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Centre of Policy and  
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# Reforming the Constitution

## Brief

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## 1. Key events of state policy in the area of constitutionalism

The new [Constitution of Ukraine](#) as a sovereign state was adopted by Verkhovna Rada of Ukraine on June 28, 1996. From the very beginning, the implementation of this Constitution did not go calm and as planned — the President of Ukraine, since the first days, began to propose his own, sometimes quite unexpected, interpretations of many of its provisions in order to expand his authority. The Parliament, being often politically unstructured and fragmented, was not always able to counter this effectively. However, with the help of the Constitutional Court of Ukraine, a certain balance was achieved, and the political community focused on legislative implementation of the constitutional provisions during 1997-2003.

On December 8, 2004, the first amendment to the Constitution of Ukraine (Law [№ 2222-IV](#)) was made, which significantly changed the way of implementing the form of state government and the balance of powers between the President and the Parliament. However, this was made in imperfect wording and in violation of the amendment procedure.

In 2010, President V. Yanukovich, referring to this fact, in order to usurp the power using the Constitutional Court of Ukraine (see Decision [№ 20-пІІ/2010](#)), unlawfully reinstated the 1996 version of the Constitution – the Constitutional Court recognized the Law [№ 2222-IV](#) as unconstitutional. After that, the Verkhovna Rada of Ukraine introduced two other minor amendments to the Constitution of Ukraine, in 2011 and 2013:

- Law [№ 2952-VI](#) on changing the terms of office of the Parliament and local councils, as well as calculating the dates of regular elections of the President, Parliament and local councils;
- Law [№ 586-VII](#) on clarifying the powers of the Accounting Chamber.

Restoring certain provisions of the [Constitution of Ukraine](#) by the Verkhovna Rada of Ukraine in political and legal manner in accordance with the laws of Ukraine of December 8, 2004 [№ 2222-IV](#), February 1, 2011 [№ 2952-VI](#), and September 19, 2013 [№ 586-VII](#) has been a key event and the outcome of the Revolution of Dignity. As a result of this amendment to the wording of the Constitution, the Parliament's influence on the formation and operation of the Government has increased, while the scope of the constitutional powers of the President has decreased (see Law of Ukraine of February 21, 2014 [№ 742-VII](#) «On Restoring Certain Provisions of the Constitution of Ukraine»).

After the Revolution of Dignity, the Verkhovna Rada of Ukraine committed to conduct an inclusive and comprehensive constitutional reform that would balance the

current system of public governance (in particular, political and legal relations in the power triangle Parliament – President – Government) and reduce the potential risks of usurpation of power in the future. Such a constitutional reform consisted of the preparation and adoption of a law on amendments to the Constitution of Ukraine in a legitimate manner — in strict accordance with the procedure provided for in Chapter XIII of the Constitution of Ukraine. On March 4, 2014, a Temporary Special Commission was formed to prepare a draft law on amendments to the Constitution of Ukraine (Resolution of the Verkhovna Rada of Ukraine № 849-VII), but a draft laws on this issue was never prepared by the Parliament and therefore no considered.

After being elected, President P. Poroshenko introduced a draft law № 4178a on June 26, 2014 on amendments to the Constitution of Ukraine (regarding the powers of state authorities and local self-government), which was the first attempt to conduct a constitutional reform regarding decentralization of state power to reform the administrative and territorial system of Ukraine; however, there was no political will to consider it in the Parliament of that convocation, and therefore it was withdrawn shortly after its introduction.

In 2015, there was a second attempt to amend the Constitution regarding decentralization: on August 31, 2015, the Verkhovna Rada of Ukraine preliminarily approved the draft law (reg. № 2217a) on amendments to the Constitution of Ukraine (on decentralization of power) that was introduced by the President of Ukraine on July 1 and 15, 2015 (initial and revised version). However, due to the fact that this draft law contained a clause granting special status to certain districts of Donetsk and Luhansk regions, such legislative initiatives caused a harsh and strong public reaction, and therefore the Parliament of the previous convocation never finally adopted it.

