VII Constitution

Results and proposals of the workstream
Management summary

Currently Ukraine is experiencing a myriad of conflicts and questions, some of which are perceived to be linked to its constitutional arrangements. They include, for example, the question of whether to decentralise the current distribution of power between central and local government and if so, how; the question of whether to introduce a two-chamber system of legislation and if so, how; and the question of how to resolve the recurring conflict of power between the office of president and the office of prime minister.

Although constitutional in nature, the above conflicts and questions will not be covered by this report. That is not because they are of lesser importance but rather because they are highly political and cannot be decided from the outside. Furthermore, there is no perfect model that could serve as the one and only answer. In Europe a diversity of models exists, e.g. the mostly centralised presidential system in France, or the mostly decentralised model of parliamentary government in Germany. Ukraine must first decide the direction in which it wants to go before this decision can be implemented in the constitution. A decision always precedes constitutional implementation.

This report focusses on issues that can be solved in the short term. Other questions, like the ones mentioned above or the coherent implementation of human rights, need social discussion and consensus in advance. They can be answered in the medium term. This report covers solely constitutional jurisdiction; ordinary jurisdiction is covered by the report of the "Rule of Law" Workstream.

Not the opportune moment for a new constitution

The domestic political situation in Ukraine after the Maidan Revolution calls for a new constitution. This revolution of the people includes an unambiguous decision to institute a constitution incorporating liberal constitutional thinking as established since the French Revolution: ‘Any society in which the guarantee of rights is not assured nor the separation of powers is determined has no constitution.’ (Article 16, French Declaration of the Rights of Man and of the Citizen)

This decision requires an act by the ‘constituent power of the people’ to illustrate constitutionally the dawn of a new era, the road to Europe and the will to a comprehensive modernisation of Ukraine.
Furthermore a fundamental constitutional amendment on modernisation is necessary because in its current form, the constitution is in large parts purely semantic, a pseudo-constitution. It is an effective instrument in the hands of politics rather than an expression of the ‘rule of (constitutional) law’. Its legitimacy has been undermined by numerous questionable interpretations by the constitutional court and by a set of erroneous procedural changes. In the 25 years of Ukrainian independence, it has become too much a tool for political power and is therefore hardly able to procure legitimation, ie to establish legal confidence in the calculability, reliability and predictability of politics.

However the current political challenges provide only unfavourable basic conditions for a new constitution. The military conflict in the east and the unclear domestic political balance of power will most likely lead to political instrumentalisation of the constituent procedure. If those disturbing factors were mostly dispelled, an opportune moment (καιρός) for a new constitution could suddenly occur. In the meantime some of the urgent deficits of the current constitution have to be changed in the course of modernisation.

**Independence of the constitutional court**

One of the most urgent tasks of the Ukrainian constitution is to set up a legally secured and effectively operating independence for the Ukrainian Constitutional Court. Although constituent power could freely decide in favour of or against the establishment of a constitutional court, constitutional states may, but need not necessarily, have a constitutional court with wide-reaching power. However, the moment Ukraine decides to establish a constitutional court (Articles 147 – 150 UC) it must ensure its independence from the influence of the executive branch effectively and on a lasting basis. In particular, any form of dismissal of the constitutional judges by the executive branch must be abolished. Furthermore, any such dismissal may only be adopted by the qualified majority of the constitutional court itself and only in extreme individual cases.

**Implementation of an individual constitutional complaint**

The introduction of a constitutional complaint is explicitly recommended. The establishment of constitutional jurisdiction is regarded to be the keystone of every development of a constitutional state, and the introduction of a constitutional complaint is regarded as the ‘crowning glory of the constitutional state’.
By establishing a constitutional complaint the state facilitates and guarantees ultimate legal protection from itself. It acknowledges anticipating the possibility of its institutions acting illegally. Thereby it provides a possibility for the citizens to defend themselves against state bodies acting contrary to the constitution.

By introducing a constitutional complaint the state self-confidently demonstrates that it can be controlled by the courts it has established itself; that their rulings will apply against it, and that it accepts the outcome. The state would truly be a state ‘ruled by law’, one which sees itself really bound by (constitutional) law. This would be a profound cultural achievement of legal-historical import.

The citizens can – without any fear of reprisals – sue the state based on those fundamental rights guaranteed by the state. The constitution of a state, which implements such an institutional arrangement would become the ‘constitution of its citizens’, would really strengthen the integration of the people by law, and would stabilise the state as one by the people because the people can by virtue of their trust believe in its constitutional promises.

**Integrity of public service**

In applying its executive powers the state shows its true colours. The state directly encounters its citizens only through its agencies and offices, its civilian officials and judges. The way it behaves towards its citizens and the expectations it has of them reveal whether the state understands itself to be an ‘attorney of the common good’ or acts as a ‘band of robbers’ (Augustine of Hippo), simply exploiting its citizens; if it sees itself as the servant of the citizens or if it merely treats them as subjects without rights. Literally, the way the state exerts its power demonstrates whether the constitutional provisions and statutory law are being put into real practice or, instead of being the law of the state, masquerading, leading a semantically independent existence without practical relevance and just being a cover-up for arbitrariness, corruption and partiality.

Therefore the integrity of public service is of vital importance for the stability of any state. It is crucial for the confidence the citizens should principally have in their state. That is what any state needs for stability and prosperity. The best constitution and the best statutes, the noblest ideals and the highest aims become meaningless if the ‘servants of the state’ lack technical competence, motivation and moral integrity. Ukraine’s ‘way to Europe’ therefore requires dedicated cooperation from everyone, from citizens as well as public officials. The effectiveness, efficiency and integrity of the national administration will decide
the long-term success of the state and the constitution. That is why explicit reg-
ulation of public service is recommended on a constitutional level and in a form
that defines the basic principles involved.

Constitutional enforcement of private property

There is an urgent need to strengthen the protection of private property under
the constitution. The effective guarantee of private property is of crucial impor-
tance for both the liberal quality of the state and for the economic prosperity of
the country. The constitutional guarantee of private property should therefore
clearly always have priority over every form of state, public or national property.
The current equal status in the constitutional provisions of the protection of ‘pri-
ivate’ and ‘public’ property, with a distinct leaning towards the latter, is creating
legal uncertainty and distrust. It impedes the willingness of companies to in-
vest and the development of economic success. This does not mean that state,
public or national property should be illegal. However, it is important in any case
to justify why the state and not the citizens should have ownership of certain
goods.

In particular, the state does not need to own land to ensure the common good.
The state can meet its individual and social responsibilities solely based on its
territorial jurisdiction. Ukraine can and must fulfil its responsibility to put in place
an appropriate system of property ownership in particular in the agricultural
sector. In doing so, it must take into account economically reasonable sizes of
enterprises yet at the same time prevent the development of oligarchic struc-
tures in the agricultural sector.
1  Ukraine on the road to a new constitution

1.1  Significant expression of the will of the Ukrainian people for a new constitution

1.1.1  Orange Revolution and Maidan Revolution

After 25 years of independence Ukraine is searching for its own identity. The Maidan movement (like the Orange Revolution before it) clearly came about by decision of the Ukrainian people, which is typical of political and – subsequently – legal revolutions. Constitutional theory thus reflects on such key political events of national history as acts of the constituent power of the people (pouvoir constitué) that set the general political direction for a (new) constitution. This ground-breaking decision indicates that the country has committed itself to freedom as the fundamental value for society in the Ukrainian state. Freedom implies national independence of the country from the outside world as well as the individual independence of citizens within their country. The latter is expressed in the democratic right to vote as the fundamental right to self-determination. These achievements have to be implemented as the constituent decision of the Ukrainian people in favour of:

- the state under the rule of law (constitutional state), i.e. legal independence of courts and the integrity of the law,
- constitutionally guaranteed freedom (liberty) and property rights,
- democracy as the fundamental legitimation of the state and
- separation of powers as a system of checks and balances.

