

Thomas Markert¹

The role of the Venice Commission in the constitutional development of the countries of the former Soviet Union

Abstract

Following the fall of communism, the Venice Commission assisted several member states of the Commonwealth of Independent States in the drafting of their new constitutions. Its role in the subsequent constitutional reforms in the European countries of the former Soviet Union and Kyrgyzstan was even more important. The crucial issue in the region was the scope of presidential powers, with several Presidents attempting to increase their powers and establish an authoritarian regime by means of a dubious referendum.

While this attempt succeeded in Belarus despite strong criticism by the Venice Commission and Russia became steadily more authoritarian, the Commission decisively contributed to thwart attempts to increase presidential powers in Ukraine and Moldova and assisted Georgia and Armenia in establishing parliamentary democracies. The other main focus of the Commission's work is strengthening the rule of law, an area where a lot remains to be done in all countries in the region.

1 The adoption of new Constitutions

The Venice Commission was established in 1990 in the aftermath of the fall of the Berlin Wall. At the beginning, its main task was to advise the countries of Central and Eastern Europe on the drafting of their new constitutions and of legislation essential for the functioning of their new democratic system. In this article I will, for reasons of space, focus on co-operation directly relating to constitutional texts and leave largely aside co-operation on ordinary laws.

Co-operation started with countries of Central Europe but, following the dissolution of the Soviet Union, as of 1992 the constitutional commissions of several member states of the Commonwealth of Independent States sought the assistance of the Venice Commission.

¹ The views expressed in this article are those of the author and not the official view of the Venice Commission or the Council of Europe.

It may appear surprising today, but initially the Russian Federation was the country most interested in co-operation. Ukraine, Kyrgyzstan, Moldova and Georgia followed. Co-operation with Armenia, Azerbaijan and Belarus started after the adoption of the respective constitutions. Representatives of all Central Asian states attended a seminar on “Constitution-making as an instrument of democratic transition”, organised by the Venice Commission in the framework of the Turkish chairmanship of the Committee of Ministers of the Council of Europe in October 1992. This led to fruitful co-operation with Kyrgyzstan but not with the other Central Asian countries, which had little interest in building a genuine democracy. I will not discuss co-operation with the Baltic states in this contribution, since their development rather resembled the example of the Central European countries than of the CIS member states.

The Russian Federation. At the request of the executive secretary of the Constitutional Commission, Mr Rumyantsev, the Commission provided in 1992 and 1993 detailed comments on different drafts of the new Russian Constitution and had several discussions with representatives of the Constitutional Commission. The comments covered most of the articles of the drafts, with a focus on the powers of the President, the federal system, the judicial system, the drafting of the chapter on human rights and the relationship between domestic and international law. While the power-sharing arrangements between President, government and parliament were a main focus of the comments, the Commission was not involved in the well-known struggle between President Yeltsin and the Duma.

According to the Commission’s Opinion of March 1994² on the text of the Constitution adopted by referendum in December 1993, several provisions of the final text reflect previous comments by the Commission. This influence is confirmed by Taliya Khabrieva, who was member of the Venice Commission on behalf of the Russian Federation.³ In its Opinion the Commission noted that the Constitution “*does not give rise to any serious question as to its conformity with the principles of a democratic State governed by the rule of law and respectful of human rights*”. It nevertheless underlined that “[o]nly the future will prove whether or not the Russian system of semi-presidentialism is viable” and that the Constitution “*establishes a fairly centralised federal system*.”⁴

Kyrgyzstan. The Kyrgyz authorities showed genuine interest in co-operation with the Venice Commission. In early 1993 the Venice Commission provided written comments on the draft Constitution.⁵ A delegation went to Bishkek and

2 CDL(1994)01. All Venice Commission documents mentioned in this Article are accessible at the Commission’s web-site venice.coe.int.

3 T. Khabrieva, *Russia and the Venice Commission of the Council of Europe*, in S. Granta-Menghini, Z. Tanyar (eds.), *Venice Commission – Thirty-Year Quest for Democracy through Law 1990–2020*, 2020, pp. 393 et seq.

4 CDL(1994)011.

5 CDL(1993)016.

held exchanges of views with the Constitutional Commission and other authorities. The Constitution adopted in May 1993 established a semi-presidential system and took into account comments of the Commission.

