with the Constitution of Ukraine. Earlier, the body empowered to check the compliance was the Central Election Commission. It was criticized by many experts because the Commission did not have professional skills to assess the constitutionality of such issues. According to the official opinion of the Consultative Council of European Judges in 2010, if the decision of the Constitutional Court is not enforces, the right to a fair trial is to no purpose. To improve the effectiveness of the decision of the Constitutional Court of Ukraine, minor changes in the all procedural codes of Ukraine were conducted. First of all, the Constitutional Court was empowered 1) to establish unconstitutionality of a law and of other types of legal acts in the administrative cases, in which the final decision has

[56] Stuart, Wallace and Conall, Mallory, Applying the European Convention on Human Rights to the Conflict in Ukraine, 2018

not been entered in force; 2) to check the constitutionality of laws used by the courts in the criminal proceedings.

Financial aspect was also reformed in order to improve the independence of the judges of the Constitutional Court. According to Law of Ukraine "On the Constitutional Court of Ukraine" the Court have the possibility to administer its funds from the State Budget of Ukraine by itself. The expenditure for the following year provided as the financial support cannot be less than paying out for the previous year. According to the experts, the budget requirements specified by the Court did not meet the standards of the realism, actuality and social importance.

After the long discussion on the Constitutional Court independence, the review of the autonomy of the Supreme Court and Court of the General Jurisdiction is also the must[57]. The system of courts is functioning on the basis of the territorial principle and the principle of specialization. The Supreme Court is defined as the highest judicial organ in comparison to other courts of Ukraine. Judicial system is also characterized by the existence of the high specialized courts. To illustrate, Administrative courts were created with the aim to protect the rights and freedoms of person in the aspect of public relations. Extraordinary courts that are not prescribed by the Constitution of Ukraine are not permitted. According to the Law "On the Judiciary and the Status of Judges" the Supreme Court consists of Grand Chamber of the Supreme Court, Administrative Cassation Court, Commercial Cassation Court, Criminal Cassation Court, Civil Cassation Court. Amendments of 2016 changed the four-level judicial system to a three-level system. Previously, there were courts of the first instance, the courts of the second instance, appellate courts and the Supreme Court of Ukraine. Now the judicial system has the courts of the first and the second instances, and the Supreme Court combined with the specialized cassation courts.

Evaluating the independency of the courts, probably, the public opinion plays greater role, than prescribed legal guarantees. In the opinion of the Consultative Council of European Judges, high quality judicial system could be assessed by the level of clearness, transparency and predictability of judicial proceedings.

The Committee of Ministers to the member States insisted in the fact that the appeals to the third court should take place in the cases when the decision would have influence on the whole legal sphere. Ukrainian legislative branch applied this recommendation by the combining the courts of cassation with the Supreme Court. Additionally, to avoid the fourth instance, appeals to the Grand Chamber were specified according to the level of public significance. To submit this norm, in the Law "On the Judiciary and the Status of Judges" mandatory function of the conclusions of the

[57] The Council of Judges of Ukraine, On the State of Enforcement in the Nation of the Constitution and Laws of Ukraine Regarding the Provision of Autonomy of the Courts and the Independence of Judges, statutes and Decisions, vol. 44, no.1, 2009

Supreme Courts was prescribed. Final decisions interpreting the laws were binding for all government bodies that appeal to these legal provisions during their activity. Venice Commission noted that for the system uncharacterized by the precedents such approach was helpful. In Ukraine as in the country of civil law system, the Supreme Court plays important rule, because it sets the standards for the future cases, maintains the unity of the legislation, removes collisions, and thus keeps public trust to the judicial system. For instance, Administrative Code of Ukraine states the clause, that if the administrative courts have typical judicial proceedings, it is possible for the court trying to proceed this case to apply for the Supreme Court and ask for the submission of reviewing this case as the court of the first instance.

All in all, changes in the context of the judicial reform in Ukraine could be regarded as progressive. One should, however, not forget that the legal aspect does not show the real picture. The whole situation will be seen just after studying political, social, and historical factors. The reforms improved the judicial system functioning and increased its independency. The rule of law became to prevail in Ukraine due to the independent competency of the Constitutional Court. Nevertheless, the reforms should be completed. First of all, the Rules of Procedure of the Constitutional Court must be adopted, because the functioning of the court without this act will be powerless. Secondly, the body that form the staff of the court should be protected in order to act independently from the opinion of the political actors[58]. Thirdly, the interaction among the President, the Parliament and the Council of Justice should be improved.

2.3.Implementation of the Constitutional Norms and the Status of International ActsLaw

The forms of the constitutional implementations are enforcement, fulfillment, adherence, application. According to the professor Shapoval, the most important form is an application. It is worth to look at it closer. The judiciary uses an application of the constitutional norms at all levels. The basis for the implementation of the Constitution could be found in Article 7 of the Constitution. It is said that the norms of the Constitution have direct effects (self-executing). Expert Shapoval mentioned that the direct effect of the constitutional norms means that all government bodies should be driven by the constitutional norms and can take decisions only on the basis of the clauses of these norms[14].

Doubtless, the principle of the direct effect must be known by the judges. To illustrate, the President of the Supreme Court commented, that when the legislation does not provide a protection of particular human right, it is mandatory for the courts to ensure the provision of this right by

[58] Stuart, Wallace and Conall, Mallory, Applying the European Convention on Human Rights to the Conflict in Ukraine, 2018

referring to the Constitution. There is a special article of the Constitution, which defines the possibility of the courts to use the constitutional norms directly. According to Article 55, everybody has the right to challenge in the court the decisions of the state authority that contravenes the Constitution. Unfortunately, in practice judges still see themselves not as protectors of the human rights, but as guardians of the state interests. In fact, judicial branch is not the only example, another bodies of state power also neglect the constitutional provisions.

If take into consideration the acts of the President, the list of the unconstitutional acts will be larger. For example, during the history of Ukraine, the President failed to follow his oath, violated the procedure of appointments of the General Prosecutor of Ukraine, the heads of the Antimonopoly Committee and the Committee of Broadcasting. The President also exceeded its authority by ratified decrees on the issues, that were outside of his competency. In addition, the President violated the legislative procedures by refusing to sign the law on Local State Administration, even after the Parliament overridden his veto. This infringement took place twice, so the President violated the article 94 of the Constitution two times. The most evident violation is the fact when the President issued decrees without the mandatory countersignature of the Prime Minister and concerned ministers. Additionally, the President appointed the majors in some cities, despite these posts were elected.

It should be said, that the implementation of the Constitution depends on the position of the legislation generally in Ukraine[59]. Referring to the history, it is influenced by the status of the legislation in the USSR, when the separation of powers was absent, and the dominant power was in the hand of the Communists. So, the adoption of the Law on the functioning of the Constitutional Court was a turnout moment, which brought the new mechanism of limiting and controlling a state power and of securing the human rights. The creation of the new institution such as the Constitutional Court laid the foundation of the new constitutional order in the country. Experts suggest that unsatisfactory implementation of the Constitution is cause by the political influence. The most evidence argue is the fact that the Constitution was adopted in the context of the competition between the Parliament and the President, aiming to hold their office. The negotiations among the parties took a lot of time. The president wanted to conduct the referendum, on which he drafted the questions promoting his own interests. The Parliament was against Russian type of the government. The desires of the President forced the Parliament to take urgent actions. As a result, the Ukrainian Constitution was adopted according to the scenario of the Parliament during so called “constitutional night”, when the session lasted 24 hours. So, the nature of the Ukrainian constitution is seen by the experts as a compromise.

[59] Закон України від 23 лютого 2006 року "Про виконання рішень та застосування практики Європейського суду з прав людини", available at http://zakon3.rada.gov.ua/laws/show/3477-15

As it was mentioned before, in Ukraine, international acts plays important role in the national legal system as in any modern state and occupy a priority place in the hierarchy of acts. Today's trends can also be distinguished by an extremely close relationship between the constitutional and international law. Article 70 of the Constitution determines the legal status of the international treaties in the national law, their legal force and ways of implementation. A considerable part of international treaties found place in the field of human rights. Therefore, research and legal analysis of the problems concerning the status of the international treaties is extremely relevant.

The basic legal act regulating the sphere of international treaties is the Vienna Convention on the Law of Treaties of 1969. It contains basic provisions on the signing the contracts, their observance, application, interpretation, and termination. So, according to Article 2 of the Convention, the "treaty" means a written international agreement between states, governed by the international law, regardless of whether such agreement is set out in a single document, two or more related documents, and regardless of its specific name. Therefore, the main features of such contracts are written form, and the subjects- states. Article 3 of the Convention also defines the scope of this act, according to which the Convention could not be applied to the treaties concluded between other entities of international law. It should be understood that the purpose of the Convention was to codify the already existed legal base of international treaties, because the number of treaties were adopted before the establishment of the Convention. Consequently, the Vienna Convention became the new stage in the development of international law, and it was designed primarily to unite the understanding of the establishing, operation and termination of the international treaties.[60] Despite the fact that states are the main subjects of the international law, however, they are not the only ones, that's why the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations was adopted on 21 March 1986. According to the Preamble of this Convention, as the principle of free consent and of good of faith and the pacta sunt servanda have been recognized, the aim of the codification was to strengthen the legal basis of international relations and to serve the purpose of the Charter of the United Nations.

Therefore, the first sphere of the legal relations in the context of adoption, application, interpretation, and termination of the international treaties is regulated by the rules of the Vienna Convention on the Law of Treaties of 1969. The crucial moment here is an application only to the subjects of international law. The second sphere of the legal relations is much more complex, because it is related to the action of the international law on the national arena, its application and removing the collisions between the norms of national and international law. So, exactly these

[60] Opinion on the Constitutional situation in Ukraine dated December 20, 2010 - Source Venice Commission, available at http://www.venice.coe.int/WebForms/documents/?pdf=CDL-AD(2010)044-e

problems are the main subject that have to be regulated by the norms of the constitutional law. According to Article 9 of the Constitution, international treaties approved by the Verkhovna Rada of Ukraine shall be an integral part of the national legislation. But the adoption of the international treaties, clauses of which breach the norms of the Constitution, shall be possible only after conducting the Constitutional amendments in this context. It is reasonable to pay attention to Article 18 of the Constitution, according to which Ukrainian foreign policy is aimed at protecting its national interests and security by maintaining peaceful and beneficial co-operation with members of the international community in compliance with the generally acknowledged principles and norms of international law. Certainly, the existence of such norm-principle in the section dedicated to the main directions of the constitutional order of Ukrainian society is important, because it determines the movement of Ukraine and shows respect to the international standards. However, the basis for the operation of the international treaties is the clause of Article 9 of the Constitution.

The main legal act regulating these relations is the Law of Ukraine "On the International Treaties of Ukraine" of 2004, which establishes the order of adopting, execution and termination of international treaties with the purpose of the proper safeguarding of national interests, the implementation of goals, tasks and principles of the foreign policy of Ukraine, enshrined in the Constitution and the legislation of Ukraine.[61] The sphere of application of this norm spreads on the all international treaties governed by the norms of the international law and concluded in accordance with the Constitution of Ukraine and requirements of the mentioned law.

Nevertheless, the main question is the application of the international acts, the way of implementing in the national legislation avoiding collisions. According to Article 9 of the Constitution, the international norms are regarded as a part of the national legislation. So, international treaties can be measured as a legislation. It is reasonable to mention here, that the Constitutional Court of Ukraine gave an official interpretation of the term "legislation" in 1998. The Constitutional Court defined that the legislation consists of laws of Ukraine, current international treaties of Ukraine, the consent for which was given by the Verkhovna Rada of Ukraine, decrees of the President of Ukraine, decrees and resolutions of the Cabinet of Ministers of Ukraine, adopted within the limits of their competency and in accordance with the Constitution and laws of Ukraine. The textual order of the normative acts demonstrated that the Constitutional Court put the international treaties on the second place after the laws of Ukraine, but above than other acts with the status of by-laws, that must comply with the higher laws. In contrast, in the Article 19 of the Law "On the International Treaties of Ukraine" the norm observes that if

[61] Summary to the Decision of the Constitutional Court of Ukraine No. 20-rp/2010 dated September 30, 2010

international treaties, which were adopted in accordance with the established procedure, established rules that differ from the national ones, it is necessary to applicate the norms of the international legislation. One should note here, that the international norms prevail over the national ones. All in all, international agreements supposed to be higher than other acts, however, the Constitutional Court put them on the second place in the hierarchy of laws according to their judicial power. It is clear from these observations that international treaties give way to the Constitution, that has the highest legal force.

All mentioned facts proved that Ukraine respected the international law, but it raised the question whether all provisions find practical application. Is there a way in which Ukraine can be bound by the signed international treaties? According to Article 8 of the Law "On the International Treaties of Ukraine", the agreement to be bound may be provided by signing, ratifying, approving, accepting the treaty, accession to the contract, and in other way, agreed by the parties. However, the Constitution defines, that the international treaty could be seen as a part of national law only when it was approved by the Verkhovna Rada. Such consent could be given by the ratification of the treaty. The procedure of ratification is provided by Article 9 of the Law "On the International Treaties of Ukraine".[62] According to this norm, ratification of the international treaties of Ukraine means the adoption of an Act of ratification, an integral part of which is the text of the international treaty. On the basis of law signed and officially proclaimed by the President of Ukraine the Chairman of the Verkhovna Rada of Ukraine signs the ratification diploma, which is certified by the signature of the Minister of the Foreign Affairs of Ukraine, if the agreement foresees the exchange of such diplomas. The list of the international treaties that must be ratified is prescribed in the Law "On the International Treaties of Ukraine": a) political (cooperation, neutrality, mutual aid), territorial and such treaties that are about economic zone, continental shelf; treaties concerning human rights of people and citizens; b) general economic (on economic and scientific and technical cooperation), treaties of general financial issues, lending and economic assistance to foreign countries and international organizations, as well as receipt loans by Ukraine from foreign countries ; c) about participation of Ukraine in interstate unions and other interstate organizations, collective security systems; d) military assistance and the deployment of units of the Armed Forces of Ukraine to other states or the admission of units of armed forces of foreign states into the territory of Ukraine, conditions of temporary stay of foreign military formations in Ukraine; e) treaties concerning the transfer of historical and cultural values of the Ukrainian people as well objects of state property of Ukraine; f) agreements enforcement of which leads to the changes in the laws of Ukraine or adoption of new laws of Ukraine; g) other international treaties, the

[62] Закон України "Про міжнародні договори України" від 29 червня 2004 року № 1906 – IV, Відомості Верховної Ради України., 2004. № 50, 540.

ratification of which is provided by the international treaty or by the law of Ukraine. It is very clear from this list that the reasons for the ratification procedure are very significant, and concern the most important spheres of the social relations, that may be regulated with the international instruments. The most important clause in terms of the constitutional law is the "b", according to which, mandatory ratification is for the treaties concerning the rights, freedoms and responsibilities of the individuals and the citizens. It should be noticed here, that the legal status of the individual and the citizen is one of the most crucial question of the constitutional law, and taking into attention the fact, that basic documents on human rights and the mechanisms for their protection were developed on the international level (in particular, activities of the European Court of Human Rights), the obligation to ratify such treaties and give them priority over the laws of Ukraine is necessary. The very fact of ratification by passing the ratification law by the Verkhovna Rada of Ukraine transforms an international treaty into national law and to some extent legitimizes its adoption. So, ratification is an important legitimizing procedure of the international treaties and their incorporation into national law.

The issue of international treaties is considered to consist of two levels of legal regulation - international law (which is the subject of the law of international treaties) and national law (directly related to their actions in national law).[63] Therefore, the possibility to foresee the ratification at the stage of concluding an international treaty is another effective way to avoid legal problems. Also, it is important to take into consideration Article 4 of the Law "On the International Treaties of Ukraine", according to which, "proposals for the conclusion of international treaties of Ukraine shall be submitted after the Minister of Justice of Ukraine has conducted a legal expertise on the international treaty compliance to the Constitution and laws of Ukraine. So, on the stage of submitting proposition to ratify an international treaty, that includes other rules, than those, contained in the acts of Ukraine, propositions to modify the relevant acts of the Ukrainian legislation are added (Article 4 of the Law "On the International Treaties of Ukraine").