These findings are most evident in the Ukrainians’ vital patriotism, domestically expressed by ‘Euromaidan’. Euromaidan embraces the ‘mythology of Europe as an area characterised by the rule of law, social justice, freedom of movement and expression’ (historian Andriy Portnov). This is enforced by foreign policy
regarding the violent annexation of Crimea and the protracted military conflict in the east of the country. On the other hand there is widespread mistrust of law and state, administration and jurisdiction, which can be seen simultaneously as a result of omnipresent corruption. Both findings indicate the country’s desire for national unity and independence, for a fundamentally new beginning politically. All of this could be expressed in a constituent act by which the nation defines itself politically.

Yet constitutional law cannot become the real ‘basic legal order of the community’ (Werner Kägi) from one day to the next. The concept of western constitutions has indeed an easy and clear core as paradigmatically shown in Article 16 of the French Declaration of the Rights of Man and of the Citizen of 1789: ‘Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no constitution.’ However this simple core of the constitution relies on numerous and demanding requirements which cannot be decreed from above and its implementation cannot be forced. A constitutional culture has to grow slowly to take root in the consciousness of the people. Only then can the constitution provide a stable and reliable foundation for a liberal society and become an institution that is truly trustworthy. The Maidan Revolution, like the Orange Revolution before it, already seems to be an expression of ongoing social change now seeking adequate constitutional expression.

1.1.2 Not a καιρος\(^1\) for constitutionalising

On the other hand the current position of Ukraine favours neither substantial nor fundamental changes to its constitution. Nor does it support changing the wording of the constitution. Economic difficulties, social disintegration, political division, vague constellations and separation of public power and the conflict in eastern Ukraine, all of these factors turn the constitution, along with its application, interpretation and amendment, into a pawn in the political game. The constitution cannot fulfil its designation and provide a reliable and respected basis for resolving political discussions, supported by all political movement.

Consequently it is not the moment, not the καιρος for constitutionalisation.

\(^1\) “Kairos”, Ancient Greek word meaning the right or opportune moment (the supreme moment).
1.2 Constitution without authority

The current status of the constitution is burdened by several circumstances. The constitution is widely semantic. Instead of channelling political power, it is actually exploited by it. Therefore it lends itself to misuse and abuse, thereby constantly losing its legitimacy and undermining its own authority. The result is a lack of trust in the constitution.

1.2.1 Semantic constitution

The present constitution deals with this concern only to a certain extent. Based on external form, the constitution contains all standards of western constitutions (fundamental rights, democracy, and rule of law). However, these standards are continuously foiled by opposing regulations, which have counter-effects on the implementation of constitutional standards. Based on external form, the constitution of 2004 could well meet western standards in terms of system, structure and fields of regulation.

However, in central and politically sensitive fields of regulation, it appears to be a semantic constitution. It is exposed to political exploitation and is interpreted according to politics in such a way that desired political decisions can be proved to be compliant with the constitution. Furthermore, the politically crucial sections of the constitution are malleable and vague. They do not clearly separate and define the powers among the different state bodies, e.g. president or parliament. Consequently there is a constant political temptation to increase one’s own powers and respectively decrease those of others. The constitution does not provide a reliable and approved foundation for all the constitutional actors, state bodies and political parties. That is why it is qualified as being only a semantic constitution, not an acting one.

The constitutional changes that have been adopted since 1996 are sometimes merely on the brink of constitutionality and are implemented in a crude manner, incongruous to the idea of any constitution. One example is Decision No. 20rp/2010 handed down by the Constitutional Court of Ukraine on 30 September 2010, which was probably triggered by political decisions and pressures. Based on formal legal errors this decision led to the abolishment of the 2004 constitution and the reintroduction of the 1996 constitution.

Consequently, one of the most important objectives of constitutional amendments has to be that the constitution can be trusted; that the constitution is
not only a semantic one, with hollow words and norms that can be exploited, merely camouflaging the real balance of power. Confucius stated 2500 years ago what is absolutely necessary: ‘If language is not correct then what is said is not what is meant. If what is said is not what is meant, then what ought to be done remains undone. If this remains undone, then morals and acts deteriorate. If morals and acts deteriorate, justice will go astray. If justice goes astray, the people will stand about in helpless confusion. Hence, there must be no arbitrariness in what is said. This matters above everything.’ The short step from false language with lies and misconception via dishonest law (semantic law) to being without rights (arbitrariness) and to the perversion of law (corruption) cannot be explained more concisely.

Anyone who talks about a constitution must also want a constitution, taking it and its words seriously. Anyone who wants to take a constitution at its word has to accede to the authentic interpretation of it by independent courts. Anyone who postulates the independence of the courts has to guarantee their independence. This however means, very precisely, a judge cannot be called to account for a judicial decision, except in the case of a punishable and intentional violation of the law. In other words, defective judgements, whether actual or putative, have to be respected by state and citizens. Defective judgements have to be and can be prevented with sufficient qualification requirements for judges. Incorrect decisions can be criticised and corrected by means of legal steps or an open discussion in public and among experts. Finally a panel in which a number of judges participate – at the constitutional court there are 18 judges – increases the probability of correct and legally convincing decisions.

All of these efforts of course do not guarantee the ‘correct’ decision, because people can always make mistakes. But true independence of judges enables impartial and fair decisions on legal questions by a non-political judiciary. If these requirements are provided, the accuracy of a court decision cannot and may not be questioned, and the decision has to be accepted. This applies in particular to decisions of the constitutional court, the highest judicial body.

Only this institutional arrangement of an independent judiciary can gain the sustainable trust of the people and guarantee it for the future. Otherwise, the judicial system would be a continuation of politics; the law would be demoted to a maidservant of politics. The separation of the executive and legislative branches from the judiciary would be undetermined and blurred. To use the words of the French Declaration of Human Rights: such a state would not have a constitution at all.
1.2.2 Misuse of the constitution

After 25 years of independence there have been four prominent political shifts in direction and subsequent constitutional changes. Under these political conditions confidence in the ‘rule of law’ cannot grow; instead, constitutional law is considered a plaything of politics. The various constitutional changes, questionable decisions by the constitutional court and defective procedural changes have all accelerated this process of the delegitimization of the prevailing constitution. This fact likewise supports the recommendation to free the constitutional foundation of the state from this inherited burden that is ruining its legitimacy and to draft a whole new, politically unencumbered constitution. This step could succeed in strengthening the trust people have in the law, in the constitution, in the courts and judges.

1.3 Recommendations

In the context of the unresolved question of power, the issue of a new constitution can only be addressed if two essential events transpire: If the outside independence of the Ukrainian state and its inner stability consolidate and the military conflict ends, a constitutional new beginning can be recommended, the καιρος for a new constitution will have come. Until then only a few constitutional deficits can be identified and improved upon.

1.3.1 Current constitutional conflicts and questions

Over the course of many years, Ukraine has seen trenchant disputes arise, some of which are perceived to be linked to its constitutional arrangements. At the same time, profound constitutional questions are very much part of public discourse. Among them is the question of whether to decentralise the current distribution of power between central and local government and if so, how; the question of whether to introduce a two-chamber system of legislation and if so, how; and the question of how to resolve the recurring conflict of power between the office of president and the office of prime minister.

These matters are not only highly political, they also cannot be resolved from the outside or based on an expert’s view of the inherently correct constitutional solution. Ukraine will have to find its own answers to these dilemmas recognising that it is choosing ultimate arrangements for the life of the nation and not
just short-term answers to the growing pains of its early history as an independent state.

The process described below on how to amend or replace the current constitution with a new one (see section 1.3.2.) is therefore not designed to structure or assist in finding answers to the above questions, however important they may be. The country itself must move towards a basic consensus of what is wanted politically and, above all, democratically. That is a social process and discussion that cannot be fitted in a tight and predetermined structure. Instead, it must emerge from within the society. Real and realistic constitutional solutions can only grow from within a country.

An example of a social process of this kind can be seen in the demands of the Orange Revolution and the Maidan Revolution. However, even then not every citizen supported those demands. Consensus does not rule out questioning or opposing a movement, but it does require overall participation.

Consensus arrived at in this way can and must be transferred to the formal process of amending the constitution. Whatever solution is agreed upon to resolve the marked issues, its implementation in the constitution must be clear-cut and coherent. And first and foremost it must be taken seriously. A solution will not have any of the desired effects if it is treated with disrespect, ie if people do not comply with it completely or if it is implemented incoherently. Instead, it will most likely create even more problems and raise even more new questions.