Moldova. In 1993 the Commission provided written comments on the draft Constitution of Moldova⁶ and participated in a workshop in the Moldovan parliament. The Constitution, adopted in July 1994, established a semi-presidential system.

Georgia. After independence Georgia went through a difficult period and co-operation with the Venice Commission on the drafting of the new Constitution started only in 1994. The Commission provided written comments on two versions of the draft Constitution in 1994 and 1995 and noted that the more recent draft contained many improvements.⁷ The constitutional drafts were discussed at meetings in Tbilisi and Venice. Since Georgia was faced with separatist tendencies in some regions, issues of territorial organisation were important in the discussions. The Constitution was adopted in August 1995.

Ukraine. Cooperation with Ukraine on the drafting of the Constitution started in late 1992 and was quite *intense* in 1993. The process of adopting the new Constitution got, however, stuck due to constant conflicts between the President of the country and the Verkhovna Rada. This created problems both domestically, since the theoretically still valid Constitution of the Ukrainian Soviet Socialist Republic of 1978 was obviously not suitable for the new reality, and internationally, since the absence of a democratic constitution was an obstacle to accession to the Council of Europe.

In order to find a way out of the crisis, in June 1995 a Constitutional Agreement was concluded between President Kuchma and the Verkhovna Rada and adopted as a law by the Rada. This so-called Constitutional Accord provided a temporary solution setting out main principles of the state structure, in particular on the distribution of powers between the President and the Rada. The fairly positive assessment of this Accord as a transitional solution by the Venice Commission⁸ was one of the elements enabling the Parliamentary Assembly of the Council of Europe (henceforth referred to as PACE) to give a positive opinion on Ukraine's accession to the Council of Europe.⁹ Ukraine became a member of the Council before the Russian Federation, committing to enact a new Constitution within one year.

Subsequently, co-operation with the Venice Commission intensified and Ukraine adopted its new Constitution in June 1996 on the basis of a draft examined by the Commission. At the request of PACE the Commission adopted an

6 CDL(1993)051, 053 and 054.

7 CDL(1994)013 and (1995)008.

8 CDL-INF(1995)002.

9 *Opinion 190(1995) on the Application by Ukraine for membership of the Council of Europe.*

Opinion on the adopted text.¹⁰ The Opinion was quite positive, pointing to improvements in the definition of the powers of the various state organs and appreciating the emphasis on the rule of law and its implementation. The Commission expressed, however, concern that the Transitional Provisions of the Constitution could lead to the continued existence of problematic institutions such as the Soviet-type *prokuratura* system.

2 Attempts to establish an authoritarian presidential regime

The period of adoption of the new constitutions had already shown that the scope of the presidential powers was the crucial issue for the democratic development of the former Soviet Union states. In several countries, where the Venice Commission was not involved at the time (Azerbaijan, Central Asia with the exception of Kyrgyzstan), a presidential system was introduced, and these presidents governed in an authoritarian manner. In the other countries, a semi-presidential system with fairly strong presidential powers was adopted. In several of these countries, presidents attempted to further concentrate powers in their hands. They typically used referendums of questionable constitutionality to achieve this aim, using the wish of the people for government by a strong man.

Belarus. This trend started in Belarus, where President Lukashenka organised in November 1996, against the background of conflicts between him and parliament, a referendum to amend the Constitution. Although the Constitutional Court decided that this referendum, which did not respect the constitutional amendment procedure, could only have a consultative character, the President declared its result binding and the amendments were implemented. In its Opinion,¹¹ adopted at the request of the Speaker of Parliament, the Commission was quite blunt, pointing out that the amendments fell short of democratic minimum standards and implied a strong influence, if not total control, of the President on all other bodies of the state. As a result of this constitutional change, the special guest status of Belarus with PACE was suspended and the country was never admitted as a member of the Council of Europe.

Having been fairly recently elected, President Lukashenka in 1996 saw no need to have the constitutional provision limiting the office of the President to two terms abrogated. When the end of his second term approached in 2004, he organised a further referendum, allowing him personally to participate as a candidate in the next presidential elections and abrogating the constitutional term limit. This was strongly criticised in the Opinion of the Venice Commission on the referendum,¹² pointing out that the procedure was illegal under the law of Belarus and that the result would further aggravate the democratic deficit in the country.