One must admit the collision in the norms regulating the ratification procedure is present. There is norm, that permits the President to approve an international treaty in the form of decree or the Cabinet of Ministers – in the form of resolution. This raises a question on the status and legal force of such treaties. According to the Constitution, an international treaty can be a part of Ukrainian legislation, if Verkhovna Rada gave its approval. The question is whether other international treaties may be a part of national legislation? The clause of the Constitution claiming that only Verkhovna Rada has the right to ratify international treaties proves the realization of the idea of legitimizing of the international treaties. As Verkhovna Rada is the only legislative body with the

[63] Ukraine's parliament backs changes to Constitution confirming Ukraine's path toward EU, NATO, UNIAN, 2016

power to adopt laws, and international treaties concern important social issues, so, empowering Verkhovna Rada means to embody the idea of the representative democracy and to realize the will of people. To overcome mentioned collision, it is helpful to take into consideration the clause of the resolution, that "Dealing with cases, resolving (overcoming) a conflict between the norm of international law, which entered into force without the consent of the Verkhovna Rada of Ukraine and the norm of another act of the legislation of Ukraine, should take into account the validity of an act of legislation that was approved to be an international treaty of Ukraine.[50] Thus, the problem was solved.

Considering the international treaties of Ukraine as a source of constitutional law of Ukraine and starting from Art. 9 of the Law on International Treaties of Ukraine, we can say that these treaties being the source of constitutional law are subject to mandatory ratification and have super-legal status. First of all, these treaties are related to human rights, freedoms and responsibilities of citizens. The widespread international human rights instrument, for example, is the European Convention on Human Rights, drafted in 1950. As already it was noted that the internationalization of constitutional law as a modern trend leads to inclusion in national constitutions human rights, envisaged in international acts, and therefore all such treaties are obviously becoming a part of national constitutional law of Ukraine, which thus approaches international law standards. According to Nazarenko, the list of international treaties thought to be sources of constitutional law consists of treaties on human rights, freedoms and responsibilities, and also certain bilateral treaties (such as agreement on Ukraine-Germany cooperation in the affairs of persons of German desent who reside in Ukraine, ratified in 1997). After all, the list is not so important, as subject to legal regulation enabling to enroll treaties in the sources of constitutional law. The most important of such subjects are those concerning the legal status of man and of citizen in their relationship with the state (and even states, as it was shown on the last example).

One must admit, that agreements seen to be a part of Ukrainian constitutional law should be ratified, and they have lower status than the Constitution, because according to the Article 8 of the Constitution, it has the highest legal force, and adoption of international treaties is possible after constitutional amendments. The Constitutional Court of Ukraine is empowered to hear cases and give conclusion on the constitutionality of international treaties of Ukraine, which are brought to the Verkhovna Rada to receive an approval on their obligation. So, there are preliminary and subsequent constitutional control of international treaties. Definitely the question of further constitutional control in the context of the principle of pacta sunt servanda is debatable, because in the case of defining the international treaty to be inconsistent, the Constitutional Court also resolves the issue of unconstitutionality of this treaty or the parts of it. (Article 87 of the Law "On the Constitutional Law"). As a result, the operation of international treaty is suspended in the

Ukrainian law, but without termination of Ukrainian obligations under this treaty. So, it became a question of international law, however, it is the constitutional law regulated the order of operation of the international treaties in the Ukrainian law.

2.4.Access to constitutional adjudication in Ukraine

This section will observe the level of constitutional adjudication, its contents, such as judicial review. To begin with, judicial review means that the court has opportunity to review the constitutionality of national acts and nullify them in case of their incompliance with the Constitution. It is reasonable to tell, that structures of judicial review differ from country to country, but experts distinguish two basic types of the judicial control over the laws and branches of state power. For example, in the USA, the constitutional review could be conducted by the courts of the all instances. In contrast, European judicial system is characterized by the Constitutional Court empowered to accomplish judicial review.

It is true that judicial review can speed up the process of right-based constitutional system. This argument can be analyzed through the comparison of the American judicial review and the post-Communist one. In America, judicial review is incidental to ordinary courts and spread throughout the judicial system. In the post-Soviet system, the desire to establish judicial review was characterized by pessimism[64]. Socialist constitutional thinking rejected the idea, because of the separation of powers, that seen by them to be incompatible with the provision of united power in the people. Firstly, it was caused by the absence of valid judicial review in the former system. The revision of the judicial system was not present during the Communists, and the discrete institution was changed simply. As the rules for the new constitutional bodies were changed, it caused to the emergence of the new appointments.[65] All in all, it led country to the new constitutional culture. Secondly, centralized judicial review affected also radically changes in civil society and improved the transparency of the judicial system.

Justice Marshal in Marbury vs. Madison argued that judicial review could be applied by the entire American judiciary, from the lowest instance to the highest. In Ukraine, according to the Constitution and the Law “On the Constitutional Court” the Constitutional Court was given a competency to conduct judicial review. The Constitutional Court was the first institution, created after the promulgation of the Constitution. The main aim of establishing was to provide constitutional adjudication respectively to the prescribed constitutional norms.

[64] Robert, Peacock and Gary, Cordner, “Shock Therapy” in Ukraine: a radical Approach to Post-Soviet Police Reform, Public Administration and Development, 2016

[65] Freedom House Report on the State of Democracy and Human Rights in Ukraine, Source Freedom house, 2011, available at http://www.freedomhouse.org/sites/default/files/inline_images/98.pdf

The operation of Court is seen to be separated from the hierarchy of Ukrainian courts and be the only organ of constitutional jurisdiction in Ukraine. The Constitution gave the Constitutional Court the right to review the acts of the Verkhovna Rada, the President, and the Cabinet of Ministers. The Constitutional judges can also interpret the norms of the Constitution and the laws of Ukraine. The decisions, interpretations of the Court are mandatory on the whole territory of Ukraine. The Article 152 of the Constitution claims that legislation found to be unconstitutional by the Court will lose their power from the day of the judicial decision. The Court decides also on the constitutionality of the international treaties on the request of the President or the Cabinet of Ministers. It relates to the international treaties of which Ukraine is already a party, and those ones submitted to Verkhovna Rada for ratification. It is should be noticed, that undermining the constitutionality is possible during ordinary lawsuits, so each person has the right to challenge the constitutionality of the laws or actions of the state bodies.[66] Contrary to the USA, in Ukraine the Court will hear the case brought by both citizens and non-citizens. However, the Constitution established the list of officials enable to appeal directly to the Constitutional Court: the President, no less than 45 National Deputies, the Supreme Court, and the Authorized Human Rights Representative.

The emergence of the judicial review was resulted in the growth of two models of the review: abstract and concrete. The American model is characterized by the "concrete" review, in which the court decides disputes between two litigants in the concrete case. Whereas the European model is "abstract" one, when constitutional judicial review is not raised on the basis of particular dispute, but because the issue is appealed by the officials. And Ukraine follows the European model, which is proved by many states to operate effectively and provide harmonization of constitutional jurisprudence.

One of the powers of the Constitutional Court is to resolve the issue of conformity of the Constitution of Ukraine with the law of Ukraine on the constitutional complaint of a person who believes that the law of Ukraine applied in the final judicial decision contravened the Constitution of Ukraine (Article 151 of the Constitution). Accordingly, a constitutional complaint is a form of appeal by the citizens of Ukraine, non-citizens, stateless persons and legal entities. Besides, if the person requests to recognize the Resolution to breach the norms of the Constitution, the Constitutional Court has the ground to refuse to open a constitutional proceeding on the base of Article 62 of the Law "On the Constitutional Court of Ukraine", claiming about inadmissibility of a constitutional complaint. According to the Law, a person may file a constitutional complaint only regarding the constitutionality of the law of Ukraine, and not of another act.

[66] The Handbook of Political Change in Eastern Europe, Edward Elgar Publishing, 2013

In addition, the Constitutional Court of Ukraine is not authorized to review judicial decisions, annul them, assess the correctness of the application of substantive and procedural law by the courts, as well as to review court decisions for compliance with the Constitution of Ukraine. It is important also, that the Constitutional Court is considering the question of conformity of the existing acts with the Constitution of Ukraine. But if the annulment of act took place, the ground for refusing to open constitutional proceedings was present. At the same time, in order to protect and restore the rights of the individuals, the Court is considering the conformity of the Constitution of the act, which has expired. So, in this case the proceeding on the terminated act continues to be actual to the legal relationships that have arisen during its validity.

A constitutional complaint is defined in the Law to be a written request to the Court to review the final judicial decision on the conformity with the Constitution in the case of the subject of the constitutional complaint. If the constitutional complaint is raised in the context of laws that were not applied in the final decision, the Court has right to refuse it.

According to Article 56 of the Law, the subject of the right to a constitutional complaint is a person who believes that the law of Ukraine applied in the final decision in its case contravenes the Constitution of Ukraine. Subjects of the right to a constitutional complaint do not belong to public-law entities.

Article 77 of the Law provided, that the constitutional complaint is considered admissible, if all national remedies have been exhausted and no more than three months has expired from the date of entry into force of the final court decision.

To conclude this topic, constitutional adjudication is ensured in Ukraine, and judicial review through constitutional complain is one of the methods to guarantee effectiveness of the constitutional system. Ukraine chose European model of abstract judicial review, but functioning of constitutional jurisprudence is still ongoing process in Ukraine. According to the law, Ukrainian citizens have right for individual complain. One should remember, that trust in the judiciary is extremely low in Ukraine, so people did not use to rely on the whole judicial branch, including the the Constitutional Court of Ukraine.

3. Ukraine in Europe

3.1. The Impact of the EU on Ukrainian state-building. The Association Agreement.

The impact of the international resources was crucial in building the democratic government of the post-Soviet states. As it was mentioned in the previous chapters, the separation of powers was absent in the USSR, and countries did not have experience of having different branches of power. So, the European Union and the USA practice helped Ukraine to build its executive, legislative, and judicial system.

The impact of the Europe was evident in the functioning of the parliament. First of all, the EU supported and promoted the development of the democratic parliaments.[67] According to the Copenhagen declaration of 1993, each country going to become the member of the union had to ensure the rule of law, democracy, promulgation and protection of human rights. What is more, the EU, particularly, the EU Parliament conducted trainings, workshops, conferences with the aim to promote democratic standards in the post-Soviet countries[26]. This support was strengthened by the other European organizations and bodies, such as the Council of Europe, United Nations Development Program, and others. National programs, for example, Frost-Solomon Task Force took part also in the building parliaments of the former soviet countries. The main aim of the Frost Solomon Task Force was to assist parliaments, build and ensure democratic stability.

The second example of the European assistance was its important role in building strong executive over the parliament. In order national economic policies met requirements of the EU's objectives, the EU wanted to develop powerful executives. The process of the reinforcement led to the strengthened executive. Scientist Mansfeldova in the context of this issue noticed that these procedures began with the accession to the EU and could continue while the membership would be obtained. [68]

Nevertheless, the impact of the EU on the post-Soviet parliaments was ambiguous. Most of the states comprise the USSR did not have accession negotiations, except some Baltic states. If take into attention Ukraine, it was caused by close ties with Russia, its close geographical position to the Russian borders[69].

One must admit, that the impact of the EU was cumulative, because it could be seen in different spheres of social life, but in little proportions. In addition, the parliament of Ukraine was acting in the period of transition, characterized by an amalgam of the soviet traditions and of the elements

[67] EU and Ukraine 17 April 2014 FACT SHEET, European External Action Service, 2014
[68] Zdenka Mansfelgova, Post-Communist Party Systems: Competition, Representation, and Inter-Party Cooperation, Cambridge Studies in Comparative Politics, 2012
[69] Valentina, Feklyunina, Soft power and identity: Russia, Ukraine and the "Russian worlds", European Journal of International Relations, 2016

of the transition itself. Thus, international actors intended to support the parliaments, but they aimed to strengthen the executive both in the cabinet and in the parliament.

It is necessary to pay attention on the fact that post-Soviet states differed also from each other. They differed not only in the context of parliaments, but also in their transitions, duration of the communist regime. So, their own understanding played crucial role. Each of the post-Soviet state saw its own political future, organization of the parliaments, the way of its operating. Ukraine is a country with the complex geographic position. Its transition period is still ongoing process, because the directions taken by the Ukrainian government during its departure from the soviet dogmas are fickle. Pro-Russian paths were being transformed to the pro-European ones, and vice versa.

Relations between Ukraine and Europe started in 1991, when Ukrainian independence was recognized on behalf of the European Union. Ukraine defined its strategic directions towards Europe having signed the Law "On the Foundations of Internal and Foreign Policy" in 2010. Article 11 of this Law defined that the main aim of the Ukrainian foreign policy is ensuring the transition of Ukraine to the European political, economic and legal standards to become the member of the EU. So, the developments of Ukraine according to the European model was started long time before. Verkhovna Rada of Ukraine in its Decision in 1993 "On the Key Directions of the Foreign Policy" proclaimed its European way as the prevail aim. It was mentioned that Ukrainian foreign policy is to obtain membership of the European bodies, but while it does not damage the interests of the Ukraine.

From the economic point of view, Ukraine-Europe relations had meaningful strategy for both Ukraine and the EU. Close geographic position made Ukraine one of the main partners for the cooperation. So, association regime was needed for two sides. The way toward the Europe was granted by the Verkhovna Rada of Ukraine. To illustrate, Verkhovna Rada conducted hearings dedicated to the cooperation of Ukraine and the EU on the 28th of November in 2002, then approved the Declaration in 2007 on the beginning of negotiations on the cooperation.

Association Agreement put the start of the Ukrainian partnership with the East. One should note here, that the contract will be actualized after fulfillment special terms by Ukraine[70]. These requirements are connected to the legal, political, and economic spheres. One of the most important condition was to ensure free trade area, which was expected to bring closer the modernization processes of Ukraine. In general, the relations between the Europe and Ukraine is governed through the cooperation and partnership. The directions were based in the Partnership and Cooperation Agreement signed between the European Community members and Ukraine.

[70] Odysseas, Spiliopolos, The EU-Ukraine Association Agreement As a Framework of Integration between The Two Parties, 2014

Nevertheless, the agreement did not establish the way of accession of Ukraine to the EU, but it was defined the rules for the cooperation.

Agreement covered all important spheres of social life, such as economic partnership conditions, democracy and human rights, so promulgated provisions were used as a legal base. The base of the cooperation was to increase democracy in Ukraine, provide political freedom, human rights protection, and to support the independency of Ukraine. The main condition was to accomplish the transition of the market and to fulfill the bilateral international issues.

The PCA was conducted by the establishment of the Cooperation Council, the Cooperation Committee and the Parliamentary Cooperation Committee to ensure the implementation of the EU standards. The conditions of the treaty were seen to be mandatory to continue cooperation in another spheres, for example, to achieve free trade zone. To illustrate this fact, Ukraine began to promote the set of the economic reforms.

Preamble of the agreement defined the main directions for the cooperation: 1) to fulfil the gap of the principles indicated in the treaty; 2) Foreign and Security Policy; 3) Justice and Freedom; 4) trade relations; 5) economic cooperation; 6) other institutional implementations. All in all, the EU-Ukraine agreement was the new stage of the relations among both sides. Political dialogue was started, economic transition was also launched due to the promised cooperation in the time of crisis. It was the first agreement, that touched all comprehensive areas of common interests. Fir the first time, the scope of the issues was expanded hugely, and commitments were set precisely.

The signing of the PCA was seen by the experts to be the point of departure from the Russian influence[34]. It could finally demonstrate Ukrainian way of foreign policy.

The main question was about the possibility of Ukraine to be the full member of the EU. The agreement is not characterized by the binding character, but preamble consists of crucial references to the common principles, proved the European integration and adopted by Ukraine. Evident mention was made to the democratic principles, such as provision of human rights, freedoms and the rule of law. In addition, bilateral relations were based on the fight against corruption, qualified governance and antiterrorism.