The reader is referred to section 3.1. and 4.2. of ‘Modern government’ in this report for concrete recommendations on the current questions of decentralisation and on separation of powers for the office of president and the office of prime minister.

1.3.2 New constitution

The moment the question of power is resolved would be the καιρός, the supreme moment, to formulate a new constitution. Doing so would transform the political aims of the Maidan Revolution by an act of constituent power on the legal foundation of the Ukrainian state. At the same time, many deficits of legitimisation embedded in and associated with the current constitution would be overcome and Ukraine could get off to a fresh constitutional start liberated from the unsettled political past. The Ukrainian people would have reached a fundamental consensus on this matter, thereby leading all political differences towards being cloaked in a civilised, democratic and constitutional form. Moreover, this
A constituent act would give the Ukrainian people the legal possibility to become the ‘source of all governmental power’, to strengthen their integration through participation and thereby to secure the legitimacy of the future constitution.

The purpose would be to formulate a legally binding constitution, with a commitment to provisions that are unambiguous and coherent. Only then would the constitution provide society with fundamental order that would be supported and accepted by all political forces. Insofar as the constitution decides on certain matters, these decisions are no longer subject to but nevertheless fundamental to the resolution of political controversies. In this way, the constitution reduces political complexity and variability without, in principle, prohibiting amendments to itself. It unburdens the business of politics and enables currently desired political challenges to be tackled.

As regards the formal process by which the people exercise their constituent power, numerous forms have arisen in the history of contemporary constitutions. They range from a constitution imposed by a dominant power or passed by constitutional bodies to an over-all revision in compliance with the current constitution to constitutional conventions of the people (Waldhoff, Christian. ‘Entstehung des Verfassungsgesetzes’. Verfassungstheorie. Ed. Depenheuer/Grabewarter. 2010. p. 289–348). In the present circumstances a new constitution of the Ukraine cannot be established in any other way than by an act of self-determination on the part of the Ukrainian people. Therefore the new constitution has to be accepted democratically and has to be legitimized by referendum.

The process of drafting a new constitution should include experts who are not bound to a previously decided outcome but who can support this process independently. It should also include a broad common discussion in which the Ukrainian people can participate. The prepared draft then needs to be adopted by a referendum of the people.

### 1.3.3 Partial revision of the constitution

Until this constituent καιρος occurs, the only promising strategy will be to begin gradually reformulating constitutional deficits. These efforts would strengthen the ‘confidence of the people in state and law’ step by step, building some constitutional ‘islands of trusts’. This is even more urgent for Ukraine. Unlike its successful neighbour Poland, Ukraine never underwent a rapid and sustained transformation of its outdated institutions, i.e. property rights, independence of courts, public service, which could have otherwise fostered certainty and trust in
the people. With this fact in mind subsequent proposed changes to the current constitution are intended particularly to strengthen ‘confidence in constitutional law’ by protecting the integrity of the constitutional court (see section 2. below). These changes are intended to transform the constitution into a constitution of the people by introducing a constitutional complaint (see section 3.). These changes are proposed in order to provide constitutional guidance to strengthen the integrity of public services (see section 4.) and to create predictability in legal decisions by putting in place a constitutionally consistent guarantee of private property and thereby to support economic development (see section 5.).

1.3.4 Procedure of constitutional amendments

These necessary constitutional amendments should include a small but not negligible change, namely in the constitutional amendment process itself. According to Article 159 CU, the constitutional court shall investigate, in the course of constitutional amendment processes, if the presented draft is consistent with ‘the requirements of Articles 157 and 158’.

This involvement of the constitutional court is virtually without substance (1); moreover, it is contrary to the principle of constitutional jurisdiction (2) and in practice has served no responsible function (3). It therefore should be abolished without substitution (see the opinion of the Venice Commission No. 599/2010 on this matter).

(1) Substantial regulatory content is not recognisable. The constitutional court should only verify the compatibility of the draft amendments to constitutional law with the ‘requirements of Articles 157 and 158’. The constitutional court should not verify their compatibility with the overall constitution, which would demand expertise from the constitutional court, but only, as mentioned, with the procedural requirements of Articles 157 and 158 CU. The scope of this assessment is so limited as to verge on the superficial; it tends towards zero, so the inclusion of the court seems to be needless and useless.

(2) The inclusion of the court is furthermore contrary to a constitutional system. A constitutional court conducts its judicial review on the basis of a given constitution. It serves constitutional law and by principle should not be a contributing factor during its amendment.

(3) Finally the inclusion of the court in the process for amending the constitution has a dysfunctional effect, as it enables parliament to shift its responsibility partially to the court. In addition the court itself is precluded by its preliminary
rulings and therefore cannot conduct an unbiased judicial review of new constitutional law. The omission of this quite needless hearing of the constitutional court, can lead, whether intentionally or unintentionally, to a constitution being abrogated completely. This turn of events already happened in the short history of independent Ukraine and brought the former constitution of 1996 back into effect.

The provision creates a constitutional tinder box, which can be ignited if politically desired, constitutional camouflage for a revolution. Quite correctly, the disregard shown a needless procedural provision cannot be a constitutionally sustainable reason justifying the complete or partial abrogation of a constitution or an amendment thereto. The obligation of the constitutional court to participate in the process for amending the constitution has to be abolished completely.

### 1.3.5 Recommended constitutional amendments

<table>
<thead>
<tr>
<th>Prevailing constitutional norms</th>
<th>Recommended constitutional norms</th>
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<tbody>
<tr>
<td>Article 159. A draft law on introducing amendments to the Constitution of Ukraine is considered by the Verkhovna Rada of Ukraine upon the availability of an opinion of the Constitutional Court of Ukraine on the conformity of the draft law with the requirements of Articles 157 and 158 of this Constitution.</td>
<td>Article 159. [cancelled]</td>
</tr>
</tbody>
</table>

**Explanation**

*./ = provisions are to be taken over and remain unchanged

*abc = provisions are to be cancelled
2 Reform of the constitutional court

2.1 Fragile independence of the constitutional court

The Ukrainian Constitution establishes the constitutional court and expressly and repeatedly commits itself to the independence of the courts in general and the constitutional court in particular (Articles 126, 149 CU). Yet no state is obliged to establish constitutional jurisdiction. If, however, the state in its sovereignty decides to introduce constitutional jurisdiction, then this step must be seriously intended and cannot be allowed to lead to a kind of masquerading, where the court is nothing more than the extended arm of politics. A situation of this kind is conveyed in practice and by the constitution and simply by any other rules pertaining to constitutional jurisdiction.

Notwithstanding the provisions on the independence of the constitutional court, this institution has gained a reputation of being an obedient political tool. Confidence in the independence and authority of the constitutional court is low. In fact, some decisions can only be understood when the respective political interests are taken into consideration. This characteristic alone indicates serious structural flaws in Ukraine’s system of constitutional jurisdiction.

2.2 Pawn in the political game, not a guardian of the constitution

2.2.1 Political influence on the constitutional court

Individual provisions of the Ukrainian constitution allow the executive branch to interfere in the independence of the constitutional court in numerous and sometimes doubtful ways. The dependence of the constitutional judges is further increased by the minimal requirements for their appointment. Besides undermining their authority as constitutional court judges, this low standard
encourages political obedience and thus runs counter to their duty to judge politics according to the standards of constitutional law and, where required, to revoke political decisions as unconstitutional.

Executive authorities may influence the formation of courts only when appointing judges. In a democracy the power to appoint judges is vested only in state bodies with direct democratic legitimisation. In case of Ukraine these are the president and the parliament (Verkhovna Rada of Ukraine). They have to make personal decisions and be publicly accountable for their decisions. No other kind of state executive authority is entitled to become involved in the formation of the constitutional court or any other court. That is why the procedure of appointment under the current constitution of Ukraine (CU) raises questions. The Congress of Judges has a diverse hybrid structure that does not meet the requirements of either democratic legitimation or the foreseeable formation of attributable responsibility.