Instead, in 2016, the first constitutional reform of the judiciary and justice since the adoption of the Constitution of Ukraine in 1996 was conducted (Law of Ukraine «On Amendments to the Constitution of Ukraine (on justice)» of June 2, 2016 № 1401-VIII), according to which:

- the status of judges, the procedure for appointing and dismissing judges, the scope and limits of their immunity, and the procedure for the formation, reorganization, and liquidation of courts have been changed;
- the status and powers of the Constitutional Court of Ukraine, the procedure for appointing and dismissing judges of the Constitutional Court of Ukraine, and the scope and limits of their immunity have been substantially reformed;
- advocate and prosecutorial monopolies to represent the interests of individuals and legal entities in courts have been introduced;

- the institute of constitutional complaint has been introduced – i.e., the ability of a person to appeal the constitutionality of a law of Ukraine applied in the final judgement in his case in the event of exhaustion of all other available domestic legal remedies;
- the Constitution provided for the possibility of ratification of the Rome Statute of the International Criminal Court.

In 2019, the Constitution of Ukraine was amended twice:

- by the Law of Ukraine «On Amendments to the Constitution of Ukraine (regarding the state’s strategic course for Ukraine’s full membership in the European Union and the North Atlantic Treaty Organization)» № 2680-VIII of February 7, 2019;
- by the Law of Ukraine «On Amendments to Article 80 of the Constitution of Ukraine (regarding immunity of members of the Parliament of Ukraine)» № 27-IX of September 3, 2019, which repealed<sup>1</sup> the immunity of MP’s.

Furthermore, in 2019, after the change of power, the constitutional process for addressing the issue of the Parliament-President-Government power triangle was resumed, but solely upon the President’s urgent initiative. On August 29, 2019, the President submitted to the Parliament seven draft laws (reg. [№1013](#), [№1014](#), [№1015](#), [№1016](#), [№1017](#), [№1027](#), [№1028](#)), which were targeted, substance-free, and even added further imbalance in public governance system and strengthened the role of the President of Ukraine in the power triangle (indeed, the Constitutional Court of Ukraine for the first time issued three negative opinion regarding the draft laws on amendments to the Constitution of Ukraine)<sup>2</sup>. These draft laws were prepared behind closed doors by unknown authors, without proper public consultations with members of the Parliament and civil society, and eventually, none of these draft laws was ever adopted by the Verkhovna Rada of Ukraine.

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<sup>1</sup> The Constitutional Court of Ukraine in its opinion of June 19, 2018 № 2-B/2018 noted the following:

*«The Constitutional Court of Ukraine has repeatedly emphasized that the immunity of members of the parliament of Ukraine is not a personal privilege, an individual MP’s right , but has a public-legal character; it is aimed at ensuring the Ukrainian MPs from illegal interference in their activities, ensuring the unimpeded and effective performance of functions and the proper (normal) functioning of the parliament (...).*

*Furthermore, the European Commission «For Democracy through Law» (Venice Commission) drew attention to the consequences of complete abolition of MPs immunity, Commission noted that in a political system with a vulnerable democracy, such as in Ukraine, the complete abolition of immunity can be dangerous for the Parliament’s functioning and its autonomy (...).*» (paragraphs 7 and 8 of section 3.1 of the reasoning part of the opinion).

<sup>2</sup> See opinions [№ 6-B/2019](#) of November 20, 2019, [№ 7-B/2019](#) of December 16, 2019, [№ 9-B/2019](#) of December 24, 2019.