Preamble also defined the Ukraine to have common values and history with the European countries. So, European trajectory was the path chosen by Ukraine. Kiev thought the PCA to be a strategic achievement on the way of becoming a member of the EU.[71] But most of the European countries mistrusted Ukrainian accession to the EU. States of the EU were divided on the likelihood of Ukraine assessing EU. If on the ne hand it can be said that France, Germany, Spain contradicted to the provision of membership, the same is not true for the countries that joined the

[71] Ukraine should be an integral part of Europe – President Yushchenko, UNIAN, 2004

EU in 2004, such as Sweden, United Kingdom, that saw the preamble to be ambitious. The most common argument against any explicit reference in the preamble on joining Europe was the fact that EU was not prepared to the new enlargement because of its internal problems. Ukraine was seen by the Member States to be a difficult country with a large area and numerous population, with the strategic location in terms of energy, but with the problematic economic system. Having conducted the reforms urgently, Ukraine showed unreadiness, demonstrated its weak areas, made some steps back. These facts made Member States of the EU to believe in the Ukrainian unfulfillment of the requirements prescribed for the enlargement. So, it did not meet the criteria that were mandatory in order to become the candidate country.

Political association was established through the provision of such goals in the Association Agreement[21]:

1) to deepen political association in the spheres of foreign and security policy;
2) to provide multilateral security system with the aim of setting international stability;
3) to ensure cooperation on the issues of international security and crisis management;
4) to increase the status of the rules of law, democratic principles, to secure human rights, freedoms, and to respect the rights of national minorities;
5) to facilitate the processes of internal reforms.

The parties agreed to cooperate promoting peace and international justice by ratifying the Rome Statute of the International Criminal Code[72].

According to Article 5 of the AA, political dialogue can be provided at Summit level. At ministerial level, the political dialogue takes place by mutual agreement and only during the meetings organized between representatives of the Parties. Domestic reform is also the issue to the political dialogue. Article 6 of the AA proclaimed that the Parties cooperate with the aim to provide the functioning of the internal policies on the principles shared by the Parties. These principles are ensuring the stability of the democratic institutions, operating in the framework of the rule of law. Foreign and security policy were also covered by the political dialogue. It was told, that the Parties should strengthen their ties in these spheres, including the Common Security and Defense Policy. Among the goals of such cooperation is promoting joint policy making.

The condition of free trade area was the comprehensive clause of the AA, achieving of which was the common goal for both sides. Establishing of free trade area could deepen the Ukrainian access to the European market and could lead to the European investments in Ukraine. It was seen to be am instrument that assisted Ukrainian transition to the European market. As the result, the foreign direct investment of the EU to Ukraine amounted in 2011 to 24 billion euro. Bilateral trade is

[72] Pavlo, Pushkar, The reform of the System of criminal Justice in Ukraine: The influence of the European Convention of Human Rights, 2003, European Journal of Crime, Criminal Law and Criminal Justice, 2003

problematic, and trade deficit is the main issue. Trade deficit increased in recent years twice, it is caused by the competitiveness of the Ukrainian economy. To solve this problem, Ukraine joined the WTO. Negotiations in order to establish a free trade zone were conducted. One should admit, that the realization of this procedure will increase the possibility of Ukraine to become a country with the competitive market on the international arena.[73] An accession to the WTO created conditions of stability during the period of opening Ukrainian market.

It should be noted that the part on the free trade area comprising the AA consists of detailed description of cooperation, it estimates 15 chapters that touch all issues connected to the trade. One of the objectives of the AA is to establish a free trade area during 10 years from the date when Agreement was enforced. The section of the chapter dedicated to the trade-related matters is about national treatment. Article 33 refers to Article 8 of GATT and claims that all fees and charges imposed on the import or export of goods are limited in amount to the approximate cost of services rendered and do not represent an indirect protection of domestic goods or taxation of imports or exports for fiscal purposes.

Industrial good were also taken into attention. In the AA, the EU is obliged to remove all duties on the industrial products imported from Ukraine. According to this, Ukraine took responsibility to reduce hugely the duties on products produced in the EU. The Agreement also had provision, that after 15 years from the date when the AA was adopted all duties would be eliminated. Special regime was set for imports of such goods, as passenger cars and second hand clothes.

Besides the rules that speed up the development of free market, binding rules were also established with the aim to provide harmonization with the EU standards. It was held in the field of technical requirements, standards, specifications, special conformity assessment procedures. In order to fulfill Technical Barriers of Trade the convergence was happened: Ukraine incorporated European rules in the national legislation and annulled those which did not meet European standards.

To conclude the discussion of the chapter trade-related matters, one may conclude, that the AA formed the new atmosphere for economic relations between Europe and Ukraine. As new and investment possibilities were created, the competitiveness was increased. It gave a rise to economic activities due to the elimination of customs duties.

The most meaningful advantages were the next:

- consumers received an access to the numerous products;
- businesses were given duty-free access to the European market;
- implementation of the EU's acquis into national legislation improved domestic investments;

[73] Communists call for halt to cooperation with IMF, Kyiv Post, 2011

- making standards in compliance with the EU basis, Ukraine opened its market to the third countries also.

The chapter on justice, freedom and security comprises the Association agreement. In Article 14 the clause is about cooperation on Justice, freedom, and security. It is told about the necessity to reinforce the institutions at all levels in the spheres of administration in general and particularly judiciary administration. The aim is to strengthen the judicial system, provide access to justice, independency of judges, and to eliminate the corruption[21]. Human rights were noticed to be the guideline for the cooperation on justice. Migration issues were also mentioned: national strategies were built also for economic and social development in the spheres in which migrants originate. This provision is based on the principles of solidarity and joint responsibility.

Article 19 is dedicated to the movement of persons. Free movement across borders is known in Europe.

Institutional framework for the cooperation was also prescribed in the Association Agreement. At the highest level, the structure included the Summit with the President of the European Council and the President of the European Commission, and the President of Ukraine. The next level is ministerial, where the Association Council has the power to decide on the matters prescribed in the AA. Another empowered body is the Association Committee. It assisted the Council in conducting its sphere of functioning. Creation of subcommittees on the issues regulated by the AA is allowed. There is also parliamentary level, on which acts the Parliamentary Association Committee, that consists of members of the European Parliament and of the Ukrainian Parliament.

A crucial element of the realization of the Agreement is the processes of the harmonization of the Ukrainian legislation with the European norms and principles. Special timeframes were prescribed, ranging from two to ten years after the AA has entered into force.

As European law affected the national conditions, reforms were needed to bring closer the processes described in the AA. To check how the realization of obligations on practice, the EU created special mechanism to supervise the implementation of the objectives.

3.2.Reforms triggered by the Ukraine-EU dialogue

The European Union as the foreign policy actor uses the number of tools with the aim to transfer EU norms to the neighboring countries. One of these methods is the twining instrument, the goal of which is to reform the public sector of the country according to the principles, practices of the EU. To explain, transgovernmental cooperation intends to set aa cross-border relations between civil servants who operate towards a particular goal in the defined policy sphere. To illustrate, the Twinning instrument was implemented in 2700 project averagely since its adoption in 1998. In addition, the use of this instrument was expanded in 2004 with the aim to enlarge the policy on

the countries covered by the European Neighborhood Policy, to reform the institutions of these countries, but without promise to accept the accession to the EU.

Honestly speaking, experts in the beginning of the enlargement paid modest attention to the Twinning projects. Only several aspects of the Twinning projects were addressed. For instance, it was shown that the Twinning projects were effective in promoting the democratic values to the neighboring countries, that were not members states of the EU[74]. So, very few experts believed in the effectiveness of the Twinning projects, because it was difficult to see to what extent European projects could pass EU norms to the neighboring countries. In the opinion of some scholars, the conditions under which states will implement Twinning projects were unclear. Another question was to what extent the European norms could penetrate the national legislation. The answer was expected to be not in favor of Twinning instrument, its law penetration, and that the EU laws would lag behind the formal legislative adoption by neighboring countries.

To illustrate this assumption, it is possible to examine effectiveness of the Twinning instrument enlarged in Ukraine from 2007 to 2016. Totally, the number of projects is 32. One must admit, that effectiveness is not measured by quantity, but by quality. In another words, effectiveness could be defined as the ability of projects to introduce legal and institutional reforms in line with the EU norms and principles. It is reasonable to notice, that the data in this section was taken from the numerous interviews with Ukrainian civil servants and experts, member states of the EU, the EU institutions, who took part in the implementation and realization of the Twinning projects. One should note here, that Ukraine is the state, which hosted the highest number of adopted Twinning projects among the European Neighborhood Policy countries[75]. Another fact is that Ukraine is characterized by the liberalized regime and its incentives to follow Europeanization.

The statistic shows, that in half of the cases, Twinning projects held in Ukraine have resulted in legal or institutional convergence. The main condition for the conducting of such projects was policy fit. The EU literature has grounded in political, economic, institutional changes of the member states, but the external literature of the EU has focused on the expansion of the aquis communautaire to the ENP states. This was started after the “big bang” enlargement in 2004, and the main mission was associated with transformation of the European norms to the public sphere of the neighboring country.

Scholars proposed to invent ways to evaluate the stages of the transfer of European norms: 1) selection of the norm; 2) adoption of the norm; 3) implementation. The studies of the adoption and implementation is known to be the most complex. The potential of this concept was to affect

[74] Dmytro, Panchuk, Effectiveness of EU Transgovernmental Cooperation in the Neighbourhood: Qualitative Comprative Analysis of Twinning Projects in Ukraine, Europe-Asia Studies,2019

changes in the involved governments. Supporters of this idea mentioned that relying on soft power, it is possible even to transform the EU norms to the countries with an authoritarian regime. One must admit, that cooperation led to positive views on democratic power. In the opinion of Freyburg, cooperation has resulted in application of the European norms in the areas of environment, competition, and migration issues in Ukraine and Moldova.

However, the Twinning projects were also characterized by the weak results. Generally speaking, it depends on the performance by the beneficiary countries. In some countries the transformation was led with additional exploring such instruments as TAIEX (Technical Assistance and Information Exchange), and SIGMA (Support for Improvement in Governance and Management). The reason was low policy fit, unfulfillment of political commitments, a failure of the EU transgovernmental tools to correspond expectations on the ground. Dmytro Panchuk found four conditions, that influence the adoption of EU norms in ENP countries: 1) sector politicization; 2) EU sectoral conditionality; 3) policy fit; 4) quality of socialization. The first aspect indicates the degree of exposure of a particular policy sector during the period of transformation to European standards. It can be also explained with the politicization of decision-making, for example, high domestic cost on the norm adoption with the possibility of interference by powerful veto powers. So, all these obstacles are seen to trouble the effectiveness of the Twinning projects.

The second aspect is about conditionality set by the EU. It is made with the aim to promote the transfer of EU norms in the states that do not comprise the EU. So, special sanctions were provided and attached to the reform processes in particular policy sphere. For example, fulfilment of the commitments is leading to the rewards, such as visa liberalization, exports to the EU single market, membership in the bodies of the EU. Step by step, having met all conditions and affectively accomplished them, the main reward will be an accession to the EU.

The third condition by Panchuk is policy fit. In another words, it means the compatibility of the European norms with the traditional government, technical possibilities, and need of the beneficent country. It is reasonable to notice here, that some level of traditional misfit is needed, because the goal of such processes is to change the common policy regime in particular areas. So, the comfort zone of traditional administrative traditions is broken. As practice shows, the EU takes into consideration the needs of the recipient country, so the cooperation is more likely to be resultative.[76]

The last point is the quality of socialization, its crucial role in the cooperation between partners. Obviously, the transfer procedures need permanent interaction, joint problem-solving. Panchuk insists on the necessity to include this condition, because the quality of socialization influences on

[76] EU expanding its 'sphere of influence,' Russia says, EU Observer, 21 March 2009

the possibility of the country to pattern new practices. Close cooperation among partners can lead to mutual understanding, thus, the likelihood of further institutional changes will be strengthened. As it was mentioned before, the first Twinning project was introduced in 1998 in order to prepare the Central and Eastern countries to become the members of the EU. The main aim was to transfer and implement acquis Communautaire of the EU. In 2004 the Twinning instrument was expanded to non-candidate countries. It led to the enlargement of the Partnership and Cooperation Agreements, Actions Plans, and sometimes Association Agreements. The main feature of the Twinning instrument is its long duration, that gives more chances to promote changes.

Ukraine is known to be a Twinning champion, because more than 42 Twinning projects were presented. Sectors in which Twinning projects played role were justice, trade, finance, and social policy. Such variety gave the possibility to observe the conditions of the efficiency described above. It is necessary to remember that Ukraine declared its incentives to follow the European way, it aimed to join the EU, and Ukraine succeeded in conducting numerous reforms in judicial, financial, public administration, decentralization spheres.[77] Ukrainian reform processes were intensified by the adoption of the Association Agreement in 2014. It led to the Deep and Comprehensive Free Trade Area, visa liberalization and another consequence, that would be discussed next. Dynamic reform process made Ukraine to be the most suitable case for analyzing an effectiveness of the transgovernmental partnership in comparison to other ENP countries.

As it was researched by experts, the low policy fit was the main obstacle of all ineffective Twinning projects. Twinning objectives did not answer the needs of the beneficiary country. The analysis of Ukrainian implementation also showed lack of legal convergence. It would be unfair not to mention that fact that despite the good policy fit, some Twinning projects did not produce no legal convergence. The high level of policy fit may be present even in Twinning project that is characterized low conditionality and insufficient socialization as long as such projects reflect the needs and technical preferences of the recipient government. For example, the main reasons for the project effectiveness on the judicial system in Ukraine were the clarity of the objectives and the understanding of functioning of the Ukrainian justice system.[78]

As experts pointed out, the result of the Twinning project depends on how the main task have been spelled out. If the formulation was correct, including the needs, desires, additional needed expertise, then the project would be effective. If objectives were put in general way, then the Twinning instrument would be useless.

[77] Ukrainians dream of EU future, BBC News, 2008

[78] Ukraine proposes EU develop 'roadmap' for association, estimates needed aid at EUR 10 b - Arbuzov, Interfax-Ukraine, 2013

One must admit that to produce legal convergence, high policy fit has to be combined with low sector politicization. The weak politicization makes it easier to reach consensus in the context of legal and institutional modifications that go in line with the objectives of the Twinning project. In contrast, the high level of politicization and low conditionality lead to the lack of legal convergence. It was seen in the projects on audit, judges, and police. Experts from Ukraine noticed that Twinning projects often were regarded as a threat to the status quo in the policy sphere. So, Twinning instrument with such objectives was vetoed by players, willing to prevent enactment of the new laws or practices in traditional Ukrainian schemes.[79]

Scientists also emphasize the lack of EU sectoral conditionality in the context of exercising the objectives of the Twinning projects. For example, low priority was given to the Social policy. Nevertheless, the lower importance can be explained by the fact that Ukrainian civil servants have the possibility to accept European practice and use it in their daily work without implementation of the law.[51] Although the fact proving the problem of the quality of socialization is absent, but it is necessary to take into consideration language barriers, personalities of the participants, and local culture. To illustrate, in project Telecomms, Resident Twinning Advisors and some other coordinators were replaced because of difficulties in communication.

All in all, the effectiveness of the sighed Association Agreement depends on the promotion of the reforms outlined by the Council of European Union. It was defined at the 16th EU-Ukraine Summit in 2013 in Brussels, when Ukraine was obliged to make modifications in such spheres: to conduct parliamentary elections according to the European standards, to promote independency and impartiality of the judges, and to reform political and economic areas in compliance with the Association Agenda. [80]The Ukrainian public and authorities in general tend to believe that reputable electoral system based on the principles of transparency, stability and on the standards of clear election code was crucial issue. Also, judiciary was a sector demanded reforms in line with the standards of the EU.

Firstly, accent was made on the Ukrainian commitments to implement the judgements of the European Court of Human Rights and guidance of the Council of Europe about conditions for prisoners, particularly, their medical care. Secondly, Ukraine achieved progress by reforming the criminal justice system. Modified criminal procedure was introduced, and the mechanism against torture was also established. Such reforms affected the changes in the functioning of the Prosecutor's Office, the Criminal Code, judicial system and the police too[23]. Thirdly, modification concerned other commitments defined in the Association Agenda. The most important condition was to set the DCFTA and to eliminate the corruption, that flourished in all public spheres in

[79] EU demands more reforms from Ukraine to lift visa barrier, 2014
[80] Socio-political expectations: April 2014

Ukraine. Business area was also the field for the reforms, because favorable investments were rare, and financial management was on the law level.