10 CDL-INF(1997)002.

11 CDL-INF(1998)008.

12 CDL-AD(2004)029.

Ukraine. In a situation of conflict between the President and the Verkhovna Rada, on 15 January 2000 President Kuchma adopted a decree calling a constitutional referendum for 16 April 2000. The voters were invited to express no confidence in the current Verkhovna Rada and approve constitutional amendments weakening parliament, including by facilitating the dissolution of the Rada by the President. The decree did not specify explicitly whether the proposed amendments were to be adopted directly by the referendum or whether the referendum was consultative in this respect.

In its Opinion,¹³ adopted following a request by PACE and the Secretary General despite heavy lobbying by the Ukrainian authorities, the Commission pointed out that the proposed vote of no confidence in the Verkhovna Rada was clearly unconstitutional and that the Constitution could not be amended directly by the referendum, which was based on the general provision in the Constitution on the holding of national referendums and did not respect the constitutional amendment procedure. The amendments were problematic and would have disrupted the balance of powers between the President and the parliament. The Constitutional Court of Ukraine, which had obtained knowledge of the draft Opinion of the Commission, declared the proposed vote of no confidence in the Rada unconstitutional and followed the Commission's approach on the consultative character of the referendum, although not unambiguously. The referendum took place, but its results were not implemented.¹⁴

This did, however, not mean that there were no more attempts to revise the Ukrainian Constitution. On the contrary, constitutional reform remained constantly on the political agenda in the country and the Venice Commission was continuously involved. Between 2001 and 2015 it adopted 19 Opinions on proposed or adopted amendments to the text of the Constitution or on the procedure for amending it and was involved in numerous meetings and discussions on this topic. The main issue remained the distribution of powers between the President, the government and the Verkhovna Rada. The approach of most Ukrainian politicians on this topic was completely opportunistic: the political forces close to the respective President favoured stronger powers for the President (a so-called presidential-parliamentary model) and those in opposition stronger parliamentary powers (a so-called parliamentary-presidential model). When the President changed, the political forces changed their position. The Commission was very much aware that in the Ukrainian context strong presidential powers tended to lead to authoritarian tendencies and consistently favoured a stronger position for the government and the Verkhovna Rada. In addition, it insisted on the need for respecting the procedure for amending the Constitution set forth in the Consti-

13 CDL-INF(2000)011.

14 Cf. also the *Opinion on the implementation of the constitutional referendum in Ukraine*, CDL-INF(2000)014.

tution and warned against any attempt to directly amend the Constitution by referendum.¹⁵

Following the failure of the implementation of the constitutional referendum, several proposals were made to amend the Constitution in the opposite direction, strengthening the powers of parliament. One of these reform proposals was adopted in December 2004 in the framework of the Orange Revolution. For the political forces close to outgoing President Kuchma a weakening of the powers of newly elected President Yushchenko was welcome and this helped them to accept their electoral defeat.

The Venice Commission, which had examined this and other drafts previously, welcomed that many of its recommendations had been followed but expressed concern that several provisions might lead to unnecessary political conflicts and be detrimental to stability.¹⁶ Subsequent developments showed that this warning was fully justified.

President Yanukovych, elected in February 2010, wanted to get rid of the limitations on presidential power introduced by the 2004 amendments. At the request of members of parliament from the pro-presidential majority in September 2010 the Constitutional Court declared these amendments unconstitutional, due to alleged violations of the procedure for adopting constitutional amendments. In its Opinion on the constitutional situation in Ukraine, adopted in December 2010 at the request of PACE,¹⁷ the Commission pointed to unexplained inconsistencies in the case-law of the Court, which previously had confirmed the constitutionality of the amendments. It noted that the reinstatement of a previous version of the Constitution after several years raised questions of the legitimacy of past actions of the state bodies and of the current institutions. The Commission called for a comprehensive constitutional reform effectively strengthening the stability, independence and efficiency of the state institutions. In February 2014, in the framework of the Revolution of Dignity, the Verkhovna Rada reinstated the 2004 amendments.

No further reform of the political system was enacted since then. However, other topics of importance were addressed. With respect to the role of the *prokuratura* and judicial reform the Constitution was comprehensively revised in 2016 (see below). In 2015 a proposal to reform the Constitution to further decentralisation, which was positively assessed by the Commission, got stuck due to controversy on the inclusion of a provision which would have provided a constitutional basis for special arrangements for the non-government controlled parts of the Donbas.¹⁸

Moldova. In Moldova President Lucinschi organised a consultative referendum in May 1999 to establish a presidential system of government. He did, how-

15 *E.g.* CDL-AD(2008)015 at 106.