The third unsuccessful attempt to amend the Constitution of Ukraine on decentralization was made in December 2019 — January 2020: on December 13 and 27, 2019, the President of Ukraine submitted to the Verkhovna Rada of Ukraine draft law [№ 2598](#) (initial and revised version), which proposed amendments to the Constitution of Ukraine exclusively in the context of administrative-territorial reform without any hint of the Minsk Agreements, as was the case with the previous draft law of 2015. However, despite the fact that the draft law generally complied with the set objectives and ensured decentralization at the constitutional level (reform of the administrative-territorial system and local self-government in Ukraine), a number of its provisions contained inappropriate, ambiguous, or problematic wording, the implementation of which could prove to be a serious challenge in the future, and therefore it was withdrawn.

On February 22, 2021, the MPs of Ukraine registered in the Parliament a draft Law (Reg. № [5133](#)) on amendments to Articles 85 and 106 of the Constitution of Ukraine (regarding the procedure for appointing and dismissing the Director of the National Anti-Corruption Bureau of Ukraine and the Director of the State Bureau of Investigation). This draft law provided for setting in the Constitution of Ukraine the President's authority to appoint (on a competitive basis) and dismiss the Director of the NABU and the Director of the SBI, with the Parliament's consent. However, after the Parliament referred this draft law to the Constitutional Court of Ukraine on March 16, 2021 in order to obtain an opinion on its compliance with requirements of Articles 157 and 158 of the Constitution of Ukraine, the Constitutional Court of Ukraine never provided the corresponding opinion to the Parliament, despite the fact that, by law, the deadline for consideration of such an issue by the Court has long expired<sup>3</sup>.

As of the beginning of 2022, the Verkhovna Rada of Ukraine was considering the following draft laws on amendments to the Constitution of Ukraine, which were introduced earlier, but were never voted on:

- Draft Law on Amendments to Article 133 of the Constitution of Ukraine (on renaming of Kirovohrad Oblast) — submitted to Verkhovna Rada of Ukraine of VIII convocation (reg. [№ 8380](#)), re-registered on August 29, 2019 in the Verkhovna Rada of Ukraine of the IX convocation (reg. [№ 0967](#)); positive opinion of the Constitutional Court of Ukraine of February 5, 2019 [№ 1-B/2019](#). It provides for the renaming of Kirovohrad oblast to Kropyvnytska. It

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<sup>3</sup> According to paragraph 1 of section three of Article 75 of the Law of Ukraine «[On the Constitutional Court of Ukraine](#)», the term of constitutional proceedings for cases on issuing an opinion on the compliance of the draft law on amendments to the Constitution of Ukraine with requirements of Articles 157 and 158 of the Constitution of Ukraine cannot exceed thirty calendar days.

has not yet been considered by the Verkhovna Rada of Ukraine of VIII and IX convocations;

- Draft Law on Amendments to Article 133 of the Constitution of Ukraine (on renaming of Dnipropetrovsk Oblast) — submitted to the Verkhovna Rada of Ukraine of the VIII convocation (reg. [№ 9310-1](#)), re-registered on August 29, 2019 in the Verkhovna Rada of Ukraine of the IX convocation (reg. [№ 0968](#)); positive opinion of the Constitutional Court of Ukraine of April 2, 2019 [№ 2-B/2019](#). It provides for the renaming of Dnipropetrovsk oblast to Sicheslavsk. It has not yet been considered by the Verkhovna Rada of Ukraine of VIII and IX convocations;
- Draft Law on Amendments to Article 93 of the Constitution of Ukraine (on people's legislative initiative), introduced by the President of Ukraine on August 29, 2019 (reg. [№ 1015](#)) — positive opinion of the Constitutional Court of Ukraine with reservations <sup>4</sup> of November 13, 2019 [№ 5-B/2019](#). It declaratively grants the right of legislative initiative to the people of Ukraine as provided for by a law. It has not yet been considered by the Verkhovna Rada of Ukraine of IX convocation.

These draft laws could hypothetically be adopted in the future after the end of martial law.

## **2. Key issues and challenges as of the beginning of 2022**

*Key issues in the Constitution of Ukraine* that caused the need for its reform (see the full list of issues in the [Green Book of Constitutional Reform in Ukraine](#)):

- Lack of clear hierarchy of national legal acts by legal force.
- Vague constitutional regulation of the status of the President, definition of the scope and limits of his powers, and methods of interaction with the Parliament and the Government.
- Unrealistic constitutional procedure for removing the President of Ukraine from office by impeachment.