First and foremost, the adoption of the new tax code and the legislation on the Public procurement were the major steps toward accomplishment the clauses of the AA. Ukraine took responsibility to take measures to improve the operation of the public institutions, to fight with the corruption, and ensured that reforms would be conducted in transparent manner and in close cooperation with the Council of Europe. In the end, the aim was to achieve the support of IMF, addressing the question of fiscal sustainability. In order to establish DCFTA the EU expected Ukraine to abstain from introduction of protectionist measures, such as recycling fees on vehicles that contradicted the requirements of the WTO.[81]

All in all, the Ukrainian authority had to demonstrate their compliance with the agreed conditions in the Association Agreement. Implementation of this program into national legislation could pave the way of Ukraine. Although the EU is willing to admit Ukrainian accession, however, it cannot make any preferential allowance regarding the adoption by Ukraine of the European standards. It is essential for the Ukraine, to conduct reforms under the association Agreement to arrive at a point to fulfill the criteria for joining the EU. In the next paragraphs, the way of promoting reforms will be analyzed.

Judicial reform was one of the most important spheres to reform. The goal was to create a modern judicial system. The strategy for the promoting reform was given by the EU and with participation of the Council of Europe. Clear plan of action was adopted by the council, and the time framework for the implementation of reforms was from 2015 to 2020. The strategy included three main directions: 1) to promote European standards; 2) to reformate the institutions of the judicial system; 3) to review the staff.

In general, promoting of the fundamental principles of the EU were launched in 2014. It was started with the Law “On the Renewal of Trust in the Judiciary”. In another words, these laws was named as lustration law. According to the social poll, the judicial system was recognized to be the most corruptive sphere. As a result, the trust of the society to the judiciary is extremely small. Thus, an adoption of the lustration law served the aim to break connections of the judges with the previous political power, decrease an influence on the judges, and investigate offences of the judges that blamed the peaceful demonstrators. Previous chief judges of the courts were resolved, and the law gave the opportunity for the judges to elect their own chief judges. All

[81] Survey on the attitude of Ukrainians to the EU, NATO, Rosia, UNIAN, 2014

officials of judicial institutions (the High Qualification Commission of Judges, the Hugh Council of Justice) that were appointed by the previous political power were dismissed. [82]

As the law was limited, an efficiency was more on paper than in practice. For example, the reappointment in the HQCJ and the HCJ changed decision-making on judicial appointment. But, in real life the staff was changed, because the judges elected the same chief judges. Such results demonstrated the fact that Ukrainian judicial system was not ready for the large scope of the independency and self-governance.

Another important fact proving marginal efficiency is the functioning of the Temporary Special Commission, that was created in order to investigate the offences of judges during the Revolution of Dignity. It was known that more than 300 judges prosecuted the peaceful protestors. Nevertheless, the mission of the Special Commission failed, because of limited mandate of the judges, Parliament interference, and unwillingness of the High Council of Justice to accept decisions of the Commission.

As the law did not fulfill the requirements of the Ukrainian society, the demand for the radical changes was still actual issue. Extensive judicial reform was must. One of the most problematic issues was to decide how to put the end to the old corruptive staff on the judicial system.

On the initiative of the President, it was established a new body - the Judicial Reform Council, the mission of which was to unite the office of the President, the Government, the Parliament, and the judges with the goal to promote new solutions. It is undeniable that this goal was formal, because the creation of this body enabled the President to control the judicial reform. All in all, strategy for the reform of the judiciary was adopted by the Council. The documents consisted of five pillars:

1. promoting independence of the judges;
2. upgrading the self-governance of the judiciary and the way of appointment;
3. stipulating the transparency of the judicial proceedings and providing accountability of the judges;
4. promote access to justice and modify the competences of jurisdictions.

The strategy was divided into two steps. The first one was dedicated to the realization of the already adopted amendments on restoring the confidence of the judiciary. Norms were prescribed in the Law “On Assuring the Right to a Fair Trial”, ratified in 2015. The aim of the first stage was to complete the processes determined in the updated law, because the law failed to realize its amendments. The level of trust was being decreasing and the justice institutions became more politically dependent, than before. It was caused by the constitutional limitations and lack of will by political actors, particularly the President and the Parliament. To illustrate the level of

[82] Ukrainian PM Azarov instructs group to plan talks with EU on association agreement implementation, Interfax-Ukraine, 2014

inefficiency, only 27 guidelines out of 77 given by the Council of Europe were completely taken into account, 21 were partially taken into account, 15 were ignored, and 14 were implemented on the constitutional level. [83]Besides, the law also affected additional problems, such as allowance to the previous court chiefs to occupy their positions for four years.

It is reasonable to notice also, that new qualification assessment of the judges was not effective. For example, the assessment of the judges of the Supreme Court of Ukraine and higher courts have not started yet because of the block by the Council of Justice. This judicial organ questioned the constitutionality of such methodology and appeal to the Constitutional Court of Ukraine. In the end, the procedure was approved, and the qualification procedure was launched, but for the judges of the first instance. Later, on the fact that Constitution has norm that restrict to dismiss the judges on the basis of inability to prove the way of purchasing their assets. So, the assessment procedure was recognized to be resultativeness and was suspended. The only solution in this case was to send the judges for additional training. All in all, the first stage was known to be without important changes, and the demand to solve the problems of judicial system was raised. Society was waiting for the radical changes in reforms and in the Constitution.

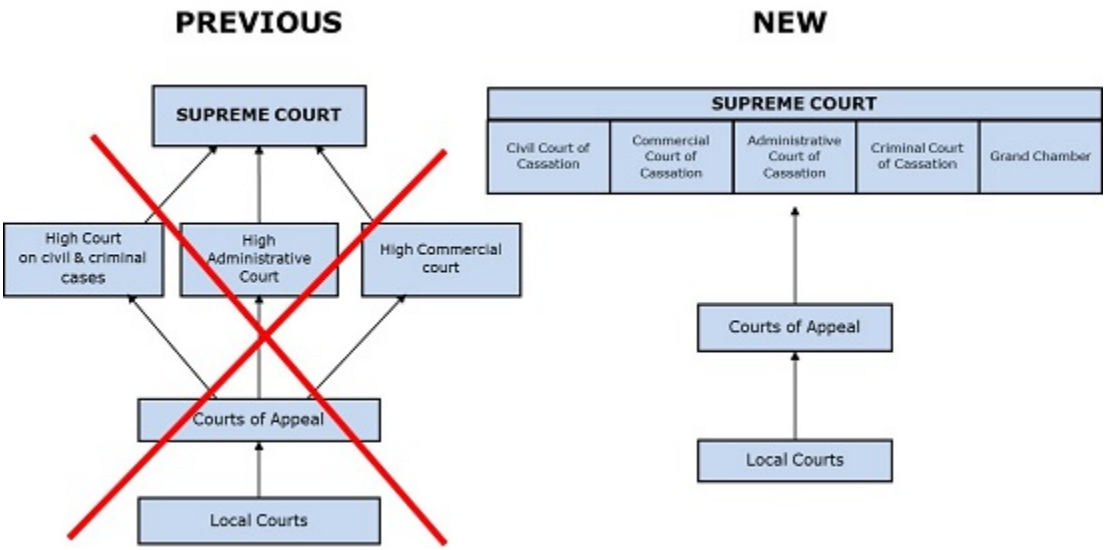
The next stage was started in 2015, when the Constitutional Commission prepared new amendments to the Constitution of Ukraine. The issues of the amendments concerned corruption and judicial system, particularly, modernizing of judiciary, providing independency and accountability of the judges.

To reform judicial system of Ukraine, it was taken European experience. The EU proposed its standards and practices. It was suggested to limit the presidential and parliamentary competency to decide on the careers of judges. The idea was to shift decision-making of political actors to the judicial self-government.[84] In the second chapter of this work it was mentioned an example of modified self-governance of the Constitutional Court of Ukraine.

Moreover, constitutional amendments touched the modernization of the judiciary as a whole. Changes were made in accordance with the recommendations of the Venice Commission. The goal was to conduct the transition to the three-tier court system. As it was mentioned in the previous chapter dedicated to the organization of the courts in Ukraine, the previous court system had four levels.

[83] "European Council Conclusions on Ukraine (15 December 2016)". European Council. 15 December 2016. Retrieved 15 December 2016.

[84] "Commission Progress Report: Ukraine meets criteria for visa liberalisation". European Commission. 18 December 2015. Retrieved 20 April 2016.



According to scheme above, the Law on judiciary promoted three-tier judicial system, that will be comprised with local courts, courts of appeal and the Supreme Court, on which cassation responsibilities were put. [85]The structure of the Supreme Court is set according to the specific categories of the cases. Thus, it consists of the Supreme Court Grand chamber, the Administrative Court of Cassation, the Commercial Court of Cassation, the Criminal Court of Cassation, and the Civil Court of Cassation. After the launching of the reforms in 2015, the system became more efficient due to fastened delivery of the final ruling. Nevertheless, the functioning of judicial bodies such as HCJ, HQCJ and CoJ were preserved. Possibly, it was considered as a compromise between the European experience implementation and the need of Ukrainian bodies to promote judicial reform in a sustainable way. As a result, in 2015 during the lustration processes, the HQCJ presented itself to be more progressive body and demonstrated the capacity to fulfill the objectives of the reforms.[86]

It should be told, that reforms led to numerous discussions. As the majority of the judges were appointed during the Soviet regime, they were used to act on the basis of the written law without regard for human rights. To increase the trust of the people, numerous trainings with the European financial support were held, but the picture did not change. So, it became evident, that only new people without Soviet experience could reform Ukrainian judiciary.

Numerous solutions were proposed by different actors. The expert community proposed to promote new selection procedure for each candidate on any judicial position. The new Supreme Court was decided to be the first body to test this reform. Later, it was proposed to conduct a patrol police reform. [87]The main conditions were to promote new principles, uniform, equipment, and

[85] Closed vertical. What is the Higher Anti-Corruption Court and why its creation is afraid of politics?, Ukrayinska Pravda, 2018
[86] Key players in Ukraine's justice system, Kyiv Post, 2010
[87] Yanukovych signs law on humanization of responsibility for economic crimes, Kyiv Post, 2011

the most important – new people. Numerous claims were raised in this context, that such changes sis not correspond to the European standards. So, the Constitutional Commission had to prepare two variants of laws. As a result, the Venice Commission reviewed the laws and accepted such conditions: to restrict the Parliament in its competence to appoint judges, appointment of the judges for lifetime, and to ensure the judges comprising the High Council of Justice. The reason of this clause was described in the second chapter of this work.

Another novelty was made in the spheres of qualification assessment of the judges and appointment of the judges. Such appointment is performed by the President upon the proposals of the HCJ. With the aim to prevent corruption, conditions for the dismissal were expanded and the framework of immunity was lowered. Additional requirements for the judges were introduces with the launching judicial reforms. It was bought up, that failure to prove the origins of assets and to pass successfully the qualification assessment were conditions permitting to dismiss the judge. The judge having committed a crime, or any disciplinary offence will be prosecuted on the common grounds. Such constitutional amendments affected the fight against corruption and improved judicial qualification. The list of grounds permitting to dissolve the judges was exhausted. For example, such grounds as systematic neglects of professional duties, that are not in compliance with the status of judges, and disciplinary offence led to the dismissal of judges, proved their discrepancy of a post. Moreover, the judge now is known to be obliged to submit a Declaration of Judge's Integrity and a declaration of Judge's Related Person. Related information is published on the official website of the High Qualification Commission of Judges and opened to the public. Declarations are checked every five years at least one. The High Council of Justice, or the High Qualification Commission of Judges have also right to request the verification of such Declarations.

Good result about amendments is the fact of their adoption together with the Law "On Judiciary and Status of Judges" in 2016. Newly adopted law regarded the building of the judicial branch that would correspond to the Constitution. The main change was creation of the Supreme Court, that was established instead of four cassation courts.

Results were considerable: decreased corruption, electronic system to control assets of the judges was introduced, new staff obtained access to the judicial system. Reform processes were held in the context of functioning of the High Council of Justice. On December in 2016 the Law "On High Council of Justice" was adopted and reflected all expectations of the civil society. The legal framework for the operation of the HCJ was set. The HCJ was defined to be a constitutional body, responsibilities of which were to appoint, promote and discipline the judges. In addition, the President had power to transfer judges from one court to another during two year of the transitional period.

Constitutional Court functioning was also among objectives of the reform. It was introduced availability for every citizen to address the constitutional complaint to the Constitutional Court of Ukraine. The ground for this was described in two reasons. The first one is the fact of constitutionality of the law, that was applied in the final decision in contradiction to the Constitution of Ukraine. And submission to the Constitution Court is possible since all other national remedies have been exhausted.

To prove efficiency of the enlargement of reforms, it is reasonable to mention tangible results that took place in 2016. Before the constitutional amendments came into force, 30 judges were dissolved by the Parliament, because they have breached the oath.

Future steps that were set before the Parliament concerned passing a number of acts:

- the Law on Anti-corruption Courts;
- on the Constitutional Court of Ukraine;
- on Bar;
- on legal education and standards of legal profession;
- on procedural codes.

Provisions of these laws should not only change the norms of previous legislature, but to promote guarantees of effective accomplishment of such reforms. For example, the law on procedural codes defined the procedures according to which the justice was administered. The incentives to create anti-corruption courts were influenced by the will to ensure effective fight against corruption. According to the introduced reform, the High Anti-Corruption Court acts as the court of the first instance, proceeding specific cases related its jurisdiction. Such court should be created within 1 month since the law has been introduced. However, establishment of Anti-corruption court was finished on the 5th of September in 2019.[88] The Ukrainian CSO Anticorruption Action Center was built also. This idea was accepted by European experts. As the corruption was flourished on the top of the government the same, the main problem was to ensure the establishment of entirely independent court. It could be made only if the law on anti-corruption courts would be adopted. Special requirements and selection procedure for the candidates on position of the judges of anti-corruption courts should be set too. The same law had to give autonomy, protection and financial ability to the anti-corruption courts[89].

Prior to the establishment of the Anti-corruption court, the issues on corruption is investigated by the National Anticorruption Bureau of Ukraine, that submitted cases to the courts. However, such cases were teared by the old judges, who could find the reason to postpone the prosecution of

[88] Poroshenko submits bill on creating Anti-Corruption Court to High Judicial Council, Interfax-Ukraine, 2018

[89] The Council of Judges of Ukraine, On the State of Enforcement in the Nation of the Constitution and Laws of Ukraine Regarding the Provision of Autonomy of the Courts and the Independence of Judges, statutes and Decisions, vol. 44, no.1, 2009

cases. It was caused by the unwillingness of the judges to proceed cases influenced by the political changes. Unfortunately, now it is so early to analyze the work of recently created Anti-corruption Court. Though, great expectations are laid on this court. Professionality of judges is known to have been trained abroad. In the opinion of European experts, judges are able to resist pressure. There are seven colleges, each of which includes three judges. They are able to consider complex multi-volume cases not in a few years, but in several months. The Specialized Anti-Corruption Prosecutor's Office was created also. In the future, the cases will be submitted only by this body to the Anti-corruption Court. Previously, these cases were distributed between ordinary Ukrainian court of general jurisdiction, where local judges did not want to consider top corruption cases.

All in all, judicial reform is seen to be the most comprehensive in Ukraine. However, the point of entirely modern judicial system is still questionable, and there is still the possibility to return to the previous standards. The reason lies in avoidance to solve major tasks and paying attention to the marginally effective issues. It can be explained by the resistance of Ukrainian elite to launch resultative reforms that will reduce its power to influence on the judiciary. As it was mentioned above, the laws were adopted, but not only legislative framework contributed to the efficiency of the reforms. A lot of other factors exist: mentality, professional trainings, operation of institutions, cooperation with prosecutors. So, the main ingredients of prosperous reform are a political will and implementation.

The important factor was also the fact of international support. It pushed the reforms towards European way. European standards were directions which oriented Ukraine during its long way of democratic modernization. It is evident, that Ukraine and the EU cooperate closely with the aim to find effective solutions for Ukrainian judiciary.

3.3.Ukraine in the Council of Europe

Ukrainian participation in the Council of Europe is evidence, because Ukraine openly declared its adhesion to the Europe through adoption of European practices.[51] Ukraine recognized principles of pluralistic democracy, implemented the rule of law, and accepted the priority of human rights and freedoms. Ukraine took responsibility to promote common goals with the Europe. According to the program given by the Council of Europe, Ukraine is helping to address social problems that are actual for the EU. Such issues are giving support for national minorities, demolishing xenophobia and racial discrimination, protecting environment, maintaining biological moral.