2.2.2 European requirements regarding the independence of the constitutional court

Ukraine has received abundant advice on constitutional matters. Along with an undefined number of non-governmental, international and governmental organisations, the Venice Commission, an advisory body of the Council of Europe, should be mentioned first and foremost. Also the European Court of Human Rights applied European standards in several rulings, thereby providing a guideline for Ukraine to get closer to Europe. From the latter the following quotations regarding the constitutional court of Ukraine are cited as examples.

The statements of the European Court of Human Rights as of 9 April 2013 (Volkov v. Ukraine, No. 21722/11, ECHR 2013) on the ‘breach of oath’ demand new provisions to appoint constitutional judges: 'The applicant contended that there had been interference with his private life as a result of his dismissal from the post of judge of the Supreme Court. That interference had not been lawful, as the grounds for liability for "breach of oath" had been drafted too vaguely; domestic law had not provided for any limitation periods that were applicable to the dismissal proceedings and had thus not provided adequate safeguards against abuse and arbitrariness; moreover, it had not set out an appropriate scale of sanctions for disciplinary liability ensuring its application on a proportionate basis. For those reasons, it had not been compatible with the requirements of the "quality of law".' (§ 163)
Furthermore: ‘The Court notes that the text of the judicial oath offered wide discretion in interpreting the offence of “breach of oath”:’ (§ 174)

‘Finally, the most important counterbalance against the inevitable discretion of a disciplinary body in this area would be the availability of an independent and impartial review. However, domestic law did not lay down an appropriate framework for such a review [...]’ (§ 184)

So far the Ukrainian constitution does not fulfil these elementary preconditions to establish independent constitutional court jurisdiction. The procedure of appointing judges is questionable. The constitutional provision regarding the dismissal of judges and various applications of this provision border on scandalous and might have done lasting damage to the reputation of the constitutional court as an institution.

The infamous provision on breaking an oath is a blanket rule that has already led to multiple intrusions on the independence of the constitutional court. As a result the constitutional court is quite a willing instrument for the leading political players. This trait is contrary to the ‘independence of court jurisdiction’ previously promised by the constitution.

2.3 Recommendations

In respect of these obvious deficiencies the following proposals aimed at strengthening the independence of the constitutional court should be implemented:

• limit the power to appoint constitutional judges to directly democratically elected state bodies;

• have both the president and the parliament appoint each of the nine judges to the constitutional court;

• have the president’s appointment confirmed by the parliament;

• establish a qualified majority for the appointment and confirmation of constitutional judges in order to strengthen judicial authority;

• require that six of the eighteen judges have at least five years of work experience in one of the highest courts of Ukraine;

• exclude in principle the possibility of dismissing constitutional judges.
2.3.1 Power to appoint

In a democracy, as Ukraine, according to Articles 1 and 69 UC sees itself being, ‘the people are the bearers of sovereignty and the only source of power.’ This is equally applicable to judicial power. Judges do not appear out of the blue; they cannot and may not appoint themselves, but they require democratic legitimation. Their judicial position and powers have to be based on the will of the people. Therefore, only the highest among the democratically elected state bodies may appoint constitutional judges. Only these authorities possess the direct and immediate legitimacy of the people. Therefore, the authority of the president and of the parliament to appoint constitutional judges (Article 148 UC) is quite rightly uncontested.

The constitution of Ukraine as currently formulated also stipulates the Congress of Judges as a third authority to appoint constitutional judges. The Congress of Judges is considered a self-governing body of Ukrainian judges. This approach meets with deep concern, because the authorisation of this executive power can hardly be reconciled with democratic principles. Direct democratic legitimation is required for filling positions in the highest state bodies – including the constitutional court – and for exercising fundamental state functions. This legitimation exists in the case of the president and the parliament, but not in the case of the judiciary self-governing Congress of Judges.

The Congress's argumentative recourse is the idea of judicial self-government but this concept cannot override the lack of democratic legitimation. Self-government constitutes a particular form of state administration. It is assigned to self-governing bodies on a legal and democratic basis and within the framework of self-governmental autonomy to the persons concerned for dealing with ‘their own matters’. Self-government provides a legal framework of sorts for civic involvement within cities and communities, an autonomous regime for specific, professional or social interest groups with partially transferred jurisdiction. Self-government, however, is always limited to a group’s own sphere and can take legally binding decisions only with respect to its own members.

Self-government is therefore fundamentally different from the democratic self-determination of the Ukrainian people. The ‘Ukrainian judges’ and thus the ‘Congress of Judges’ are not ‘the people’, but rather merely a sum of all judges. The people are the sole source of all state power. If the judges are empowered to take decisions on factual circumstances or on the filling of positions, it is not a democracy, but a ‘rule of judges’, ie the Ukrainian people are subject to a form of undemocratic external rule.
In a democracy, all key political decisions must be vested in the directly democratically elected state bodies. This rule applies in particular to the filling of positions within the institutions of the three branches of government – legislative, executive and judiciary. Non-democratic participation of other organizations and individuals in decisions would likewise be incompatible, eg ‘self-government of the police’ or ‘self-government of the secret service’.

The label ‘self-government of judges’ does not change anything. Self-government establishes ‘partial power of management for an entity in its own matters’, but not political decision-making authority with general legal binding force. A non-democratic ‘state within the state’ must not and cannot exist as long as a state considers itself democratic. Self-government is not a surrogate for democracy; it only involves the respective parties in the practical implementation of democratically agreed law.

Therefore, the Congress of Judges must not possess the right to appoint constitutional judges. It may possibly be vested with the right to submit its proposals on filling one-third of the positions on the constitutional court. This proposal would then have to be voted on by a qualified majority of the parliament. The latter would provide democratic legitimation in this way and assume responsibility for the selection of the individuals (see more in the section below).

2.3.2 Strengthening judicial authority

Constitutional questions in a constitutional state are always questions of power. There is a constant temptation to try to influence the constitutional court politically and a constant challenge to resist this temptation. One strategy for immunizing judges of the constitutional court against such temptations is to strengthen their authority by having them be elected by a qualified majority of the parliament. In a democracy, a simple majority is sufficient in most of cases. However, a qualified majority is politically recommended in cases where officials thus elected are to enjoy special authority. This voting procedure ensures their appointment is the result of a broad cross-party consensus among citizens as reflected in their parliament. This is the case with the appointment of constitutional court judges.

The constitutional judges must make decisions based on the constitution that may have existential importance for the state and that must be accepted in particular by those who oppose the content of the decisions. The necessary willingness to accept even unpleasant, unpopular, or supposedly erroneous court


decisions is higher when the appointment of judges is the result of a cross-party consensus that also includes the opposition. The authority so acquired strengthens the independence of individual judges and of the whole court. It is of secondary importance whether the cross-party qualified majority comprises two-thirds or three-fifths of the members of parliament. The numbers making a quorum can hardly be discussed rationally but must be decided politically; the crucial point here is to require a qualified majority.

If judges are appointed by the president, it is recommended that the additional approval of a simple majority of the parliament be obtained. The authority of these judges is strengthened by the common consensus of both state bodies. Otherwise, they could be classified as ‘judges by the grace of the president’ with corresponding damage to their authority.

The authority of the court would be strengthened if the parliament were able to reject the candidates of the president by a qualified majority vote. This would also ensure that the presidential appointment of judges is based on a broad political consensus; in any case, the judges do not face wide democratic rejection.

If, however, the political powers that be choose to keep the Congress of Judges vested with the right to appoint constitutional judges, additional approval of those candidates by a qualified majority of the parliament is required, as with presidential appointments.

**2.3.3 Strengthening legal quality by requiring selection of at least six judges who previously served on the highest Ukrainian courts**

In addition to the qualification requirements of constitutional judges as set forth in Article 148 clause 3 of the UC, it is recommended that a certain number (suggestion: at least one-third) of the constitutional judges be appointed from the group of judges with at least three years of work experience in one of the highest courts in Ukraine. This approach would strengthen the legal competence and judicial authority of judges by engaging judges with longstanding and proven legal experience.