16 CDL-AD(2005)015.

17 CDL-AD((2010)044.

18 Cf. CDL-AD(2015)028, 029rev and 030.

ever, not have sufficient votes in parliament to have the constitutional amendments adopted. The Constitutional Court confirmed that the Constitution could not be amended without a vote in parliament. Within parliament alternative drafts for a constitutional reform, strengthening the role of parliament, were introduced.

The Venice Commission provided opinions on the various drafts. Following a proposal by the President of PACE, Lord Russell Johnston, a joint constitutional commission was established to try to reach a compromise. Half of its members were appointed by the President and the other half by parliament, with the Swiss member of the Venice Commission, Giorgio Malinverni, acting as the Chair. This Commission prepared a draft reflecting a rationalised parliamentary system, including mechanisms to ensure government stability such as the constructive vote of no confidence.¹⁹ The intention was to submit this draft to the Constitutional Court, which had to give the green light to any constitutional amendment. But in the meantime, a different draft, providing for a purely parliamentary system with an indirectly elected President, was adopted by parliament.

The following parliamentary elections were clearly won by the Communist Party and its chair, Vladimir Voronin, elected President. Constitutional amendments discussed in this period mainly concerned fairly technical questions, apart from an abortive attempt in 2003 to prepare a so-called federal Constitution integrating the separatist entity of Transnistria, in which the Venice Commission participated together with the EU.²⁰

When the Communists lost power in 2010, the weaknesses of the Constitution became apparent. Parliament was unable to reach a qualified majority to elect a new President and, in the absence of a deadlock-breaking mechanism, had to be dissolved several times, until finally a new President was elected in 2012. The Venice Commission proposed to amend the Constitution in parliament on this point, but the required majority was not reached. It warned against amending the Constitution in an unconstitutional manner by referendum, bypassing parliament.²¹

In 2016 the Constitutional Court of Moldova, in an unorthodox decision, declared the indirect election of the President unconstitutional. Since then, the President is again elected directly. In an Opinion adopted in 2017²² the Commission underlined that the fact that the President was now directly elected did not justify widening the scope of his power to dissolve parliament.

In 2019 the Venice Commission, quite unusually, heavily criticised an absurd decision of the Constitutional Court ordering the dissolution of parliament in order to keep the party of oligarch Plahotniuc in power.²³ The Court reversed its decision and this attempt failed.

19 See CDL-INF(2001)003: *Co-operation between the Venice Commission and the Republic of Moldova on constitutional reform*.

20 *Annual Report of Activities for 2003*, at II.11.a.

21 *Annual Report of Activities for 2010*, p. 34.

22 CDL-AD(2017)014.

23 CDL-AD(2019)012.

Kyrgyzstan. The constitutional (and political) history of Kyrgyzstan is quite turbulent, and the Commission adopted many opinions on important constitutional reforms. For reasons of space, I refer to the website of the Commission in this respect.²⁴

Russian Federation. For a long time, the Russian authorities reduced the democratic content of the constitutional system without amending the text of the Constitution. In particular, a law of 2004, which was criticised by the Venice Commission,²⁵ *de facto* ended the federal character of the Russian constitutional system. In 2020 a comprehensive constitutional reform was enacted. This reform was criticised by the Commission, notably for disproportionately strengthening the powers of the President and providing an *ad hominem* exclusion from the term limit for the current President.²⁶

Azerbaijan. Azerbaijan from the beginning had a presidential Constitution with weak checks and balances. This situation was further exacerbated by two constitutional referendums in 2009, abolishing the limit of two terms for the office of President, and in 2016, extending the term to seven years and introducing unelected Vice-Presidents to be appointed by the President. Both proposed reforms were heavily criticised by the Venice Commission²⁷ but nevertheless adopted.

3 Moves towards a parliamentary system of government

Armenia. The Constitution of Armenia was adopted in 1995 without the involvement of the Venice Commission. It established a presidential system without sufficient checks and balances and had other weaknesses, *e.g.*, providing for an excessive influence of the political organs on the judiciary. A comprehensive reform seemed indispensable in order to enable the country to become a member of the Council of Europe. Reform was, however, difficult since it had to be adopted by referendum and supported by at least one third of the registered voters, no mean feat in a country where a large number of voters live abroad. As a consequence, a referendum on a first proposed reform, prepared following consultation of the Commission, failed in 2003 due to insufficient turnout.