It is necessary to tell, that Ukrainian choice to access the Council of Europe was made in 1995. So, at the beginning of its independent history Ukraine decided to pave the road to Europe. One of the main tasks of the cooperation was to assist Ukraine in its statutory obligations, enlarged with the accession to the Council of Europe. Beyond statutory commitments, Ukraine not under

the control of the EU took responsibility to fulfill gaps in the context of democratic provisions, human rights, the rule of law.

Commitments described above are laid in PACE Opinion 190 of 1995. According to the Opinion, Ukraine applied to join the Council of Europe in 1992. First of all, Ukraine decided to submit a declaration of sovereignty and conducted a referendum to receive public support for promoting democratic standards[90]. After that the primacy to its own laws over the Soviet Union legislature was promulgated. In 1994, visits to Ukraine headed by European jurists were affected at the request of the Assembly. Experts noticed that Ukraine made meaningful progress in promoting democracy. They noticed that Ukrainian building of the legislature went in compliance with the general principles of the Council of Europe. As a result, Assembly believed that Ukraine was able to fulfill the requirements for the membership in the Council of Europe.

According to the article 3 of the Statute of the Council of Europe, each member of the Council of Europe have to accept the principles of the rule of law, to ensure provisions of human rights and freedoms, and to cooperate openly with the aim to promote effective work of the Council of Europe, realization its objectives. Since 1992, Ukraine participated actively in the intergovernmental programs, particularly in the spheres of human rights and legal reforms.

Accordingly, the strategy for the reform of judicial and legal branches in Ukraine was prepared, and its realization was scheduled for winter 1995. Ukraine proved its incentives to access the Council having signed a set of conventions: the Framework Convention for the Protection of National Minorities, the European Convention on Information on Foreign Law, The European cultural Convention, European Framework Convention on Cross-Border Cooperation among territorial communities, crime control conventions.

The council of Europe asked Ukraine to conduct particular legal changes within a year from accession: to adopt new constitution, to set a framework act on permitted by law police for the protection of human rights, to establish legal framework for the needed judicial and legal reforms, to drop criminal code and code of criminal procedure, civil code and code of civil procedure, and to establish a new law on elections and political parties.[91] Prosecutors office should be changed also according to the practice of European countries. The requirement touched also the standards of the judiciary, the status of judges, the functioning of the bar, the operation of the Constitutional Court which competency spread out on the whole territory of Ukraine, including the Autonomous Republic of Crimea.

[90] Ukraine, EU Initial Deep And Comprehensive Free Trade Agreement With EU, Ukrainian News Agency, 2012.
[91] Закон України "Про політичні партії в Україні" від 5 квітня 2001 року № 2365 – III, Відомості Верховної Ради України., 2001,118.

The Parliamentary Assembly notices that Ukraine, having accessed to the Council of Europe, intended to sign the European Convention on Human Rights and to recognize the right of individual to apply to apply to the European Commission and to the jurisdiction of the European Court. The Convention for the Protection of Human Rights and Fundamental Freedoms had to be ratified within one year from the time of accession. Accordingly, the death penalty was abolished. The European convention for the Prevention of Torture and Inhuman and degrading Treatment or Punishment was also signed. In general, Ukraine took responsibility to sign and ratify other conventions of the Council of Europe, promoting realization of the basic principles.[92] With the aim to accomplish realization of commitments in the Opinion 190 of the Parliamentary Assembly, Ukraine was invited to become a member of the Council of Europe. 12 seats in the Parliamentary Assembly were allocated to Ukraine.

In accordance with the Memorandum of Understanding between Ukraine and the Council of Europe, that led to the establishment of the Office of the Council of Europe on the territory of Ukraine, further democratic development was must. Special Action Plan was created to induce effective realization of objectives.

The last Action Plan prepared by the Council of Europe was authorized by the Committee of Ministers in 2018. The time framework was strictly defined- from 2018 to 2021. The Action Plan was seen as a strategic tool which main goal was to assist country in its attempts to bring national legislation, institutions and activity in line with the European experience in the fields of democracy, human rights, and the rule of law. Also, the task was to support the country in its implementations of the obligations obtaining in result of the Council of Europe' membership. The Action Plan was also important instrument which could stimulate the performance of the commitments prescribed in the Ukraine-Europe Union's Association Agreement.

Priorities of the Action Plan were defined due to relevant judgements of the European Court of Human Rights, suggestions, opinions of the institutions of the Council of Europe, its monitoring tools and other advisory organs. Ukrainian interests were taken into attention, priority task were set in accordance with Ukraine's needs, problematic issues, its strengths and weaknesses.

To accomplish the Action Plan, financial base estimates €29 million. It could be collected from different sources: ordinary budget of the Council of Europe, voluntary contributions of donor countries, international organizations. The Office of the Council of Europe based in Kiev took responsibility to coordinate the fulfillment of the project. The implementation of the Action Plan is conducted with the assistance of the Secretary General established in 2014.

[92] 17th EU-Ukraine summit, Ukraine, 27/04/2015. European Council.

Recently, in spring 2019, at the annual session of the Committee of Ministers of the Council of Europe in Helsinki, Ukrainian deputy Foreign Minister Sergiy Kyslytsya mentioned that Ukraine changed its approaches to the participation in the Council of Europe. The deputy set, that Ukraine was going to deepen and make rational its participation. He also insisted on the fact that Ukraine would not support that did not affect the protection of human rights. Moreover, it was argued, that Ukraine would serve political interests that were going under the guise of protection human rights.

3.3.1 ECtHR case law on Ukraine

Ukraine ratified the European Convention on Human Rights in 1997. Totally, the Court dealt with 3043 cases on Ukraine in 2018, but 2753 were recognized to be inadmissible or struck down. So, 290 applications were decided by judgements, 86 of delivered judgements found at least one violation of the European Convention on Human Rights.

Noteworthy cases on Ukraine will be discussed in the next paragraphs. The most famous case for Ukraine was Gongadze v. Ukraine in 2015. The case concerned failure to protect a journalist's life and ineffective investigation into his disappearance and death. The applicant was Myroslava Gongadze, Ukrainian citizen, lived in Arlington (United States of America). Her husband, Georgiy Gongadze, was a political journalist and chief-editor of the Internet journal "Ukrainskaya Pravda". He was willing to raise nationally and internationally awareness about the lack of freedom of speech in Ukraine. He informed on corruption schemes on the high-level State officials. Prior to his disappearance, journalist claimed that he was receiving threats and being under surveillance. In 2000, Georgiy Gongadze wrote letter to the Prosecutor General and informed him about the fact, that his relatives and friends were being questioned about him by the law enforcement bodies in the context of incident he was not aware at all. Also, he mentioned, that unknown drivers of the car followed him. Moreover, journalist gave description of the car, having given the number of plate. In his letter to the Prosecutor general, he asked to protect him and punish involved people.

The applicant confirmed that since disappearance of her husband on September 2000, she notified the Moskovskiy District Police Department of Kyiv. Later behead person was found in the Kyiv region. Having examined the body, relatives found jewelry belonging to Mr Gongadze. Then, the Chairman of the Ukrainian Socialist Party announced that some audiotapes concerning Gongadze case were found in the office of the President Kuchma and other top-level officials. In one of the recorded conversation, the President asked to threat journalist. The Minister reassured that people called "real eagles" was able to do any job.

In contrast, the Prosecutor General mentioned that corpse was not journalist and that there was no evidence to recognize Mr Gongadze to be killed. To prove it, witnesses were found to claim that they saw the journalist alive. However, later in 2001 the DNA test showed that the body was of

Mr Gongadze. In 2003 Pukach, an official of the Ministry of the Interior previously having arrested in this case, was released on his undertaking not to escape. In 2004 Viktor Yushenko was elected the President of Ukraine, and the investigation was re-opened.[93] In 2005, during the Parliamentary session, the investigating committee on the murder of Mr Gogadze reported, that the kidnap and murder of Mr Gongadze had been organized by former President Kuchma and Mr Kravchenko and speaker of the Parliament Mr Lytvyn, and parliament member Mr Derkach. It was finally mentioned that General Prosecutor Office had failed to take any measures. The applicant relied on Articles 2,3 and 13 and asked to take into attention the fact that State bodies failed to protect the life of her husband.

As a result, the European Court of Human Rights held unanimously, that there had been a violation of Article 2 (right to life) of the ECHR, concerning the failure of the Ukrainian authorities to protect the life of Mr Gongadze.[94] The Court found that the complaints of the Mr Gongadze were ignored or denied without proper investigation during considerable period of time. Any reaction was not shown by the police even after publicly spread facts in the Grani newspaper. A violation of Article 2 in reference to inadequate investigation of Mr Gongadze's death was present too. Article 3 that prohibits inhuman or degrading treatment was violated the same. The Court mentioned that the wife of Gongadze received numerous contradictory statements of the law enforcement bodies. State authority also refused to give full access to the materials of the case. According to the facts, the body was proved to be of the applicant's husband only in 2005. The court found that the way of the investigation caused serious suffering to the family of Mr Gongadze. The applicant added violation of Article 13, giving the right to an effective remedy. The Court observed that the applicant denied an effective remedy in respect of the death of her husband. The most important fact, that for more than four years effective criminal investigation was not conducted according to Article 13.

All in all, Gongadze case make huge contribution in the development of criminal procedures in Ukraine. In 2018 the European Implementation Network conducted civil society briefing to Permanent Representations of the Council of Europe. Case Gongadze v. Ukraine was presented and discussed there.[95] The representative from Ukraine noticed that positive achievements was made through the introduction of four newly created corpus delicti into the Criminal Code of Ukraine[23]. The legislation provided responsibility to protect journalists belonging to associations and bloggers, other non-professional mass media actors.

[93] Key suspect in Gongadze murder arrested; Pukach allegedly strangled journalist, but who gave the order, Kyiv Post, 2009
[94] Ukraine finds 'reporter's skull', BBC News, 2009
[95] Ukraine official sentenced over journalist murder", BBC, 2003

The second case that has made input in the judicial system is Oleksandr Volkov v. Ukraine of 2018. The core problem of this case reflected the central issue of the whole judicial system n Ukraine – independence of the judges. The case is recognized to be important because the Court for the first time studied the issue of the dismissal of judges. An applicant Volkov is a former Supreme Court judge, who has been dissolved according to the procedure that violates Article 6, 8 of the Convention. The reason for the dismissal was a breach of oath, which lacked sufficient proves. As the Court stated, the text of the oath offered wide interpretation. Pleading before the court, the Government mentioned that legislation on this issue would be amended afterwards. So, the Court exceeded the scope of the case and referred to the new legislation, that touched offence details coming outside of the case subject. It is possible to tell that the Court used obiter dictum, because new legislation could not be applied to this case, but the authority exercised widely its discretion. [96]

The Court also mentioned a political interference into judicial branch, particularly, dismissal of judges. The independence of judges of the Highest Administrative Court, that reviewed the operation of the High Council of Justice, and the Parliament were doubted. The High Council of Justice uses the great scope of power and influences on the careers of judges. It is also known that the HCJ lacks safeguards to be independent and impartial. The Court is not sure that the judges of the Highest Administrative Court is able to demonstrate independence in cases where the HCJ takes part. It violates Article 6 of the Constitution. In this context, it was crucial for the Court to analyze the level of independency and impartiality of the HCJ, because it is the key body bringing the judge to accountability.

In addition, according to the European Charter on the statute for judges, the Court mentioned that in cases of disciplinary proceedings of judges, substantial representation of judges should be present.[97] In contrary, during the applicant's time, the representation was not substantial, the HCJ was represented by 16 members, and only 3 of them were judges.

The Government again referred to the amendments having made after case of the applicants and mentioned that ten members of the HCJ were judges. The Court ignored that fact that such amendments did not affect the applicant. The Court again used obiter dictum having declared that in any case such amendments could be insufficient, because the bodies appointing the members of the HCJ remained the same. In this context it was used the opinion of the Venice Commission, that noticed while the appointment was being conducted by the same bodies and not by the judicial corps, such amendments could not solve the issue.

[96] Lesya Gongadze: They want to blame my son's murder on a dead person, Kyiv Post, 2010
[97] "Journalists seek freedom on the net", Kyiv Post, 4 May 2000

Having referred to Article 46 of the Convention, the Court confirmed that case Volkov v. Ukraine raise the problem of judicial system of Ukraine, which is not organized in a proper way. It was also mentioned, that judicial discipline did not ensure sufficient level of independency from other branches of State power. Additionally, it was absent measures for misuse of disciplinary methods that threatened judicial independence. Moreover, this condition is known to be the crucial principle of democracy. Consequently, Ukraine has made to take measures promoting reforms on judicial discipline, including the changes in the institutional basis of the judicial system. [98]

Oleksandr Volkov v. Ukraine affected the political life in Ukraine due to raised discussions on abuse of the electronic voting system in the Parliament. Volkov argued that during the voting procedure on his dismissal some Members of the Parliament were absent, and their votes were made by other Members. His complaint was based on the video of the plenary meeting of Parliament and on the notarized statements of 4 Members of the Parliament.[99]

Thus, the Court stated that the voting procedure was conducted unlawfully since the majority of the members were absent. The decision did not meet the requirements of the legislation, requiring personal participation of the members in voting procedures. So, it breached Article 6 of the Convention.

The case Volkov v. Ukraine has resulted in the introduction of amendments concerning the rules of procedure of the Ukrainian Parliament. The changes were also made in the context of violations of the personal voting rule. The positive development was seen, and the fact of violation of the law by officials was confirmed.

In this case the applicant also claimed that his dismissal from the post of judge amounted to an interference with his private and professional life, which contradicts Article 8 of the Convention. The Court assessed that there had been an interference with the right to respect for applicant's private life. The Court noticed that private life maned to have opportunity to develop relationships with other human beings, including also relationships of professional life. Article 8 of the Convention promote the right to develop such relationships all over the world. The concept of "private life" refers also to the activities of business and professional life. Thus, restrictions imposed on professional sphere is connected with personal life, and it was seen as a direct threat for "private life". Likewise, the dismissal of applicant from the post of judge was recognized to be interference in his right to respect for private life. [100]

In addition, the Court had to define the lawfulness of the interference. According to the law, an interference should be in compliance with the domestic law. The Court has found that the decision

[98] Про звільнення суддів: Верховна Рада України; Постанова від 17.06.2010 № 2352-VI

[99] Справа «Олександр Волков проти України». Рішення Європейського суду із прав людини у справі № 21722/11 від 9 січня 2013 р. / Інтернет — ресурс «Протокол», 02.07.2014

[100] Суддя Волков порадив Лавриновичу не коментувати його справу / BBC, 27 серпня 2013

to remove the judge taken during parliamentary meeting was unlawful. This condition was already enough for the court to state that an interference was illegal, and law enforcement bodies exceeded the scope of their legal competency.

Besides all, the Court had to observe whether the requirements of the "quality of law" were met. The Court found that prior to 2010 the legislation did not have any description of the notion "breach of oath". The text of the oath was written in general words and gave possibility for wide discretion in interpreting offence of "breach of oath". It was evidence, that such norms could be characterized with rigidity. So, the Court mentioned that application of the oath depended on the practice. It was told that such issues should have additional detailed statutory regulations, that consisted of numerous circumstances arising in practice. Such statutes demanded constant reviews and updates. According to the present case Volkov v. Ukraine, any guidelines, practices were absent and were not enforced in any way.[101] It was also studied that any procedural norms for proceedings against a judge who breached the oath were not set. It proved the discretion of the authorities and undermined the legal certainty of the principle.

It is known that disciplinary sanctions should be conducted according to the principle of proportionality. Ukrainian law defined inly three sanctions: reprimand, downgrading of qualification class, and dismissal. So, the variants of sanctions left little room for choosing the correct disciplinary measure for a judge.

All in all, absence of practice, guidelines, and lack of legal measures led to the unpredictability of the domestic law. According to the way in which the disciplinary measures set each judge during his career could be charged for "breach of oath" and be removed from office. In the light of the discussions made above, Volkov v. Ukraine case found the core problems of the judicial system, such as law failure to satisfy the requirements of law effects to be predictable and absence of adequate protection against arbitrariness.

3.3.2. The implementation of ECtHR judgements in Ukraine and the role of the Constitutional Court

The main task of the Constitutional Court is known to protect the Constitution, its fundamental principles. Moreover, the goal of the legal character of the international law envisages the same idea. The Constitutional Court has its extra role in protecting human rights and freedoms. To provide the protection effectively the Court must act in cooperation with the European Court of Human Rights.