With six judges, chosen from the highest courts of the Ukraine, both the president and the parliament ought each to nominate three candidates from this vital group of judges. If the Congress of Judges continues to be involved in the appointment of constitutional judges, it would similarly be proper to limit its right to making proposals from this circle of persons.
2.3.4 Exclusion of dismissal by the executive power

As a matter of principle, constitutional judges and general judges have to be irremovable for the duration of their term of office. The premature termination of a judge’s service can only be executed on the basis of constitutional and legally standardized procedures and well defined arguments. In no event can this decision on dismissal be made by policy-makers. In addition, in all cases any dismissal should become subject to the control of the courts. It is preferable to have the decision on the dismissal of constitutional judges assigned only to the constitutional court itself, excluding the judge concerned.

The current dismissal procedure only partially complies with the principles of rule of law. As per the assessment of the text the grounds for dismissal as stipulated by Article 149 in conjunction with Article 126 UC are partly redundant (death, expiration of term), and partly far too vague, making them largely open to abuse. In particular, the infamous ‘breach of oath’ has served repeatedly in the past as a welcome vehicle to recall unwanted judges at political will. The multiple cases of such dismissals in the recent history of the constitutional court, in particular as a result of changes in political direction, find no comparisons in the history of other constitutional states. This clearly demonstrates the lack of independence of the constitutional judges in Ukraine. In this context, numerous improvements to the ‘Law on the judicial system and the status of judges’ and amendments to the ‘Law on the High Council of Justice of Ukraine’ were adopted in February of this year (2015). The law however does not apply to the constitutional court (Article 3 clause 3). In this respect the provisions on the judicial system still have to be applied in particular to the constitutional court.

The next revision of the constitution should therefore in any case eliminate compulsory dismissal because of the oath breach. It is preferable to have a new wording of the reasons for dismissal of constitutional judges, without regulations on dismissal but rather only provisions on the termination of office of a constitutional judge. The proposed new wording is based on the German example. As an expression of the separation of powers the dismissal of a constitutional judge remains at the sole discretion of the constitutional court itself, which makes a decision by a qualified majority. The fact that this procedure has never been used in Germany emphasises the trust there in constitutional judges and in the stability and independence of the constitutional court.
## 2.3.5 Recommended constitutional amendments

<table>
<thead>
<tr>
<th>Prevailing constitutional norms</th>
<th>Recommended constitutional norms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 147. The Constitutional Court of Ukraine is the sole body of constitutional jurisdiction in Ukraine.</td>
<td>Article 147. The Constitutional Court of Ukraine decides on issues of conformity of laws and other legal acts with the Constitution of Ukraine and provides the official interpretation of the Constitution of Ukraine and the laws of Ukraine.</td>
</tr>
<tr>
<td>Article 148. The Constitutional Court of Ukraine is composed of eighteen judges of the Constitutional Court of Ukraine.</td>
<td>Article 148. The Constitutional Court of Ukraine is composed of eighteen judges. At least six judges shall have had at least five years of prior work experience in one of the highest courts of Ukraine.</td>
</tr>
<tr>
<td>The President of Ukraine, the Verkhovna Rada of Ukraine and the Congress of Judges of Ukraine each appoint six judges to the Constitutional Court of Ukraine.</td>
<td>The President of Ukraine and the Verkhovna Rada of Ukraine each appoint nine judges to the Constitutional Court of Ukraine. The judges appointed by the President of Ukraine are subject to approval by the Verkhovna Rada, which can reject individual judges with a majority of 2/3 of its constitutional composition. The Verkhovna Rada elects the judges to be appointed with a majority of 2/3 of its constitutional composition.</td>
</tr>
<tr>
<td>A citizen of Ukraine who has attained the age of forty on the day of appointment has a higher legal education and professional experience of no less than ten years, has resided in Ukraine for the last twenty years, and has command of the state language, may be a judge of the Constitutional Court of Ukraine.</td>
<td>Judges who are citizens of Ukraine and who have attained the age of forty years on the day of appointment are eligible to the Verkhovna Rada and qualified to hold judicial office. They may neither be member of the Verkhovna Rada nor of the state government authorities. When appointed to the position of judge, they shall terminate their employment with such authorities.</td>
</tr>
<tr>
<td>A judge of the Constitutional Court of Ukraine is appointed for nine years without the right of appointment to a repeat term.</td>
<td>[cancelled]</td>
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</tbody>
</table>
The Chairperson of the Constitutional Court of Ukraine is elected by secret ballot only for one three-year term at a special plenary meeting of the Constitutional Court of Ukraine from among the judges of the Constitutional Court of Ukraine.

<table>
<thead>
<tr>
<th>Article 149. Judges of the Constitutional Court of Ukraine are subject to the guarantees of independence and immunity and to the grounds for dismissal from office envisaged by Article 126 of this Constitution, and the requirements concerning incompatibility as determined in Article 127, paragraph two of this Constitution.</th>
<th>[cancelled]</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 149. A constitutional judge shall be dismissed from office on expiration of the term for which he was appointed or in case of death or permanent disability. He is entitled to request a dismissal at any time, with such dismissal to be approved by the President of Ukraine.</td>
<td></td>
</tr>
<tr>
<td>The judge of the Constitutional Court shall be provided with working conditions and remuneration corresponding to the rank of his office and the scope of his duties.</td>
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</tr>
<tr>
<td>The judges of the Constitutional Court throughout the term of their office shall neither belong to political parties nor trade unions nor take part in any activity incompatible with the principles of independence of courts and judges.</td>
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<tr>
<td>If a judge of the Constitutional Court is sentenced to imprisonment exceeding 6 months or has committed a serious breach of duty that is incompatible with his service in the office, the Constitutional Court may, by a majority of 2/3 of its statutory composition, authorize the President of Ukraine to dismiss such a judge.</td>
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</tr>
<tr>
<td>A judge of the Constitutional Court may not be held criminally liable or deprived of freedom without the prior consent of the Constitutional Court. The judge may neither be detained nor arrested, except if he is caught committing the infringement and the arrest is aimed at ensuring the proper course of proceedings. The arrest shall be immediately reported to the Chairman of the Constitutional Court, who may demand the immediate release of the detained person.</td>
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</tbody>
</table>

**Explanation**

*.f. = provisions are to be taken over and remain unchanged*

abc = provisions are to be cancelled
3 Individual constitutional complaint

3.1 Missing keystone of the constitution

A constitutional complaint is currently not possible in Ukraine. The establishment of a constitutional complaint appears helpful, given the widespread distrust of the citizens towards the state and its institutions, specifically towards the judiciary. Together with the guarantee of truly independent constitutional jurisdiction the Ukrainian state could, by establishing a constitutional complaint, regain lost trust from the people. A truly independent and professionally staffed constitutional court could become a trustworthy partner for the citizens, thereby becoming an “island of trust”.

3.2 Citizens without constitutional participation

In order to strengthen the trust of the state in its citizens (fundamental rights) and in its civilian officials and judges (independence), the introduction of a constitutional complaint is highly recommended. This step would empower citizens to defend their fundamental rights against national measures – legal statutes, administrative acts, judgements – through a complaint before the constitutional court. Simultaneously the constitutional court would be entitled to the role of safeguarding the citizens’ fundamental rights and protecting the independence of civilian officials and judges.