In 2004 co-operation with the Venice Commission on constitutional reform was resumed. It proved quite difficult to reach agreement between the Armenian authorities and the Commission,²⁸ but the final text included sufficient improvements to receive a favourable assessment.²⁹ It was adopted by referendum in November 2005 and provided for a semi-presidential system of government.

24 www.venice.coe.int/webforms/documents/?country=45&year=all.

25 CDL-AD(2004)042.

26 CDL-AD(2021)005.

27 CDL-AD(2009)010 and CDL-AD(2016)029.

28 An interim Opinion of the Commission – CDL-AD(2005)016 – was quite critical and pointed to an insufficient balance of powers between the state organs.

29 CDL-AD(2005)025.

The text did, however, still contain weaknesses and the state of democracy in the country remained unsatisfactory. A further constitutional reform initiative was therefore launched in 2014 with the close involvement of the Venice Commission, aimed at moving towards a parliamentary system of government. The final text of the reform achieved this aim and received a highly positive assessment by the Commission.³⁰ The main difficulty during the reform process concerned the electoral system. The Commission warned against regulating it in too much detail in the Constitution, also based on a suspicion that the aim was to unduly favour the current majority.

The revised Constitution was adopted in a controversial referendum in December 2015. Following the 2018 revolution the previous opposition, which had been critical of the reform, accepted it and the 2015 reform remains in force.

Georgia. The Constitution adopted in 1995 provided for a presidential system of government. Following the Rose Revolution in November 2003 there were expectations that the country would move towards a more parliamentary system. The new President, Mikhaïl Saakashvili, was, however, quite reluctant to have his powers reduced and therefore not keen on co-operation with the Venice Commission on constitutional reform. When speaking before PACE on 28 January 2004, he nevertheless committed to consulting the Commission and the draft amendments were indeed sent to it the following day, informing the Commission that their adoption was foreseen within a few days. The Commission had prepared for that eventuality and sent individual comments of the rapporteurs within one week. In the Opinion later adopted on the basis of these comments,³¹ the Commission pointed out that the approach was not coherent. The drafters seemed torn between their stated intention to increase the powers of the government and parliament and their desire to keep a very strong President.

The same approach could again be observed when the next comprehensive constitutional reform process was launched by President Saakashvili in 2009/10. While this reform clearly improved the text, inconsistencies remained, in particular giving an excessive role to the President with respect to the vote of no confidence in the government.³²

These inconsistencies were addressed in a further round of constitutional reform, launched by the new majority in 2016 after President Saakashvili lost power in elections. While the Venice Commission appreciated that this new text completed Georgia's evolution towards a parliamentary system of government, it noted that the political system remained highly centralised and that, also due to the electoral system favouring large majorities, there was a risk of insufficient pluralism.³³ These concerns were only partly addressed through further, more limited consti-

30 CDL-AD(2015)038.

31 CDL-AD((2004)008.

32 See the Commission Opinion CDL-AD(2010)028.

33 CDL-AD(2017)013.

tutional amendments.³⁴ In any case, the Commission could not address the major issue not reflected in any text: the real power did lie in the hands of an oligarch without any political mandate.

4 Strengthening the rule of law

In recent years the main emphasis of the Commission's work in this (and other) regions has been on strengthening the rule of law. While the constitutions adopted after the end of the Soviet Union generally reflected rule of law principles such as judicial independence, implementing them in practice proved quite difficult in the absence of a culture of the rule of law.

Constitutional justice. From the very beginning, the Venice Commission strongly supported the establishment of constitutional courts. All new constitutions in the region provided for such a court, although sometimes with quite limited powers. This was probably facilitated by the fact that already in the late Soviet period a Constitutional Oversight Committee had been established.

The powers of these courts were, however, often quite limited and the Commission constantly argued in favour of expanding their competences, including by introducing a constitutional complaint by individuals, whose constitutional rights had been violated. While most of the Commission's opinions in this respect addressed legislation and not the text of the Constitution, a strengthening of the Constitutional Court was part of all comprehensive constitutional reforms supported by the Venice Commission.³⁵ The Commission also paid particular attention to the need to safeguard the independence of these courts and to provide for appointment procedures guaranteeing pluralism within them.