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<sup>4</sup> The Constitutional Court of Ukraine drew the attention of the Verkhovna Rada of Ukraine to the following: «2. According to the second part of Article 5 of the Constitution of Ukraine, the people are the bearers of sovereignty and the only source of power in Ukraine, therefore it cannot be defined as such that has the right to initiate legislation without establishing in the Constitution of Ukraine the appropriate number of citizens of Ukraine who have the right to vote, for the implementation of the right to initiate legislation, the provision proposed by the draft law makes it impossible to implement such an initiative. [...] When establishing the cases and procedure for implementing the right to initiate legislation, the Verkhovna Rada of Ukraine cannot limit the right of anyone entitled to initiate legislation by the Constitution of Ukraine». (paragraph 2 of the reasoning of the opinion)

- Controversial regulation of many aspects of the legislative process and parliamentary procedures.
- Unregulated issue of the system of executive authorities, their types and status, as well as the procedure of interaction with other authorities.
- Outdated and inefficient system of administrative-territorial organization and local self-government.
- Technical and legal issues, including: the use of Soviet terminology; the use of different legal terms and constructs to denote the same phenomena (for example, «law enforcement agency», «law and order agency»); lack of consistent approach to the naming of relevant bodies (for example, «Supreme Court» – but «Constitutional Court of Ukraine»).
- Lack of clear regulation of public finance issues and extraordinary constitutional regimes (for example, state of emergency, martial law, state of war).

In addition, the following challenges/problems regarding the *reform of the Constitution and the constitutional process* should be mentioned:

- Lack of conceptual vision of the constitutional reform. Constitutional initiatives launched by MPs or the President of Ukraine, as a rule, are the result of changing political arrangements and do not set far-reaching goals for addressing current issues of the constitutional legal order in the Ukrainian society's interests.
- Draft laws on amendments to the Constitution of Ukraine are prepared by authorities without proper prior discussion with expert community and civil society. This leads both to an extremely ambiguous assessment of constitutional innovations (especially among experts and international partners), as well as to the low quality of the documents themselves, which is confirmed by negative opinions and legal positions of the Constitutional Court of Ukraine.
- Constitutional populism. The process of initiating, developing, and introducing amendments to the Constitution of Ukraine is a hostage to political interests: frequently offered simple and quick solutions do not address the complex issues of Ukraine's state mechanism functioning. The result of such an approach is the devaluation of the Basic Law as a fundamental value of the state and society.
- Lack of attention to the systemic problem of branches of power imbalance,

which was put on the agenda after the Revolution of Dignity and, until now, no logical solution has been found for conducting a comprehensive constitutional reform to improve the mixed form of government. Constitutional initiatives mostly introduce an even greater imbalance into the system of public governance rather than correcting existing shortcomings.

- Low quality of the texts of draft laws with regards to legal technique. Draft laws on amendments to the Constitution of Ukraine, as a rule, contain significant legal shortcomings, contributing to the emergence of conflicts in legal regulation of social relations, as well as contain contradictory and ambiguous provisions.
- Ignoring the need for timely preliminary control of draft laws on constitutional amendments by the Constitutional Court of Ukraine. In particular, in the case regarding draft law № 5133 of February 22, 2021, the Constitutional Court of Ukraine did not provide its opinion within the time limit established by law, which blocks the possibility of its potential consideration in the Parliament.