The admission requirements of a constitutional complaint would have to be regulated in detail within the statute governing the constitutional court, and would surely put an extra burden on the court. This however could be kept within limits by procedural requirements.
3.3 Recommended constitutional amendments

<table>
<thead>
<tr>
<th>Prevailing constitutional norms</th>
<th>Recommended constitutional norms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 150. The authority of the Constitutional Court of Ukraine comprises:</td>
<td>Article 150. /.</td>
</tr>
<tr>
<td>1) deciding on issues of conformity with the Constitution of Ukraine (constitutionality) of the following:</td>
<td>/.</td>
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<tr>
<td>• laws and other legal acts of the Verkhovna Rada of Ukraine;</td>
<td></td>
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<tr>
<td>• acts of the President of Ukraine;</td>
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<tr>
<td>• acts of the Cabinet of Ministers of Ukraine;</td>
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<tr>
<td>• legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea.</td>
<td></td>
</tr>
<tr>
<td>These issues are considered on the appeals of: the President of Ukraine; no less than forty-five People's Deputies of Ukraine; the Supreme Court of Ukraine; the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine; the Verkhovna Rada of the Autonomous Republic of Crimea;</td>
<td>/.</td>
</tr>
<tr>
<td>2) the official interpretation of the Constitution of Ukraine and the laws of Ukraine.</td>
<td>/.</td>
</tr>
<tr>
<td>3) the decision on the constitutionality of the acts proclaimed by the authorities of the legislative, executive or judicial power, following the complaint of any person who claims that an act violates his constitutional rights (the Constitutional complaint). A constitutional complaint shall be admissible only after legal remedies are exhausted. Details are regulated by the law.</td>
<td>/.</td>
</tr>
<tr>
<td>On issues envisaged by this Article, the Constitutional Court of Ukraine adopts decisions that are mandatory for execution throughout the territory of Ukraine, that are final and shall not be appealed.</td>
<td>/.</td>
</tr>
</tbody>
</table>

Explanation
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abc = provisions are to be cancelled
4 Public service

4.1 The true colours of the state: public service

The Ukrainian constitution does not cover the principles of public service. These are found scattered about in special individual laws. This alone would not be a reason per se for a pertinent constitutional amendment if public service in Ukraine were basically reliable and effective, neutral and impartial, efficient and focused on the main issues. But according to the general assessment exactly these features do not apply.

4.2 Widespread distrust in the integrity of public administration

The constitutional reality in Ukraine in this respect can only be described as disastrous. In sum, corruption is everywhere and the people have no confidence in the integrity of the administration – and waste no more words on it. See the comparable disillusioning descriptions of the Workstream Rule of Law (Lord Macdonald) and Workstream Anti-Corruption (Cimoszewicz).

Furthermore unclear responsibilities obstruct the classification of concrete personal accountability. The administration appears to be a black box, a bottomless pit. The citizens find themselves powerless in the face of those who are actually obligated to serve them (‘service’). This administration is ‘the face of the state’ and the consequences for the reputation of the political system are devastating: people do not believe it, people do not trust it and civil loyalty cannot grow. A legitimacy gap divides politics and society. A state in this situation always teeters on the brink of a revolution. It only requires the right time and place for the appropriate charismatic personalities to explode unrestrained.
4.3 Recommendations

4.3.1 Tasks on many levels

This issue can only be successfully tackled through simultaneous interventions on various levels, e.g. especially through an immediate intervention involving a direct political, administrative fight against corruption (see the report of the Workstream Anti-Corruption) and steps to strengthen the rule of the law (see the report of the Workstream Rule of Law). However, comparable provisions in constitutional or statutory law can only yield long-term effects if applied in actual administrative practice.

Constitutional and statutory law can especially bear in mind the principles of elementary mutual obligations that exist between a state and its servants. It can define standards of behaviour and thus stipulate public responsibilities for the selection of public servants, and similarly for their rights and obligations. It can enforce the obligation to verify requirement criteria and thereby constrain the dangers of corruption. Yet at the same time all subsequent recommended regulations will require legal-practical implementation, in every case, through statute, regulation and single case provision. Nevertheless constitutional legal standardization seems recommendable in the case of Ukraine to make matters of course in a constitutional administration obvious for every citizen and public servant.

4.3.2 Principles of public service

In detail, first of all and above all a regulation regarding the limitation and exclusiveness of public service, including mutual obligations of state and public servant, seems necessary and reasonable. State duties in a narrower sense should only be performed by members of the public service. Only these individuals are ‘servants of the state’ in a specific sense and as such underlie special rules (see the first paragraph of the appended wording proposal). Adequate structures, adequate procedural rules, mechanisms of control, rewards and sanctions are the factors crucial to safeguarding administrative activity orientated to public interest. The major structural issues below should be reflected and acknowledged in the constitution:

Public servants should be selected according to their expertise and performance. These qualifications are an effective mechanism to prevent any form of nepotism and patronage.
Any person exercising a public function and office is obligated to act on behalf of the common good. A civilian office holder must act and decide impartially and focused on the issue regardless of the features of the client involved. To ensure this he has to take an oath of office (see the third paragraph of the appended wording proposal).

Impartiality is primarily safeguarded by making every public servant personally liable for the lawfulness of his acts. Particularly the order given to him by a superior does not discharge him of this liability. An illegal order (instruction) can only bind a public servant if the superior confirms it after remonstration and takes responsibility for the consequences himself. But in any case a public servant is committed to the constitution, which cannot be overridden by any other state authority. Any order in conflict with the constitution has to be refused. The explicit setting up of statutory obligations is equivalent to creating personal liability (see the fourth paragraph of the appended wording proposal).

The altruistic behaviour of public servants is based on their interest for the common good, which ensures appropriate material indemnification for public servants and their family. Constitutionally guaranteed lifelong indemnification serves as security for their lifelong and extensive duty of loyalty. Public servants are basically not subject to dismissal and enjoy permanent employment status (lifelong employment) as well as an appropriate and sufficient salary. The latter ensures that the public servant does not accept additional income or other benefit from selling his national services as state authority (corruption) to make a decent living. Corruption and other serious neglect of duty will result in immediate and permanent removal from public service. The requirements for entering or leaving public service moreover need to be legally formulated in a clear and specific manner. Recourse to the courts should remain open to public servants in all cases (see the fifth paragraph of the appended wording proposal).

The final recommendation is a constitutional obligation to establish a system of ombudspersons within the administration. Every citizen and civil official can approach an ombudsperson who is sworn to confidentiality, so that the anonymity of the complainant remains protected. They can request intervention in particular cases or express grievances about administration. The ombudsperson is allowed to instruct those responsible to mediate in individual cases or he might develop strategies as a precaution against recurrence, (see the sixth paragraph of the appended wording proposal).
### 4.3.3 Recommended constitutional amendments

<table>
<thead>
<tr>
<th>Prevailing constitutional norms</th>
<th>Recommended constitutional norms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 118. The composition of local state administrations is formed by heads of local state administrations.</td>
<td>Article 118. [cancelled]</td>
</tr>
<tr>
<td>Article 120.1 [new]. The exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who have a relationship to service and loyalty as defined by the law of Ukraine.</td>
<td>Every citizen of Ukraine shall be equally eligible for any public position according to his aptitude, qualifications and professional achievements.</td>
</tr>
<tr>
<td>Members of the public service are servants of the entire population, not of a party or any other group. They shall perform their official duties and carry out their tasks professionally and impartially irrespective of the person or party. Every official shall swear the following official oath: 'I swear that I will perform the official duties assigned to me to the best of my knowledge and ability, protect and defend the constitution and the law, conscientiously fulfil my duties and exercise fairness in my dealings with everyone.'</td>
<td>The public servants shall be personally liable to the full extent for the legality of their official actions. In case of concerns about legality of official matters, a public servant shall promptly raise his concern to his immediate supervisor. Should the official matter be upheld and the official servant still has doubts about its legality, he shall refer it to the next higher supervisor. Should the official matter be approved, the public servant shall have to perform it and is thus exempted from liability. Upon demand, the approval shall follow in written form.</td>
</tr>
</tbody>
</table>
Public servants shall be appointed for lifetime and provided with appropriate conditions for work and granted remuneration corresponding to the rank of their office and the scope of their duties. Public servants appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiration of their term of office only for the reasons and in the manner specified by law. Their status shall be protected by judicial procedure.

An ombudsperson office shall be set up in every administrative unit and all officials and citizens may confidentially address their concerns to it. The ombudspersons shall be assigned by and report solely to the central office responsible for the integrity of the administration, which shall in turn be established by the President of Ukraine and the Verkhovna Rada of Ukraine. The ombudspersons shall be bound by the obligation of secrecy and shall submit proposals relating to the improvement of the integrity of administrative activities.

Explanation
/. = provisions are to be taken over and remain unchanged
abc = provisions are to be cancelled
5 Private property

5.1 Unclear status of private property

5.1.1 Deceptive guarantee of private property

According to its current wording the constitution of Ukraine guarantees private property and contains a legal reservation regarding state interventions as well as the guarantee of full compensation for expropriation (Article 41 CU). Up to that point the constitution meets the standards of contemporary protection of property on the constitutional level.