[101] The European Court of Human Rights. CASE OF KULYKOV AND OTHERS v. UKRAINE 19 January 2017

The Constitutional Court in the reasoning part of its judicial proceedings refers to the practice of the ECHR. It is reasonable to notice that there are two parallel methods: review of cases in the ECHR and review of cases in the Ukrainian Constitutional Court. Decisions of the Constitutional Court of Ukraine should be made according to the practice of the international law. The task of the European Court of Human Rights is to enhance the interchange of views between the international judicial experience and national one.[102] To ensure such provisions, the professional level of judges was improved in order to guarantee the institutional capacity to understand and implement the case-law of the ECHR.

Ukraine ranks third in the number of appeals to the European court of Human Rights. Since 1997, 1400 judgements were adopted towards Ukraine. It is evidence, that Ukrainian practice was undermined by the international experts. The efficiency of cooperation can be analyzed through the efficiency of implementation on domestic level. Unfortunately, the practice is controversial. In the beginning, it will be discussed positive changes, particularly in the Criminal Code of Ukraine[103]. Then, the analyze will move on the issue of famous pilot case Ivanov v. Ukraine, that demonstrates the best the way of implementation.

To start, novelty was made in the conducting of criminal procedures, particular, the compliance of The Constitution of Ukraine with Article 315 of the Criminal Procedure Code of Ukraine. According to this, a judge cannot exceed the detention period without having received a petition of the prosecutor. Also, in the substantive part of this decision, the Court relied on the case-law of the European Court of Human Rights, according to which detention without an appropriate judicial decision, especially in the period after the investigation and before the trial, as well as on the basis of court decisions made at the judicial review stage, which do not contain specific terms of further detention, contradicts the requirements of Article 5 of the Convention. Such approach is consistent with the purpose of Article 5 of the Convention, which proclaims prevention from arbitrary or unjustified deprivation of liberty.

The lawfulness of the detention was also questioned in case Ignatov v. Ukraine. In this case, Mr Ignatov complained that national courts failed to support the relevant standards when ordering pre-trial detention. Having regard the applicant's complaint, the ECHR considered that the most appropriate way to remedy the violation was the adoption without significant delay of legislative changes in order to bring the national criminal procedure into line with the requirements of Article 5 of the Convention. Ukraine has taken responsibility to take measures, according to which the use of preventive measures is possible only if there are justified suspicions.

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[102] "Supreme Court Restores Stanik As Constitutional Court Judge". Ukrainian News agency, 2008

[103] Pavlo, Pushkar, The reform of the System of criminal Justice in Ukraine: The influence of the European Convention of Human Rights, 2003, European Journal of Crime, Criminal Law and Criminal Justice, 2003

Implementation of the ECHR judgements can be resulted in strengthened institutional capacity of the Constitutional Court and extensive application of the case law in the jurisprudence of national courts of Ukraine. But the question is whether Ukraine enforces effectively and regularly judicial decision of the European Court of Human Rights?

The case of Yuri Nikolaevich Ivanov v. Ukraine was the first pilot decision of the ECHR against Ukraine. It illustrates the best a problem of low quality of enforcement in Ukraine. Yuri Ivanov served in Ukrainian army and retired in 2000. After the resignation, Ivanov had the right of being paid once (retirement payment) and compensation for his uniform. As practice showed, Mr Ivanov did not receive anything of due. Ivanov referred to court, and Military Court decided in his favor by ordering his military unit to pay him a pension, a single compensation and legal costs. Nevertheless, Ivanov did not meet the results of the decision. Over the next few years, the applicant submitted his case to several courts, aiming to enforce this decision. Finally, Ivanov received a debt for a one-time retirement payment, but not for his uniform and legal costs. Later, he was informed that the bank accounts were closed, but he did not receive any funds. The Ministry of Defense of Ukraine sent the letter arguing that the compensation for his uniform could not be paid, because there were no budgetary allocations for such payments.

Ivanov decided to submit a separate complaint to the district court and claimed about the lack of enforcement. The district court ordered Ivanov with payments, but the judgement again was not executed. In 2009 the European Court of Human Rights began to rule on Ivanov v. Ukraine case. The ECHR found violations of Articles 6 (right to a fair trial), 13 (right to an affective remedy), 1 of the Convention (protection of property). The Court mentioned that the reasons of such situation were different: lack of budgetary funds, negligence of judicial officers, gaps in national legislation. The fact of the Ivanov case has clearly demonstrated that failure to fulfill was a long-standing issue, the roots of which lied in legal, judicial and political systems of Ukraine. Thus, the European Court of Human Rights decided to apply for the first time a pilot judgement against Ukraine, recalling the periodic and ongoing nature of the raised issue, a large number of people affected by this problem in Ukraine and the urgent need to take measures and promote an appropriate compensation at the national level.

Unlike past decisions and general measures, pilot judgements establish has specific features (defined terms and conditions). The Court gave Ukraine one year from the date of entry into force of the final decision to introduce resultative domestic measures capable to ensure adequate and sufficient compensation for non-performance or delayed execution of the final judicial decisions.

As a result, Ukraine showed minimal compliance with taken responsibilities. The Committee of Ministers assessed the way of implementation and confirmed that Ukrainian progress is imperceptible. The case of Mr Ivanov was issued in 2009, Ukraine was given 1 year to implement

the provisions of the final decision in its legislation. In practice, Ukraine failed to execute of the pilot judgement, and requested a 12- month extension. The ECHR agreed to allow extension, but for 6 months, recalling the fact that there were any changes since the final decision has been enforced. Only in September 2011 a draft law "On Guarantees of the State Concerning Execution of Court Decisions" was presented in the Parliament of Ukraine. The goal was to address problems of pilot judgement and to provide a domestic remedy.[104] In December, the pilot judgement was not executed yet, the Committee of Ministers expressed their regret and stated that such incompetence undermined the efficiency of the Convention. In 2012 the Committee of Ministers examined again the way of execution, but Ivanov judgement had not been adopted yet. The ECHR decided to unfreeze similar cases with the pending status at the court. In February 2011, the number of such cases estimated 2500. The Court stated that Ukraine not only failed to conduct reforms, but also to resolve more than 700 individual cases. Ukrainian authorities were asked again to provide necessary changes and to provide information about the time framework.[105] Finally, the draft law was adopted by the Verkhovna Rada in 2013.

The case described above illustrates systemic non-enforcement of the Ukrainian judicial decisions and decisions of the ECHR. The reasons are lied in the legislation failure and unwilling of the state bodies. Experts consider that inefficient response to the pilot judgement confirmed the lack of political will. To analyze the political will, it is necessary to prove state capacity for reform. The scholars believe that Ukraine is characterized by voluntary resistance of state officials. One of the possible reasons is restrictions on the forced sale of debtor's assets. Also in Ivanov case, the failure to pay him a compensation for the uniform was caused by the moratorium on the forced state of state assets. In this context the ECHR emphasized that lack of funds was not a reason to evade from response to a court judgement. The Ukrainian authority was trying to find legal solutions to resolve this issue. In 2010 the Cabinet of Ministers approved Resolution in order to create a strategy to decrease a systemic non-enforcement. As a result, in the law on budget in 2010 it was foreseen funds for compliance of pilot judgements with the ECHR.[106]

The aspect of political elite also plays important role in the enforcement of judicial decision. For example, when Yanukovych and Azarov came to power, the draft laws and proposals on the enforcement were scrapped, however, Yuschenko government were discussing such issues for years. So, some actors had more incentives to promote reforms than others. The Ministry of Justice

[104] Recent Developments in the Ukrainian Judicial System and the Impact of International and European Law, East European Politics and Societies (EEPS), 2012
[105] Judicial Reform Index for Ukraine, American Bar Association, 2007
[106] Yanukovych notes political pressure on Ukraine's judicial system, Kyiv Post (March 25, 2010)

mentioned that almost 70 % of proposals prepared by the Ministry of Justice were stopped by the Parliament. [107]

The bill "On Guarantees of the State Concerning the Execution of Court Decisions" that was finally adopted in 2013 introduced important provisions which the Council of Europe had asked a lot of time to implement. The first novelty was the identified government agency which responsibility was to enforce court decisions concerning debts got by the public bodies. The second important provision defined the responsibility for prolonged non-enforcement of judicial decision. Thirdly, the law on moratorium on the forced sale of the state property was recognized to be expired.

It is important to notice, that the Committee of Ministers considers that pilot judgement is still ongoing problematic issue, that remains to be executed. This situation put in danger the rule of law and the effectiveness of the Convention. Thus, the adoption of the Resolution did not live up to expectations, because the legal gap was not the only problem. The core of the non-enforcement is laid in the absence of political will.

[107] Transparency International Global Corruption Barometer: Ukraine has become more corrupt over the last two years, The Ukrainian Week, 2013

4.Ukrainian steps towards democratization in comparison to the rest of post-soviet states

4.1.Pro-western and pro-Russian steps taken by post-soviet countries to go away from communist constitutionalism

This chapter is dedicated to analysis of the democratization processes taken by post-Soviet states with the aim to understand why Ukraine has its particular features. Experts propose to observe and compare the trajectories of the development of such countries: Belarus, Moldova, Russia, and Ukraine. Obstacles that influenced on the state building in these countries are dominance of old regime officials, a lack of democratic experience, powerless civil society, incorrect interpreting of the rule of law, and international isolation for a long period.

Mentioned countries can be grouped: Belarus and Russia are on one side, and Moldova and Ukraine - on another side. Such division is caused by the fact of similarities among the regimes of these states. Obviously, they all have one common important feature, such as Soviet past with its predominance of the Communist party, absent of the separation of powers and the rule of law, huge labor class[3]. Nevertheless, since the collapse of the Soviet Union had happened, the countries chose different ways of their democracy building.

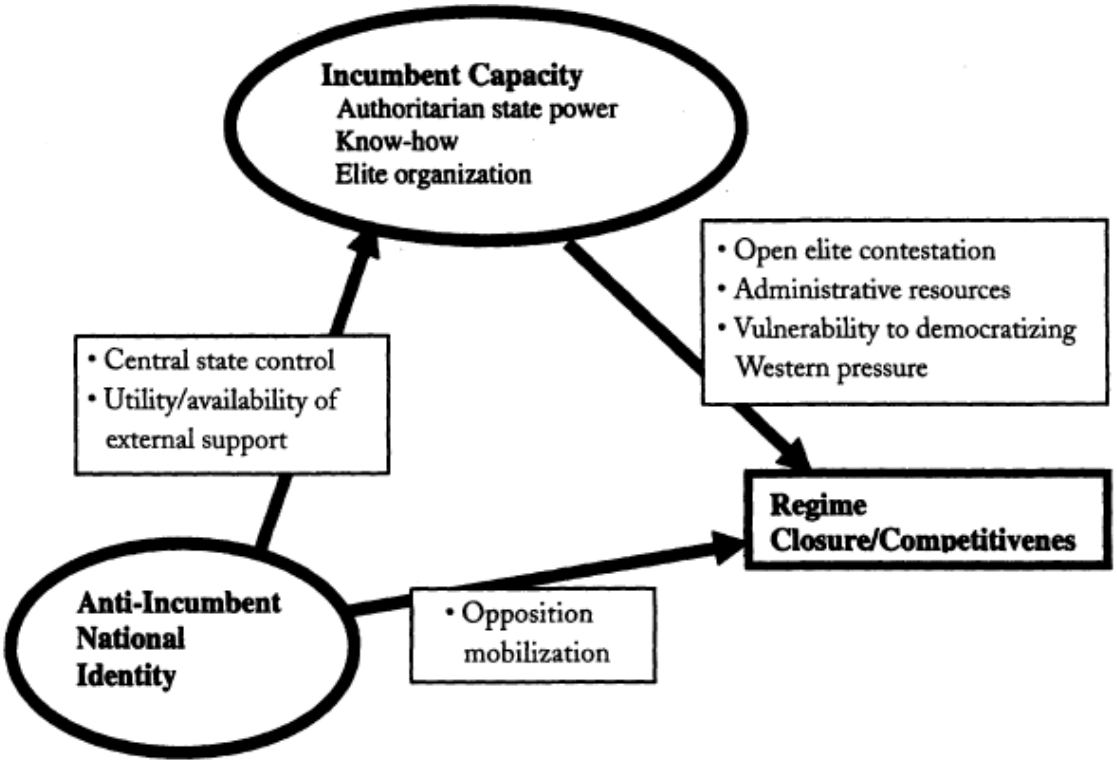
Scholars divide transition period into four studies[108]. The first decade was the transitional, the second was the consolidation stage, the third is about uncertainty. In the beginning, all states were seemed to be relatively open, but then some of them became more closed with time. What was the reason? Was it caused by different trajectories? It is reasonable to tell, that different levels of competitiveness were influenced by different mechanism of regime formation. Some scientists consider that weak international pressures also affected the transition processes. Moreover, some states were characterized with inability of incumbent to keep power in their hands, and another states – with ability of old elite to concentrate political control in all spheres of social life (elections, media, judiciary, using force against opposite representatives). The result of transition in the post-Soviet states was named as “pluralism by default”[17], when the pluralism was allowed theoretically, but without capacity to apply it.

[108] Lucan A, Way, Authoritarian state building and the sources of regime competitiveness in the fourth wave, the cases of Belarus, Moldova, Russia, and Ukraine, World Politics, Vol. 57, No.2, 2005

Table 3: Types of Legislatures – Post-Communist and Post Soviet: The Second Decade

		Autonomy from Executive		
Party System Polarisation		Low	Medium	High
	Low	Russia		Slovenia
	Medium	Ukraine	Poland Czech Republic	
	High	Moldova	Hungary	

In the Table above,[109] it is seen the level of plurality among countries. Autonomy is influenced by the level of executive dependence. The most pluralistic country is Slovenia. Obviously, Russia in recognized to be the state with the lowest level of party polarization.



The level of anti-incumbent national identity described schematically above differs across countries[31]. To illustrate, in Belarus and Russia the post-Soviet regime was being built on weak anti-incumbent national identity, strong leaders that were able to preserve a power over economic actors. In contrast, Ukraine and Belarus were countries of stronger anti-incumbent national identity and lower capacity of state actors to control economic sphere. So, in the last case authoritarian regime was undermined as opposition representatives were able to mobilize pro-Russian and anti-

[109] Hryhorii, Berchenko and Serhii, Fedchyshyn, Constituent power: The Theory and Practice of its Implementation in Ukraine, Russian Law Journal, 2018

Russian national identities[110]. So, the directions taken by Ukraine and Moldova gave opportunity for the country to test radical changes. The disadvantage of this way was possibility to experience long uncertainty in the country because of oppositions, and be under the influence of Russia because of weak leadership. In addition, such factors as lack of know-how, elite organization of no effect, weakness of crucial values of state power.

Governing elite in Ukraine was more disorganized, than in Russia. The main reason was caused by the problems of authoritarian state-building, that was impossible in Ukraine due to elite disunity. However, weak elite dissonance threatened the same democratization processes, because procedural norms demanded consensus to be adopted.

One must admit that existence of strong private sector also took part in state building, particularly by influencing on the mood of society through independent media. In Russia, mass media is known to be under pressure of elite, came from the Soviet Union. Ukraine differs also its relatively large territory and proximity both to Europe and Russia. So, the state felt pressure from both sides. The positive effect is Western pressure for democratization. The level of influence depended also on the capacity of Ukraine to control its economy. The fact of well-established patron-client relationships among primed ministers, close advisers, parties, large quasi-familiar networks – the strength of such relationships led to the possibility of such members to have direct access outside of their control. In other words, strong connections among state actors led to the wholly controlled Ukrainian society by some groups of rich people. To obtain access to state bodies it was necessary to be in close relationships with such people or to pay a bride to be admitted.

The second factor that should be discussed is know-how. This notion is also important in building regimes, especially for the USSR, the union with iron curtains. The first implemented know-how was national elections. Ukrainian experience demonstrated that the President asked a consent of the people to promote democratic constitution. In this order, it was held the first referendum in the history of Ukraine. Privatization was another know-how. In Belarus it made easier for Lukashenko to maintain state control, because the privatization processes were more restricted than on other states.