### **3. Plans and actions of the authorities in this area as of beginning of 2022**

As of the beginning of 2022, no new draft laws on amendments to the Constitution of Ukraine, other than those mentioned above, have been initiated. The only issue that was constantly raised by the authorities on the political agenda was the reform of administrative-territorial system and the completion of decentralization reform through the introduction of appropriate amendments to the Constitution of Ukraine. In particular, the government set itself the task to complete the decentralization reform by enshrining in the Constitution of Ukraine a new administrative-territorial system and strengthening local self-government, including through the establishment of financial guarantees for its implementation. However, despite the fact that the decentralization reform was launched back in 2014 and the reform of sub-regional administrative and territorial system of Ukraine was conducted in 2020 (see Resolution of the Verkhovna Rada of Ukraine of July 17, 2020 «[On the Formation and Liquidation of Districts](#)»), the necessary amendments to the Constitution of Ukraine had not been made as of beginning of 2022.

As of the beginning of 2022, a fairly good level of dialogue between the public and authorities regarding the reform of the Constitution was established. In particular, on December 28, 2020, the Centre of Policy and Legal Reform published a public experts' [appeal](#) to the members of the Parliament of Ukraine regarding the creation of a parliamentary expert working group on constitutional reform. 16 MPs responded to the invitation and actively participated in the working group's meetings. During

January - May 2021, this working group held 9 closed and 2 public (expanded) online meetings. As a result, the [Green Book on Constitutional Reform in Ukraine](#) was prepared and discussed.

Furthermore, on July 20, 2021, the Verkhovna Rada of Ukraine [created](#) the largest inter-factional MPs association «*For Constitutional Reform and Effective Power*», which at that time included 283 MPs. The purpose of its creation is to set forward the constitutional reform's priority directions, interaction with expert civic organizations on exchanging information on the necessary amendments to the Constitution of Ukraine, and the formation of a coordination center in the executive branch. However, as of the beginning of 2022, not a single draft law on amendment to the Constitution of Ukraine were been registered by this association.

#### **4. The influence of the war and martial law on this area of state policy**

Since the Constitution cannot be amended under conditions of martial law or a state of emergency (paragraph two of Article 157 of the Constitution of Ukraine), the constitutional process in Ukraine was put on hold after February 24, 2022. However, whereas martial law is an obstacle to constitutional reform from the legal point of view, the war itself is an existential challenge for Ukraine's statehood, which at the same time remains a catalyst for long-overdue reforms. It is obvious that the current war:

- makes it possible to more clearly see the problems of constitutional regulation of public administration at different levels of the organization of power, which were not given enough attention during peace times;
- helps the society to redefine the values and meaning of democracy, the rule of law, human dignity, human rights, and constitutionalism for the Ukrainian people in extreme conditions;
- demonstrates the urgency of the need for decommunization of the text of the Constitution of Ukraine and de-Sovietization of constitutional legislation;
- actualizes the problems of constitutionalism in the eyes of various socio-political actors and stakeholders;
- builds an all-encompassing public demand for full-fledged and comprehensive constitutional reform after Ukraine's victory.

Therefore, the restoration of the constitutional process after the war should become the basis of deep transformational processes that are taking place in the Ukrainian society after February 24, 2022. In particular, immediately after the victory, it is

advisable to form a political-scholarly-public constitutional commission, which will prepare draft law(s) on constitutional amendments. Preparation of a new version of the Constitution of Ukraine can be an option of this reform. Corresponding constitutional initiatives must necessarily become the subject of a broad public discussion, as well as pass the stages of consideration and approval in the Parliament. Should they contain proposals for amendments to Chapters I, III, XIII of the Constitution of Ukraine, or should a new version of the Constitution of Ukraine will be prepared, then - after consideration and adoption in the Parliament - they must be approved in an all-Ukrainian referendum. Such a constitutional reform will be a natural result of the formalization of the post-war constitutional order and will also symbolize the beginning of a new stage of state-building processes in Ukraine.

## **5. EU requirements and standards in this area, as well as other international**

There are no uniform requirements or standards regarding the substantive content of constitutional reform or its procedural component in the EU, since the constitutional order in each EU member state is unique and based on its own national constitutional traditions.