But appearances are deceptive: parallel to the guarantee of private property the constitution also contains fundamental and far-reaching provisions for the protection of state property in Article 13 and 14 CU. This spirit is most prominently reflected in Article 14 CU: ‘Land is the major national asset; it is under special state protection.’

5.1.2 Socialist ‘state ownership structures’

Fundamental land reform in Ukraine remains long overdue because of the clear decision to consider land the major national asset of Ukraine and fundamental to its wealth. The system of property ownership in fact favours the socialist ‘state ownership structures’ and has remained largely untouched.

This national importance attributed to Ukrainian land aims at preventing the sell-out of land to and by Ukrainian landowners and foreign investors.

The corresponding laws have to be considered precisely in this respect. At present, the Land Code of Ukraine (2001) is the main legislative act regulating the market for agricultural land. The transitional provisions, which were amended and prolonged several times, read as follows:

- Individuals and legal entities who have land plots in private ownership for family farming and other agricultural production have no right to sell or alienate in any way their land plots and land shares, except by inheritance or withdrawal for public needs till at least 1 January 2016.
• Until at least 1 January 2016, land shareowners have no right in principle to contribute their shares to the statutory fund of business associations/commercial companies.

• For the period till 1 January 2015, individuals and legal entities could acquire agricultural land plots with the total area not exceeding 100 hectares. However, this area could be increased in the case of legitimate inheritance of these land plots by citizens and legal entities.

Although a large percentage of agricultural land (74%) is ‘private’ property, owners are not allowed to exercise their property right at their discretion. The right of land ownership lacks a crucial liberty, i.e. the power to dispose of property freely.

Overall, a strategically and economically important factor of economic development in Ukraine remains, so to speak, ‘uncultivated’ because of this dysfunctional constitutional situation, literally on hold and uninvested. This potential cornerstone of a functional and economically profitable agricultural sector remains unused and property cannot gain importance as an economic resource. For a country in an economic situation like that of Ukraine, such a dysfunctional system of property ownership is a redundant and expensive luxury.

5.1.3 Distrust in property rights

It is not surprising, in a legally and factually uncertain environment, that there is little trust in the constitutional guarantee of property rights according to numerous polls. Although the constitution of Ukraine guarantees ownership rights, the factual protection of property is caught up in the old categories and is one of the most serious barriers on the road to economic prosperity. This finding is reflected in property protection being rated so poorly. According to the International Property Rights Index (IPRI 2014) the country was rated no. 94 of 97 Global Rank and no. 10 of 10 Regional Rank.
5.2 No stable foundation for economic prosperity

Wide-spread mistrust in the current system of property ownership and the lack of land reform are both consequences of a necessary and predictable causality. Constitutional law allows a contradictory decision and thus de facto no decision at all on the system of property ownership. The resulting legal uncertainty understandably raises distrust in the failed system of property ownership. This distrust is reinforced by land reform being state-blocked and constantly delayed. Stable fundamental trust in the reliability of the system of property ownership serves as a necessary precondition for economic initiatives, investment and prosperity. Given that fact, the establishment of a straightforward constitutional system of property ownership is of utmost constitutional concern.

5.2.1 Contradictory and inconsistent set of rules

The legal assessment of the Ukrainian constitution regarding property reveals a contradictory and inconsistent set of rules. State property does not merely stand in contrast to private property; it is also awarded a higher rank. Not only is it considered the ‘major national asset’ constituting ‘fundamental national wealth’, it also enjoys special state protection. The declaration that ownership of land is declared a reserved domain for the state authorizes the executive power to disable the guarantee of private property under the constitution and to let it come to naught. That is because in case of a conflict between private and state property, the constitution gives preference to state property.

The decision to have both private and public property in the Ukrainian constitution results in legal uncertainty on a constitutional level regarding one of the fundamental questions of the economic system. It also gives the administration vast, legally unstructured and unlimited liberty to develop the system of property ownership. The lack of predictability of state actions on the constitutional level undermines the fundamental condition of a successful economy: trust through legal certainty. However, as things stand, private ownership rights cannot unfold their liberal, economic effects. Consequently, the constitutional guarantee of private property remains largely ineffective. Once again the Ukrainian constitution is in this respect irresolute and counteracts the purpose of a written constitution. A written constitution ought to define basic principles of the state and society that are beyond dispute, in order to provide the citizens as well as state
bodies with reliable guidance and legal certainty. It is exactly this function that is not fulfilled by the property provisions of the Ukrainian constitution.

The fact that it is not only the Ukrainian constitution that explicitly gives state property priority over private property does not change this alarming analysis. It has been observed that many countries of Central and Eastern Europe that underwent a tremendous transformation after the 1990s also emphasised the importance and protection of state property in the same way as the Ukraine. This constitutional echo of socialist legal thinking in respect to state property and the corresponding antipathy towards private property cannot remain without negative consequences both legally and economically. Where legal borders between private and state property become indistinct/vague, executive powers are in effect widely freed from any constitutional limitations. This leads to legal uncertainty as a predictable consequence and therefore the constitutional guarantee of private property is understandably widely distrusted. Thus, where there is no trust, the willingness to take responsibility for something, the willingness to invest in a venture can neither develop, nor can it be expected.

The ideology of the primacy of state property is historically understandable. However it is outdated and from a legal standpoint, creates confusion and uncertainty. The concept of public property is an antiquated way of trying to protect the people’s fundamental needs. It misjudges the fact that a state does not need ownership of the land to do so. By having sovereignty over the whole territory the state can still control it. Public property is no precondition to protect the interests of the state and the common good, it only inhibits the economy.

5.2.2 Foundation for the economy

The contrariness of public and private property entails an uncertainty for the basic concept of ownership. It also inhibits the economy as a whole, because land, which is not only needed for farming but also for factories, cannot be acquired through ownership. A typical example of the old-fashioned property concept is expressed in the moratorium on the sale of agricultural land that is still in place today. For a period till 1 January 2015, individuals and legal entities could acquire no more than 100 hectares of agricultural land. This legislative order means that a farmer cannot finance his business by collateralizing his land. Despite 74% of all land being ‘private’, these restrictions make it much more difficult to exercise one of the most fundamental aspects of property rights, the act of freely disposing of property as the owner sees fit.
Protection of property rights is fundamental to the market economy. The moratorium on the sale of agricultural land accompanied the introduction of the Land Code of Ukraine in 2001 and remains in place today. According to the above definition of the land market and observed prohibitions in transitional provisions of the Land Code of Ukraine, the agricultural land market does not fully function in Ukraine today. The factual protection of property in Ukraine desperately needs improvement.

5.2.3 No inadmissibility of public, state property

For the sake of clarification the following should be noted: a constitutional guarantee for private property does not imply the inadmissibility of public, state property. It only means that in a liberal society this state property is not an unquestionable basis for state actions, but instead an exception which requires justification. The state may possess goods, land, buildings and businesses, where legitimate reasons in the interest of the public good outweigh private ownership. This is the case for state institutions, military facilities, financial assets, and in the areas of infrastructure (roads, airports, etc), education (schools, universities, etc) and culture (museums, opera etc) etc.

It is state property only for its own sake that is incompatible with a liberal property system. In addition, the state does not necessarily have to be the owner of the land in order to effectively manage and secure its territory. In the medieval world, political power came with ownership of land. However, the gradual division of private property rights from the sovereign and political power in the 18th century led to apolitical ownership of the land and to political power that did not depend on property. Today the state, as a consequence of its internal sovereignty, does not need private property. The territorial sovereignty of the modern state covers all private property rights. Therefore the state reserves the right to elaborate and enforce a system of property ownership of land that prevents excessive land ownership, allows competition in the agricultural sphere and thus contributes to the common welfare.
5.3 Recommendations

Considering the above remarks, the Ukrainian constitution must make a basic decision regarding property ownership and thus meet its function of establishing a stable, reliable system of property ownership. In this way it creates constitutionally legal certainty, without neglecting legitimate state interests. Consequently, public property should neither be an object of a constitutional guarantee nor the ‘major national asset’. Rather, the guarantee of property should only apply to the property of citizens. With this provision, the constitution makes the citizens practically responsible for their ‘own’ land by granting them property rights and at the same time creates a basis for them to exercise their freedom responsibly. It thus motivates citizens to engage in economic activity and defines a necessary condition for economic growth of the Ukrainian state, particularly in the agricultural sector.