State control in Ukraine was undermined by creating opportunities for oppositions and people under the authority within an organization to ignore central commands. All in all, strong anti-incumbent processes in country led to powerful national identity. In this situation, it ended up with opposition mobilization and weakened incumbent capacity[111]. One must admit, that noticeable

[110] Valentina, Feklyunina, Soft power and identity: Russia, Ukraine and the "Russian worlds", European Journal of International Relations, 2016

[111] Serhiy, Kudelia and Taras, Kuzio, Nothing personal: explaining the rise and decline of political machines in Ukraine, Post-Soviet Affairs, 2014

national identity led to disobey of the central state and resulted in complexity to manipulate elections and impose force.

It is reasonable to return to the history to observe the evolution of Ukrainian state building. In 1994 Kravchuk became the President of Ukraine, he was seen as anti-Russian leader and was not accepted by the eastern part of Ukraine. During his presidency, Ukraine became to build relationship with the EU, having declared its will to adhere to European standards. In 2004, according to the officials from the western Ukraine, they resisted central efforts to manipulate votes in support of Kuchma, who was known to be pro-Russian leader. Ukraine is known to be country national ideas of which are divided according to Eastern and Western inhabitants following different approaches. Eastern part of Ukraine took pro-Russian ideas of evolution, western – European ones. So, national identity was influenced by two forces. Western direction affected Ukrainian democracy building and the degree to which incumbents could rely on the international resources (standards, practices)[112]. So, the dynamic of strong anti-incumbent nationalism was influenced by two competing national concepts struggling for their dominance. Such division was present on each level of society: both elites and populations were divided on pro-Western and pro-Russian supporters[31]. The divided nature of the state made difficult to promote either western know-how ideas or Russian authoritarian conceptions. All these facts exerted sufficient influence on Ukrainian long way to democracy.

As it was mentioned above, similarities among four counties were the next: their unfamiliarity with democratic rule prior to 1991. Furthermore, Soviet officials were willing to experience non-democratic methods. So, the grounds for correct understanding of the rule of law, priority of the democratic Constitution in the state were far from implementation. Belarus is the state in which the President Lukashenko established total control over legislature, media, judicial system. In Russia the regime is also autocratic to an increasing extent, because Putin controls the parliament, reduces freedom of media having eliminated independent tv, radio stations. Moldova is the most competitive country characterized with strong legislature and diverse media. Ukraine is the country directions of which have being changed at every turn on account of presidential elections. Each President turned Ukraine in the direction beneficial for him. For example, Kuchma strengthened control over the parliament, brought electoral manipulations, and put opposition in troubles. It should be said, that each country established semi-presidential systems, but balance of powers between the president and opposition was represented in different degrees. As, professor Pasquino Pasquale mentioned, the degree of opposition defined the level of democracy in the

[112] Andrew, Arato, International Role in State-Making in Ukraine: The promise of a Two-Stage Constituent Process, German Law Journal, vol. 16, no. 3, 2015

country. Thus, the level of democracy in post-Soviet states differed according to the strength of incumbent cooperation that was started during the Communists.

The argument that goes after discussion in the previous paragraphs is that constitutions and other institutions reflect the incumbent authority[113]. To illustrate, Lukashenko imposed a highly centralized constitution, that is the result of weak opposition in comparison with Ukraine and Moldova. In fact, executive authority's main task was not connected so much with formal constitutional rules, as with elite organizational capacity[12]. For example, in Russia the presidential power became stronger on practice after the emergence of a strong presidential party during the period when constitutional change had not happened yet.

Some scientists consider that changing character of the international environment takes place in countries with formal democratic institutions. In case of Ukraine, it is more correct to tell that the country was under democratic pressure from Western, than it decided to pave democratic road by itself[4].

Such conditions as weak rule of law, privatization did not create Western-style autonomous class, but created a group of very rich oligarchs who depended on government connections. In this context, leaders willing to preserve their power decided to buy support from individual oligarchs. For example, in Ukraine the ex-President Viktor Yuschenko, opposition candidate, benefited due to the support of the businessman who was closely tied with the first President of Ukraine Leonid Kuchma. In Russia Putin took different measures by increasing time by time the scope of state leaders. It led to the decreased number of opposition candidates.

Ukraine is a country that divided between west and east, with weak ruling party and weak authoritarian conceptions. Due to the western part of Ukraine, the state obtained strong national identity, that was developed under Austro-Hungarian rule in the 19th century. The east of Ukraine granted Ukraine pro-Russian traditions of state building; one of such traditions is strong presidential rule, formal constitution with weak rule of law[114]. Kuchma who was pro-Russian representative relied on coalition of the oligarchs that was known to be loose and highly volatile. He could not rely on the single party, as Putin did. Such conditions resulted in the breakdown of the authoritarian state hierarchy at the top. Central control with weak power caused demonstrations in the capital of Ukraine in 2004 known as "Orange revolution' and demonstrations in 2014 made history as "Maidan revolution"[115].

[113] Serhiy, Kudelia and Taras, Kuzio, Nothing personal: explaining the rise and decline of political machines in Ukraine, Post-Soviet Affairs, 2014

[114] Henry, Hale, Formal Constitutions in Informal politics: Institutions and Democratization in Post-Soviet Eurasia, World Politics, vol. 63, no. 4, 2011

[115] Sanshiro, Hosaka, Hybrid Historical memories in Post-Euromaidan Ukraine, Europe-Asia Studies, 2019

The Orange Revolution was unexpected event, because generally Ukraine was seen as a country of consensus. Prior Ukraine managed to avoid violations and do not step on the edge of abyss. The question of that time was whether Ukraine would go Russian way, or the balances would be maintained? Possibly, the answer had not been found, and the situation repeated 10 years later in 2014.

It is necessary to tell, that external factor always plays important role in the Ukrainian state building. The Russian factor has its specific role during the whole history of being neighboring countries. Some scientists believe that significance of Russia has declined since Ukraine obtained independence, and that trajectories were influenced by Ukrainian elite. This fact is evident if take into consideration Ukrainian elections in 2004, when Yuschenko has become the President, being anti-Russian leader. Also, in terms of institutional development, countries were moving in different directions. Obviously, the reason is different foreign policy. Ukraine was not looking for participation in supranational organizations but focused on bilateral relations within the Commonwealth of Independent States. Ukraine is not a member of the CIS, but it is one of the founders. In 2003, Ukraine also joined the Single Economic Space with Russia, Belarus, and Kazakhstan. But it could not support the creation of free trade zone, because its official goal was accession to the EU. By the end of the Yuschenko's presidency it was achieved an agreement to give Ukraine associate status in the EU. But during the next President Yanukovych who was pro-Russian new approach was proposed. Yanukovych called it "three plus one cooperation"[116] – a proposal to cooperate with the Customs Union of Russia without joining it. Negative trends of further development of Ukraine has happened: Ukraine was returned to the status of partially free state, because democracy level was reduced.

[116] Valentina, Feklyunina, Soft power and identity: Russia, Ukraine and the "Russian worlds", European Journal of International Relations, 2016

Early/Mid-1990s	*Belarus 1992–96*	*Moldova 1992–2000*	*Russia 1992–99*	*Ukraine 1992–95*
Government manipulation of elections	moderate	low	moderate	low
Incumbent monopolization of media	moderate	low	moderate	moderate
Opposition weakness	moderate	low	moderate	low
De facto power of executive over parliament	moderate	low	moderate	low
Late 1990s/Early 2000s	*1997–2004*	*2001–4*	*2000–2004*	*1996–2004*
Government manipulation of elections	high	moderate	moderate	moderate
Incumbent monopolization of media	high	high	high	high
Opposition weakness	high	moderate	high	moderate
De facto power of executive over parliament	high	high	high	moderate

To conclude this part, Russia and Belarus are the countries with stable political regime due to their strong leadership, characterized authoritarian regime. The table above[117] helps to evaluate the level of incumbent capacity in countries. Russia is characterized by the least degree of opposition and the strongest leadership. It is reasonable to tell here, Russia is less vulnerable countries to the outside pressure than other state due to its access to enormous oil and gaz. The most significant factor here is capacity of Russian political actors to control economy. Ukraine also differs from other Soviet states, because it achieved its independence peacefully, in result of agreement between opposition (democratic one) and the communists (soviet elite that supported independence of the state. Ukraine became the first country, enabled to conduct democratic elections in 1994 with the aim to replace the president and adopt democratic constitution. So, Ukrainian Constitution was the result of consensus too. The compromise was made between the Parliament and the President. In contrast, Russia adopted the Constitution by armed attacks on the Parliament, and the Constitution of the Russian federation was adopted by passing the legislative branch.

Obviously, the fact of sudden dissolution of the Soviet Union contributed to the emergence of pluralism by default. This process is characterized by unreadiness of the countries to take appropriate measures of state-building. Ukraine case is seemed to use improvisation, especially, in the beginning of its independence. Efforts at autocratic consolidation were undermined by

[117] Olexiy, Haran, Ukraine: Pluralism by Default, Revolution, Thermidor, Russian Social Science Review, vol 54, No 3, M.E. Sharpe, Inc, 2013

salient anti-incumbent national identity[118]. As a result, Ukrainian regime is characterized by long political competition.

4.2.Ukraine vs Russia in the context of human rights and access to justice

It is possible to review the status of human rights through reviewing cases inside country, but it is also possible to understand the attitude to the status of human rights and freedoms through the international deals of the country. To explain better this approach, one must admit that Russian policy inside country is rather closed, then transparent. Russia as a post-Soviet-state taken authoritarian trajectories of development is characterized by low confidence to the rule of law. So, it is complex to know the level of democratic development in post-Soviet country referring only to the domestic legislation. The armed conflict in the eastern part of Ukraine and annexation of Crimea demonstrated the best Russian approaches in the context of human rights.

There are pending cases Ukraine v. Russia before the Grand Chamber. The first case was dropped in 2014. Ukraine claimed that Russia exercised effective control over the Crimean Peninsula, that was the legal part of Ukraine. This case violates numerous provisions of the Convention, such as Article 2 (right to life), Article 3 (prohibition of torture and inhuman or degrading treatment), Article 5 (right to liberty and security), Article 6 (right to a fair trial).

Ukrainian government mentioned that Russia supported separatist groups in Eastern Ukraine. Cases proving torture and ill-treatment from the side of Russia were given. People living in Crimea were automatically recognized to be citizens of Russia. It was concerned that the property legally belonging to Ukraine was jeopardized by Russia. Ukrainian nationals were restricted to entry into Crimea. The Court applied interim measures and asked both Russia and Ukraine to refrain from any military actions, which could ended up with violations of the people[119].

Ukrainian Government submitted 3 cases to ECHR against Russia, but averagely 4000 individual complaints were brought before the Court because of events in Crimea and hostilities in Eastern Ukraine. In 2015 the Ukrainian Government lodged application to ECHR and claimed that Russia continued to control Crimea and regions of Donetsk and Luhansk. Ukraine alleged that Crimean Tatars and pro-Ukrainian nationalist have being arrested. Control over the Crimea led to suspension of Ukrainian judicial authority and delay of law-enforcement. TV channels were closed, journalists were not able to work, because their activity was restricted.

Russia is a member of the Council of Europe, which with the European Court of Human Rights promote the task of protecting human rights and the rule of law in all member states. In 2014

[118] Taras, Kuzio, Russian and Ukrainian elites: A comparative study of different identities and alternative transitions, Communist and Post-Communist Studies, 2018

[119] Boris, Kagarlitsky, Ukraine and Russia: Two states, One crisis. International critical Thought, 2016

Russia was at risk to lose its membership[120]. As the Council of Europe had revoked Russian rights to vote, Russia ceased its payments to the body. But it could cause exclusion from the body because of missed payments for two years. It should be told that if Russia left the Council of Europe, it would lose the jurisdiction of the ECHR. Consequently, such output could be terrible hit for Russian people, because thousands of Russians used to look for protection of their rights in the ECHR. Some experts emphasize that the ECHR is the only functioning court for Russian citizens. The role of the judgments of the ECHR is crucial for Russia, because it changes significantly the customary regime of Russia[121].

According to the legislation of Russia, Constitutional Court has competency to accept the judgements of the ECHR only in the case of their compliance with the Constitution of Russia. Such imperative norm weakens the role of the Convention, and it proved the fact that international law did not take priority place in the hierarchy of norms. However, the functioning of the Constitutional Court of Russia was changed in 2016 and 2017, when the Court failed to support constitutionality of particular law. The judgement required the legislature to issue new laws or interpret existed ones. In past, the courts neglected such interpretations, but after amendments in 2016 it was binding procedure for the judiciaries of all levels. The same year, after the Chief of Justice compared Western-style gender equality to anti-Christian and anti-human notion, the Court had to declare the European human rights to have priority over the Russian order. Protests in May 2018 caused by the inauguration of the Putin were interpreted by the Chief Justice to have been reminded Russian authorities that ordinary citizens had right to protest against government actions.

Scholars insisted on the fact that Russian state has features of two regimes, that coexist parallelly[1]. In some degree such situation takes place in Ukraine the same. These regimes are constitutional and politically expedient[24]. In Russia, constitutional regime is about constitutional rules and European human rights, that guide and restrain the government at the same time. The second regime of political expediency is about strategies, tactics, approaches, rules that permit the power to bypass constitutional restraints and be over the standards prescribed in the Constitution.

According to Trochev, such duality is extremely used by the judges, when the judge of the same court and even the same judge can interpret the norms according to the letter or disregard it[1]. The choice is affected by the context of the case. The Constitutional regime and politically expedient one demand decision of the Constitutional Court. The Constitutional Court in Russia is empowered to review government decisions on constitutionality. However, constitutional regime accepts litigation that protects human rights of all citizens of Russia equally and constrains government

[120] Hiski, Haukkala, From cooperative to Contested Europe? The conflict in Ukraine as a Culmination of a Long-term crisis in EU-Russia Relations, Journal of Contemporary European Studies, 2015

[121] Valentina, Feklyunina, Soft power and identity: Russia, Ukraine and the "Russian worlds", European Journal of International Relations, 2016

authority when there is legal evidence. In contrast, a regime of political expediency demands to decide on cases in favor of rulers and keep discipline inside the coalition group. Constitutional regime is about procedural principles that provide a fair trial such as impartiality, independence of judges. Political expediency is only about judgements in favor of state authority with the aim to prove legality of their actions[122].

Unfortunately, such judicial methods as dissenting opinions origins of which are applied in the context of giving protection to individual's human rights can be used in order to align judgements with the interests of the rulers. Dissenting opinions are not tolerated when they criticize officials. In 2017, judges of the Constitutional Court of Russia wrote 19 dissenting opinions in contrast to the absent of dissenting opinions in the Supreme Court of Russia. The reason is in the competency of the Constitutional Court of Russia to lobby interests of state powers. It is reasonable to mention a citation of Russian Commissar of Justice Nikolay Krylenko, "Judge in Russia is above all a politician, a worker in the political sphere".

Alexei Trochev and Peter H.Solomon consider an existence of judicial pragmatism[36]. They differ judicial pragmatism through adaptation to institutional changes, personnel changes, a popular leader, tolerating disobedience with judgements. The notion pragmatism is defined by William James, according to which it is a result of insufficiency, abstractness, fixed principles in closed systems. It goes towards power and facts instead of principles.

In Russia, the Constitutional Court under Putin aims to satisfy the interests of the President rather than popular will based on the constitutional guarantees. Since early 2000s the Court acts in favor of highly popular President which prevails over the Constitution.

[122] Petra, Stykow, The devil in the details: constitutional regime types in post-Soviet Eurasia, Post-Soviet Affairs, 2019

Table 1
Key changes in regulating the RCC, 2000–2016.