However, in the course of ongoing cooperation between Ukraine and the Venice Commission, the latter developed a number of recommendations regarding constitutional reform in Ukraine. And although the Venice Commission did not provide Ukraine with specific instructions regarding the selection of a desired form of governance, the Venice Commission in its opinions repeatedly indicated that the current governance system in Ukraine is not balanced or effective, which constantly leads to a threat to democracy and the rule of law. In particular, during the implementation of the «[Reform Speedometer](#)» project, the Centre of Policy and Legal Reform systematized all of the Venice Commission's recommendations in public and legal areas, and monitored their implementation (see Appendix № 1 to the brief).

Furthermore, the following key documents of the Venice Commission regarding the Constitution of Ukraine and the constitutional process in Ukraine should be mentioned:

- Opinion on the Constitution of Ukraine, adopted by the Venice Commission at its 30th plenary meeting (Venice, March 7-8, 1997), [CDL-INF\(1997\)002-e](#);
- Opinion on the amendments to the Constitution of Ukraine, adopted on December 8, 2004, adopted by the Venice Commission at its 63rd plenary session (Venice, June 10-11, 2005), [CDL-AD\(2005\)015-e](#);

- Opinion on the constitutional situation in Ukraine, adopted by the Venice Commission at its 85th plenary session (Venice, December 17-18, 2010), [CDL-AD\(2010\)044](#);
- Opinion on the draft law amending the Constitution of Ukraine, submitted by the President of Ukraine on July 2, 2014, adopted by the Venice Commission at its 100th plenary session (Rome, October 10-11, 2014), [CDL-AD\(2014\)037](#);
- Opinion on draft constitutional amendments on the immunity of members of parliament and judges of Ukraine, adopted by the Venice Commission at its 103rd plenary session (Venice, June 19-20, 2015), [CDL-AD\(2015\)013](#);
- Secretariat Memorandum on the compatibility of the Draft Law of Ukraine on amending the Constitution of Ukraine as to Justice as submitted by the President to the Verkhovna Rada on 25 November 2015, ([CDL-REF\(2015\)047](#)), -
- Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015 ([CDL-AD\(2015\)027](#)), taken note of by the Venice Commission at its 105th Plenary Session (Venice, 18-19 December 2015), [CDL-AD\(2015\)043](#);
- *Amicus Curiae Brief* on the limits of subsequent (*a posteriori*) review of constitutional amendments by the Constitutional Court, adopted by the Venice Commission at its 131 Plenary Session (Venice, 17-18 June, 2022), [CDL-AD\(2022\)012](#).

## **6. Current plans of the authorities as of the Fall of 2022, including Ukraine's Recovery Plan**

The authorities are fully aware of the need for constitutional reform, as stated, in particular, in Ukraine's Recovery Plan. Due to the impossibility of constitutional amendments in fall of 2022 since martial law still continues, a hypothetical constitutional process can begin, according to the authors of the document, no earlier than January 2023 (in the event of the end of martial law); however, the lack of political consensus on constitutional changes is one of the risks of achieving the corresponding goal.

In the Ukraine's Recovery Plan, the authorities set the following goal in the context of constitutional reform: review of the powers of Verkhovna Rada of Ukraine, the President of Ukraine, and the Cabinet of Ministers of Ukraine in order to create an effective system of checks and balances in the Constitution of Ukraine. To achieve

this goal, the following steps are suggested:

- forming a government-centric model of the law-making process;
- providing in the Constitution of Ukraine for the division of laws into constitutional (amendments to the Constitution), organic, ordinary, and laws on the ratification of international treaties, as well as specifying the procedure for their adoption;
- reducing the quantitative composition of the Verkhovna Rada of Ukraine to 300 members, as well as specifying the quorum needed for conducting the Parliament's session (a majority of the Parliament's constitutional composition);
- regulating the control function of committees and the activity of special control commissions;
- deepening the decentralization and reforming the local self-government in Ukraine.

The latest date for the entry into force of such laws on amendments to the Constitution of Ukraine, in accordance with Ukraine's Recovery Plan, is January 2027.