When constitutional courts adopted judgments, which were not welcome to the politicians in power, there were often attempts to curtail their powers or even abolish the respective court. Such attempts were criticised by the Commission in its Opinions³⁶ and in December 2015 the Commission authorised its President to issue statements, whenever the independence of a constitutional court was under threat. Several such statements appear on the website of the Commission. The Venice Commission also strongly supported networking among constitutional courts, including by establishing the World Conference on Constitutional Justice. This contributes to protecting their independence. On the other hand, the fact

34 Cf. CDL-AD(2018)005.

35 An overview of the Commission's role in this field is provided by S. Dürr, *Constitutional Justice – A key mission for the Venice Commission*, in S. Granata-Menghini, Z. Tanyar (eds.), *Venice Commission – Thirty-Year Quest for Democracy through Law*, 2020, pp. 215 et seq.

36 E.g., CDL-AD(2010)015: *Opinion on the draft Constitution of Kyrgyzstan*.

remains that courts in the region do not always work in a satisfactory manner and may adopt questionable judgments.³⁷

Prokuratura. Under the Soviet system the prosecution service was not a body focused on criminal prosecution but a general control organ with the task of ensuring the exact and uniform application of the law by everybody, including both public and private bodies. This highly centralised and strictly hierarchical institution was an important instrument of the Communist Party to ensure its power. The Venice Commission was critical of this system from the very beginning,³⁸ but there was strong resistance to reform from the prosecutors, who traditionally were far more powerful than judges. Moreover, prosecutors general were, although formally independent, important instruments to ensure the power of the respective presidents, who therefore had an interest in maintaining the system.

At the international level, the Russian Federation fought hard to maintain a maximum of powers for the *prokuratura*, accepting only those limitations to its powers which were required by the case-law of the European Court of Human Rights.³⁹ It justified these powers with a role of prosecutors to defend the fundamental rights of citizens and tried to influence the Council of Europe in this sense, not without success for some time⁴⁰. The Venice Commission, supported by PACE, consistently maintained that this was the proper role of Ombudspersons, criticised the general supervisory powers of prosecutors and advocated that prosecution services should have as their primary focus the criminal law field.⁴¹

The main battleground on this issue was Ukraine. The 1996 Constitution abolished the general supervisory power in principle but maintained it for a transitional period. This transitional period proved excessively long, and the 2004 amendments even reintroduced the supervisory power for some time. It was finally abolished by a law of 2014⁴² and the constitutional amendments of 2016. This abolition was due not least to the constant advocacy of the Venice Commission. Armenia, Georgia and Moldova also abolished the general supervisory powers of prosecutors.

37 *E.g.*, the judgments by the constitutional courts of Moldova and Ukraine mentioned above or a judgment by the Constitutional Court of Ukraine hindering the fight against corruption discussed in CDL-AD(2020)038.

38 See for example CDL(1993)033 on Moldova.

39 Starting with its judgment *Brumarescu v. Romania* of 28.10.1999, the European Court of Human Rights held that it was a violation of the principle of legal certainty, if the prosecution service had the power to have court decisions in civil proceedings, in which the service had not even been involved, quashed after the decision had become final.

40 See, *e.g.*, the *Conclusions of the 7th session of the Conference of Prosecutors General of Europe held in Moscow on 5–6 July 2006*.

41 For a summary of the Venice Commission approach see its *Report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service*, CDL-AD(2010)040, pp. 13 et seq.

42 See the Opinion of the Venice Commission on the draft law, CDL-AD(2013)025.

Independence of the judiciary. The new constitutions adopted after the fall of the Soviet Union proclaimed the principle of judicial independence and provided for certain personal guarantees for judges such as tenure until retirement. These guarantees were, however, not always comprehensive. In its Opinion on the Constitution of the Russian Federation⁴³ the Commission recommended to provide protection also against transfers to other courts and in Ukraine the Commission repeatedly criticised the possibility to dismiss judges on the vague ground of breach of oath.⁴⁴ Initially only the constitutions of Armenia, Moldova and Ukraine provided for the existence of a judicial council as an institution with the task of protecting the independence of the judiciary and the composition of these councils often left too much room for influence from the government and the majority in parliament. The Commission adopted numerous Opinions on judicial reforms at the legislative level in Armenia, Georgia, Kyrgyzstan, Moldova and Ukraine and the strengthening of judicial independence was a major item in the comprehensive constitutional reforms in the countries, where the Commission was involved. In Ukraine the relevant chapters of the Constitution were revised in-depth in 2016 in accordance with the recommendations of the Venice Commission.⁴⁵

In parallel, the European standards on the independence of the judiciary, which had been quite rudimentary, were further developed. The Committee of Ministers of the Council of Europe recommended that judicial councils should take the decisions on the selection and career of judges and that at least half of the members of such councils should be judges elected by their peers.⁴⁶ In its Report on the Independence of the Judicial System⁴⁷ the Venice Commission adopted its own, more detailed, set of standards.