Date of changes	Summary of changes	Goals and impact of changes
FEB. 7, 2000	Acting President Putin matched perks and benefits of judges with those of ministers and of the RCC Chairman to those of the Prime Minister	Accountability – presidential administration is responsible for providing generous perks and benefits to the RCC. Still, the RCC Chairman Zorkin complained in 2005 that he incessantly lobbied for 2 years to obtain housing for newly appointed judges.
FEB. 8, 2001	Term of judges appointed in 1994–2000 extended from 12 to 15 years and age limit removed	Accountability - aimed at keeping Chairman Marat Baglai in office yet removing Vice-Chairman Tamara Morshchakova from the bench
DEC. 15, 2001	Brought back age limit of 70 to judges appointed in 1994–2004 - to be in force from 2005 onward	Simplification - same age limit as for judges in other courts
	Established disciplinary sanctions on the RCC judges - warning and dismissal from the bench - for violating the Judicial Ethics Code and for an opinion that resulted from criminal abuse of office. RCC approval for launching a criminal case against the RCC judge is no longer required	Accountability & Simplification - aimed at making the RCC judges accountable on par with judges of other courts. In 2009, the RCC threatened to issue warnings against judges Kononov, who chose to resign immediately, and Yaroslavtsev, who recused himself, for criticizing Putin and Medvedev in the media.
	Clarified duties of government bodies in carrying out RCC decisions	Strengthened the binding power of the RCC decisions
APR. 5, 2005	Removed 15-year term and applied age limit of 70 to all RCC judges	Simplification - all sitting RCC judges are subject to the same age limit after the outspoken judges Nikolai Vitruk and Viktor Luchin had retired reaching the age of 65
FEB. 5, 2007	Relocated the RCC from Moscow to Saint-Petersburg	Accountability - test for loyalty of the RCC judges to the Kremlin, soft purge of the RCC apparatus who did not agree to relocate, lucrative contracts for trusted construction companies, displeasure of local residents
DEC. 23, 2007	President Putin offered generous relocation benefits to judges and clerks	Accountability – aimed at rewarding the RCC judges and clerks, who had agreed to relocate to Saint-Petersburg
JUN.2, 2009	Abolished election of the RCC Chairman and Vice-Chairman by the RCC judges for 3-year term and dismissal of these RCC officers by the RCC judges. Instead, President nominates the RCC Chairman and two Vice-Chairmen from among the RCC judges, and the Federation Council approves them for a 6–year renewable term. President also proposes to the Federation Council to dismiss these RCC officers from office.	Dependence & Simplification - aimed at making the RCC leaders accountable to the President the same procedure as the chairmen and vice-chairmen of other courts.

In the Table 1[123] it is possible to observe practices of the Constitutional Court that were accomplished without legislative approval, such as oral arguments, interpretations of the binding statutes, and avoidance to review the judgements of the ECHR.

Judicial pragmatism through adaptation to personnel changes is happened in cases when, for example, Putin and Medvedev expect to have loyal judges in exchange for rewards. So, the composition of the Court is conducted according to the demands of the President. It should be noticed, that judicial efficiency is not harmed in this way. Backwards, it became easier for the judges to reach consensus and decide on growing number of cases. The task of confirmation made the Constitutional court of Russia to be friendly executor of the need of Kremlin.

All in all, authoritarian Russian style in the context of constitutionalism has invented compromise, that reflects constant tension between constitutional regime and political expedient[24]. Moreover, judges see themselves as policymakers, who decide the future of Russia. However, the Court showed also positive changes such as stable demand for the constitutional review, resonant exchange of judicial opinions, improvements in the implementation of judicial decision, also, in the context of the ECHR.

Having observed the functioning of the Constitutional court of Russia, one should admit, that Ukraine has ‘Russian factor” in its politics, but in some degree. Ukraine has made steps toward

[123] Robert, Peacock and Gary, Cordner, “Shock Therapy” in Ukraine: a radical Approach to Post-Soviet Police Reform, Public Administration and Development, 2016

European standards, so it helped the state to move away from pro-Russian customs. The main feature that differs Ukraine from Russia is weak central authority. Ukraine lacks strong leader, but possibly it can be advantage for its own history. The last presidential elections are the proof. It is reasonable to discuss it in the next section.

4.3.Civic participation in Russia and Ukraine

Since 1980, the strategy for public participation has been changed. It was named New Public Management. The principles of such system was to promote self-government, decentralization, privatization of state assets[124]. In the case of Russia, participation was conducted in some degree; scientists argued that it was the result of low state capacity. There are, however, studies and current results that prove Russian desire to increase civil participation in the policy processes. It is proposed by scholars to use term "limited pluralism" for studying states with authoritarian regime. The problem of civil participation was crucial issue after the collapse of Soviet Union and continues to be ongoing problem. Globalization processes are unstoppable, so Russia must introduce state capacity for civic participation[8]. The problem is not only in the governmental authorities, but also in the people themselves. Vladimir Putin not one asked citizens to lose their Soviet mentality and confirmed that release of welfare without taking responsibility was no longer possible in the modern world. Mentality is very important. The Soviet Union thought people to live today and not think about the future. People did not use to plan. In this term Kremlin has called on greater civil involvement in policymaking, online forums, NGO, since the civic groups are more familiar with the ground issues. So, new institutions were created in order to promote participation[125].

The first modern institution was Federal Public Chamber, launched in 2005. The goal of Chamber was to facilitate influence of civil society, represent interests of the people, protect rights and freedoms. Monitoring of government activities was also among tasks of the institution. Quarter of the members were elected by the president. Such format was transferred also on regional and municipal levels. Public chambers were responsible to resolve disputes on social issues and coordinate the NGO.

It was also created a legislation governing the Public Chamber. Councils – groups of people giving opinions on the actions of ministers – were permitted too. However, the membership of the Council should be accepted by the ministry.

Russia promoted civic participation through the development of SONGO. It is a scheme of grants for civil groups of people who work on social projects. According to the law, SONGO is not-profit

[124] Marguerite, Marlin, Concepts of "Decentralization" and "Federalization" in Ukraine: Political Signifiers or Distinct Constitutionalist Approaches for Devolutionary Fderalism, Nationalism and Ethnic Politics, 2016

[125] Vasyl, Kvartiuk and Jarmila, Curtiss, Participatory rural development without participation: Insights from Ukraine, Journal of Rural Studies, 2019

organization aiming to regulated issues in the field of sport, education, health care. Official information has facts that SONGO is financed by regional and municipal authorities. Meanwhile, there are also restricted norms that foresee participation of the civil society in elections at federal, regional and municipal levels[126]. For example, President Medvedev stated that he and Putin a lot of time ago agreed that he would step aside for Putin. So, political destiny of the country was decided not by the will of the people. The parliamentary and presidential elections in 2011 were seen by experts to be dishonest entirely. It should be said that elections were illegal, and the candidate could be seen as illegitimate.

At the regional level elections were canceled on the basis of national security in 2004, and the president appointed candidates by himself. In 2011 the system was recovered by Medvedev, but in 2013 regional parliaments were given right to cancel results of the elections and submit the list with their own candidates. At the municipal level, manipulations were also present. The post of city manager was introduced, and it replaced also elected candidates. Such strategy strengthened the link between the Kremlin and the municipal authorities. Regional government and city managers became more accountable to the central politics. Thus, the bodies of decentralization were introduced, but the fact of self-government was absent.[127]

So, the citizens did not have real opportunity to take part in elections. Electoral participation was no more effective institution. In fact, elections are the type of government-organized participation that should reflect the mood of society. However, Russia choose the way of allowing certain extent of participation, but while it does not destabilize the power.

Ukrainian otherness was proved during presidential election in 2019, which came down in history as a phenomenon. The process of elections and the result showed that Ukrainian democracy is healthy. Poroshenko was the 5th president of Ukraine went down in defeat. Ukraine demonstrated its capacity to be pluralistic state, that gave rise to the opposition.

Poroshenko was acting in the midst of military attacks in the East of Ukraine. During his presidency, Ukraine made steps back in its development, so the mood of society was tuned only to radical changes. When people demand drastic measures to have been introduced, opposition party is the solution. Volodymyr Zelenskiy, actor and comedian entered the political scene in 2019. In spite of the fact that he did not have any experience in politics, and did not have representations in the Verkhovna Rada, the result was 73 % of national votes in favor of Zelenskiy. Such outcome displayed discontent of people towards the previous state power and proved how free and fair were

[126] Vasyl, Kvartiuk and Jarmila, Curtiss, Participatory rural development without participation: Insights from Ukraine, Journal of Rural Studies, 2019

[127] Marguerite, Marlin, Concepts of "Decentralization" and "Federalization" in Ukraine: Political Signifiers or Distinct Constitutionalist Approaches for Devolutionary Fderalism, Nationalism and Ethnic Politics, 2016

Ukrainian elections. Poroshenko did not manage to falsify the votes and was easily beat by successor.

Zelenskiy is recognized to be a real phenomenon in Ukraine, his name stimulate to add new terms in vocabulary: :Ze-team", "Ze-president". The part "Ze" of the terms indicates not only on the surname, but on the article "the". Ukrainians believe in success of the new president, however, experts argue that it will be difficult to conduct reforms without the support of the Parliament. Under the Constitution, most of the presidential decisions must be approved by the Parliament. Interestingly, that Zelenskiy is the first president, who started his political career from the presidential office, not from the Parliament, as all predecessors.

Zelenskiy achieved a support almost in each region of Ukraine, except Lviv, western part of Ukraine. Newly elected president demonstrated a disappointed of the Ukrainians in the presidency of Poroshenko. For the first time in history, elections were conducted with the presidential debates that took place on the Olympic Stadium. During debates, Zelenskiy declared, "I am the result of your mistakes and your promises".

The situation is quite difficult for Zelenskiy, because in 2014 Ukraine became parliamentary-presidential republic. A poll conducted by the Kyiv International Institute of Sociology found that almost 40 % of Ukrainian believed that Zelenskiy would be able to increase trust of the people to public institutions, deprive immunity of judges from prosecution, investigate corruptive cases. Zelenskiy understands the complexity of introducing such changes, but believes that modern world with its technologies will help his team to achieve the goal. The President permanently reports on his work, posts video with the process of his deals in social networks (Facebook, Instagram, Youtube). Zelenskiy is in constant dialogue with society. Many Russians noticed after debates, that Ukraine was an example of clear democracy. Andrey Nikulin, famous Russian scientist, emphasized that, "It looks like Russia is still in the kindergarten and Ukraine is already a teenager".

It was logical for Zelenskiy to dissolve the Parliament, as he did not have any support there. So, immediately after being nominated for the post of the president, Zelenskiy announced that he would dissolve the parliament. The term for the parliamentary elections was 2 months. At the same time, he appealed to the government for resignation and to the Verkhovna Rada for dissolving chiefs of offices. Officially, the reason to dissolve the Parliament was the lack of ruling coalition. Results from parliamentary elections was in favor of the President. Zelenskiy became the first president to command an overall majority in parliament since the collapse of the Soviet Union. His party was named "Servant of the people" after the TV comedy that made his famous. The party received 43 % of the votes after almost half of the votes was counted. The result of the elections was the next:

1) 70 % of the new faces in the Parliament. The main aim was to have completely new people that were not connected earlier with corruptive schemes;
2) Voters for the first time did not concern either European trajectories, or Russian, but were concerned with the goal to solve ongoing conflict in the East of Ukraine;
3) Influence of the oligarchs was present the same, however, political pluralism was encouraged. Businessmen were known to finance political parties, their election campaign.

The first session of Parliament was held in September 2019. Zelenskiy started it with radical constitutional changes. Draft laws were presented to the Parliament; members of the party "Servant of the people" mentioned that drastically changes to the legislature's composition were introduced. One bill was about reduction of the number of deputies by one-third to 300 (before, the number was 450). The term was changed to 5 years. Initiative was supported and submitted to the Constitutional Court. Other draft were also sent to the Court to be checked on constitutionality. Second bill introduced sanctions for deputies in case of their absence during voting, truancy, and obtaining citizenship of another country.[128] For instance, if a deputy missed 1/3 of parliamentary plenary sessions, he would lose a mandate. A third bill promote right for people to propose legislation in parliament.

The first achievement was made in the context of immunity deprivation from the prosecution for deputies. It is seen to be the first step in the process of fight against corruption.

All in all, Zelenskiy, who was comedian, actor, without political experience, managed to win presidential elections, to dissolve the parliament, and to obtain majority of votes during parliamentary elections. Moreover, the changes keep happening in numerous fields. Ukrainians do not lose faith in his candidacy.

[128] 40. Червяцова, Зе-ситуація, Конституційне право у контексті виборів 2019, передбачення на майбутнє, Закон і право, 2019, 77-10.

Conclusion

The Consolidation of constitutionalism in Ukraine has been a long "journey". The difficult transition period characterized by the "pluralism by default"[129] made Ukraine to promote changes when neither society or state powers were ready. Experiences from EU Member States and the US inspired Ukrainian democratic found fathers to build the new constitutional system. Obviously, it is reasonable to tell, that being neighbor of Russia, strong geopolitical actor with authoritarian rule, the constitutional transition was a complex mission and tended to be subject to foreign influence.

Ukraine was constantly under pressure of regional actors and had to make difficult choices. The choice was made in favor of building a constitutional democracy. The goal was to adopt European constitutionalism as model. The Constitution of 1996 reflects the long work of international and domestic constitutional experts. As it was observed in the work, such fundamental principles as the rule of law, legality, plurality were enshrined in the Constitution. The next decision was to create a Constitutional Court that could check the compliance of legislation with the rigid Constitution. It was the first institution after the collapse of the USSR to be set up. Its role was crucial in building and consolidating democratic institutions. The main problem was, however, the independence of judges, which were politically influenced. The reason was the soviet past, absence of experience, flourished corruption. The Council of Europe helped Ukraine to increase the independence of its judicial branch and asked Ukraine to promote specific reforms, implementation of which the Council of Europe carefully monitored.

The Council of Europe submitted Action Plan in which suggestions for further developments were given. Ukraine was considered to implement effective reforms, and this led to the signing of the Association Agreement with the EU. Scholars noted that it was an important step that brought Ukraine closer to the European accession. Unfortunately, reform processes were frozen because of the military invasion of Russian forces in the East of Ukraine. Weak Ukrainian authority and pro-Russian leaders caused a long constitutional crisis in Ukraine. As a result, it returned to the status of partially free state, according to the data of the Freedom House.

The Ukrainian judicial system of Ukraine has been reformed after adoption of the Association Agreement with the EU. As the new qualification assessment had been launched, professional skills of judges were improved. For the first time in history, institutions on appointment and dismissal of judges were introduced, constitutional grounds were widened. The new systems of

[129] The expression "pluralism by default" was coined by Olexiy Haran.
The source is Olexiy Haran, Ukraine: Pluralism by Default, Revolution, Thermidor, Russian Social Science Review, vol 54, No 3, M.E. Sharpe, Inc, 2013

sanctions can help to improve access of justice and promote affective protection of human rights. Reformed legislation on judiciary foresees the new assessment of judges based on criteria of competence, ethics, and the quality of being honest and having strong moral principles. Significant changes were made: introduction of constitutional amendments and amendments to the procedural laws of Ukraine, adoption of the law on judiciary. The fight against corruption was started, as the Anti-Corruption Court was created, and appointment of judges became more complex. Currently, no single person or organization appoint judges, but the High Qualification Commission was instituted. The Council of Integrity is responsible to assist such procedures, and law enforcement and tax bodies are also involved. The High Council of Judges is empowered to examine candidates, and the President signs decree on the appointment. So, access to justice was improved, the new Supreme Court was launched with the aim to unify judicial practice and provide effective protection of human rights. The court of appeal were updated, the specialized courts were introduced. The High Court on Intellectual Property was launched, it would concern cases on trademark, copyright, invention. This step proved Ukrainian modernization that is gaining momentum.

Nevertheless, having observed the ECtHR's case-law on Ukraine, it is evident that there is a problem with the enforcement of the European Court's judgments. Ukraine took responsibility to take measures in order to restrain non-enforcement and to promote implementations of international practices into domestic legislation. However, the implementation of the ECtHR's judgements is still ongoing process in Ukraine. The absence of political will with this regard undermines the principle of the rule of law and the country's respect Convention on the whole.

One must admit, the last changes, particularly presidential elections and reforms, inspire to believe in Ukrainian democratic future. Recently elected president Zelenskiy makes radical changes in all spheres of civil life. And the more interesting fact is a great civil support, that has never happened before. If novelties continue to take place, Ukraine will prove its status of democratic country and can in the medium or long term aspire to stand up for the EU accession.

To conclude the work, the consolidation of constitutionalism in Ukraine was achieved due to national and international actors. Judicial branch, particularly, the Constitutional Court of Ukraine played its crucial rule. The functioning of judiciary brought Ukraine closer to the European standards. Practice of the ECtHR introduced new changes into Ukrainian legislation and expanded constitutional grounds for effective democracy. Having analyzed value bases of the development in the European context, the quality level of judiciary was recognized to be upgraded and become aspiring institution.

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