5.3.1 Property as the foundation for liberty

The constitutional system of property ownership is of fundamental importance to society, to the structure of the economic system and to the status of individuals within the system. The guarantee of private property provides the citizens with independence from the state, assures private and political self-confidence and enables true exercise of constitutionally guaranteed liberties. In other words, the foundation of freedom is property. At the same time, private property ensures a market economy system in correlation with the freedom of the individual to choose an occupation. Private property is a condition for the economic prosperity and stability of society as a whole. By guaranteeing freedom and property, the constitution gives citizens the opportunity to increase their own wealth and to ensure the welfare of their families. Furthermore citizens achieve independence from the state as well as gaining recognition and political self-consciousness. The guarantee of private property enables individual and collective prosperity in which everybody can participate. As the basis and indicator of individual productivity, private property, on the other hand, also permits a legitimate approach to taxation in order to bear the burdens of the larger community. So, the guarantee of property is a requirement for obtaining tax revenues. Therefore, in a fundamental sense, private property constitutes modern statehood as such. A state that does not respect the private property rights of its citizens will have no future.
Freedom of action in the field of property rights, on the one hand, is necessary to acquire property. As a result of one's own effort, property can be accumulated through ‘congealed labour’ (Karl Marx), ‘coined freedom’ (Fyodor Dostoyevsky), the continuation of freedom in the area of the regulation of goods. The effort of the individual serves as the ethical foundation of private property. On the other hand property is a source of responsibility. There is a higher commitment to personal possession: one has to care for it, cultivate it, maintain, secure and manage it, to preserve it for tomorrow and for future generations. For an owner to own something he has acquired he must constantly reacquire it (Johann Wolfgang von Goethe). Property binds a person to an owned object, to which he sacrifices his freedom; it binds a citizen to the state, which has to guarantee the property. Property disciplines and calls for concrete accountability. The guarantee of property gives the citizen a chance to acquire property, to maintain it, to multiply it and to pass it on. Right of disposal – responsibility – liability – this triad alleviates the guarantee of property from an objective with a welfare function: the owner is first servant to his property. Anyone who abolishes or minimises the importance of property deprives the citizens of any incentive for commitment and activity. Property and inheritance motivate and commit the individual to take care of himself and his family. The constitution paves a solid foundation by providing the guarantee of property: the individual can feel confident that his concrete efforts are respected and protected by the legal community. Thus, property not only optimizes the beneficial economic effect but also forms the integral basis of a liberal social order.

Additionally the guarantee of private property provides the individual citizens with a special position of trust and allows them freedom through property. Property is ‘potential freedom’. Property gives citizens independence from the state, makes them politically self-aware and provides them with a way of actually exercising their freedom and living their lives responsibly. Above all, property imparts self-protection to the right-holder, a safeguard against the uncertainties of life: acquisition of property is a precaution against risks. This is especially applicable to those who do not own much: protection of property in a welfare state should also be accepted, particularly for the socially disadvantaged. This is because these citizens are primarily in need of this protection for the sake of their freedom. The guarantee of property has to be maintained particularly for them, to preserve and expand freedom, to allow the possibility of social advancement and not to make individual citizens playthings of state and private economic powers.
Under constitutional law, this objective can only be achieved by establishing a clear-cut constitutional legal structure of fundamental property rights. Guaranteeing private property leads structurally to private property remaining in the hands of private owners and to the state or public property becoming an exception that requires separate justification. Therefore the guarantee of private property implies an objective task for government bodies to dispose of property that is not required for particular state needs of citizens. Privatisation underlies the logic of guaranteeing private property. The state must sell excessive property positions within a reasonable time to private owners. This has to be done in accordance with a system of property ownership of land that prevents excessive land ownership, allows competition in the agricultural sphere and thus contributes to the common welfare.

5.3.2 Private property excludes public property

This structure for the constitutional guarantee of private property is incompatible with simultaneously acknowledging public property. Public property is appropriate in a liberal constitution neither as fact nor as concept. It undermines the constitutional decision in favour of the property of individuals and merely conceals the true decision-making powers. Public property evokes irresponsibility and creates an El Dorado for transferring public resources into private pockets.

However, not every piece of state property has to be released as private property. Special public objectives can justify the withdrawal of an asset from private legal ownership and its assignment to a public purpose. The introduction of public property of this kind does not violate as such the guarantee of private property; it should however remain an exception.
### 5.3.3 Recommended constitutional amendments

<table>
<thead>
<tr>
<th>Prevailing constitutional norms</th>
<th>Recommended constitutional norms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 13. The land, its subsoil, atmosphere, water and other natural resources within the territory of Ukraine, natural resources of its continental shelf and of the exclusive (maritime) economic zone shall be the objects of property rights of the Ukrainian people. State authorities and local self-government bodies shall exercise the ownership rights on behalf of the Ukrainian people within the limits determined by this Constitution.</td>
<td>Article 13. [cancelled]</td>
</tr>
<tr>
<td>Every citizen shall have the right to utilise the natural objects of the people’s property rights in accordance with the law.</td>
<td>[cancelled]</td>
</tr>
<tr>
<td>Property entails responsibility. Property shall not be used to the detriment of the individual or the society. The State shall ensure protection of rights of all property rights holders and economic operators and the social orientation of the economy. All the property rights holders shall be equal before the law.</td>
<td>[cancelled]</td>
</tr>
<tr>
<td>Article 14. Land shall be the main national asset and as such shall be under special protection of the State.</td>
<td>Article 14. [cancelled]</td>
</tr>
<tr>
<td>The property right for the land shall be guaranteed. This right shall be acquired and realised by citizens, legal persons, and the State exclusively in accordance with the law.</td>
<td>[cancelled]</td>
</tr>
</tbody>
</table>
| Article 41. Everyone shall have the right to own, use, or dispose of his property and the results of his intellectual or creative activities. | Article 41. /.

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<table>
<thead>
<tr>
<th>Property entails responsibility. Property shall not be used to the detriment of the individual or the society. The State of Ukraine shall ensure the protection of the rights of all holders of property rights and economic operators, and the social orientation of the economy. All the property rights holders shall be equal before the law. [= old Article 13 clause 4]</th>
</tr>
</thead>
<tbody>
<tr>
<td>The right for private property shall be acquired in compliance with the procedure established by law.</td>
</tr>
<tr>
<td>./.</td>
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<tr>
<td>Citizens may use the objects of state or communal property in accordance with law in order to satisfy their needs.</td>
</tr>
<tr>
<td>./.</td>
</tr>
<tr>
<td>No one shall be unlawfully deprived of the right to property. The right to private property shall be inviolable.</td>
</tr>
<tr>
<td>./.</td>
</tr>
<tr>
<td>The expropriation of private property objects may be applied only as an exception for reasons of social necessity, on the grounds of and in the order established by law, and on terms of advanced and complete compensation of the value of such objects. The expropriation of such objects with subsequent complete compensation of their value shall be permitted only under conditions of martial law or a state of emergency.</td>
</tr>
<tr>
<td>./.</td>
</tr>
<tr>
<td>Confiscation of property may be applied only pursuant to a court decision, in the cases, to the extent, and in compliance with the procedure established by law.</td>
</tr>
<tr>
<td>./.</td>
</tr>
<tr>
<td>The use of property shall not prejudice the rights, freedoms, and dignity of citizens, the interests of society or aggravate the environmental situation and the natural qualities of land.</td>
</tr>
<tr>
<td>The use of property shall not prejudice the rights, freedoms and dignity of citizens, the interests of society or aggravate the environmental situation and the natural qualities of land as defined by the law of Ukraine.</td>
</tr>
</tbody>
</table>

**Explanation**

./. = provisions are to be taken over and remain unchanged  
abc = provisions are to be cancelled
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