The constitutional provisions⁴⁸ and legislation in the countries, with which the Venice Commission co-operated, were largely brought in line with these standards and judicial councils with wide powers were established. Other problems, such as the absence of a culture of judicial independence and the hierarchical mentality within the judiciary, enabling governments to influence judges through court presidents, did not so much derive from legal texts and were harder to tackle. In this respect the constant involvement of the International Community at all levels including the training of judges remains essential.

It also became more and more apparent that outside political influence on the judiciary was not the only problem and that many judges did not act in accordance with ethical standards. The judiciary was, and is, considered as one of the most

43 CDL(1994)011.

44 CDL-AD(2013)014 at 024 with further references.

45 See CDL-AD(2015)027 and 043.

46 CM Recommendation (2010)012.

47 CDL-AD(2010)004, cf. also CDL-AD(2007)028.

48 The procedure for the appointment of judges of the Supreme Court in Georgia still leaves room for too much political influence, cf. in particular CDL-AD(2019)009.

corrupt sectors of society in many countries in the region. The Georgian judiciary and in particular the judicial council is allegedly controlled by a network of discredited judges. Judicial councils with a majority of members elected by judges proved not to be a panacea, but protect *e.g.*, in Ukraine corrupt colleagues and are vulnerable to political influence. On the other hand, no alternative system seems better suited to protect independence. Some legislative measures, such as the vetting of candidates for the judicial council for their integrity, as recommended by the Commission for Moldova,⁴⁹ may nevertheless be helpful.

At the constitutional level, the Venice Commission accepted in Ukraine, where corruption was particularly widespread, a vetting of all sitting judges for their professionalism, ethics and honesty as part of the comprehensive judicial reform.⁵⁰ It conditioned its acceptance of this exception from the basic guarantee of tenure until retirement on the existence of stringent safeguards. As a result of this reform, the situation clearly improved at least within the Supreme Court.

5 Conclusions

It is hard to overestimate the influence of the Commission on the constitutional development of the countries of the former Soviet Union. In Georgia and in Armenia the Commission's involvement was crucial for the establishment of a parliamentary democracy. This was not achieved in one go, but the Commission's persistence paid off in the end. In Moldova and Ukraine, the Commission's contribution to preventing steps backwards towards an authoritarian system was decisive, although weaknesses in the constitutional systems remain. In both countries, it was crucial that PACE consulted the Venice Commission on questionable constitutional reforms, when the authorities were not willing to do so. The Commission's insistence that constitutions could not be amended by referendums, without respecting the constitutional amendment procedure requiring a qualified parliamentary majority, was crucial to prevent democratic backsliding.

In addition, the Commission contributed a lot to strengthening the rule of law in these countries, although the situation in this respect is still far from satisfactory.

In Ukraine the Commission was continuously involved in all major reforms concerning democracy and the rule of law. It is unlikely that, without these reforms, Ukrainian society could have shown the same resilience in front of Russian aggression.

By contrast, the Commission's negative Opinions were not sufficient to prevent steps backwards towards an authoritarian system in Belarus, Azerbaijan and Russia, but they were useful providing an objective basis for domestic and international criticism. The draft new Constitution prepared by the opposition in Belarus

49 CDL-AD(2021)046.

50 CDL-AD(2015)027.

shows that the Commission's work is attentively followed also in these countries. It is certainly no coincidence that these are the countries, which have no real interest in becoming EU members and therefore feel not obliged to respect democratic standards.

The Commission has become a body accompanying all major constitutional reforms in the European countries of the former Soviet Union. In those countries interested in the perspective of European integration, it has decisively contributed to reforms strengthening the development of democracy and prevented backsliding. In the other countries, its Opinions provide inspiration to the opponents of the authoritarian regimes and a solid basis for the assessment by the International Community. In all countries, a lot still has to be done to strengthen the rule of law and this will have to remain a focus of the Commission's activity.