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# THE APPOINTMENT/ELECTION OF THE JUDGES OF THE ITALIAN CONSTITUTIONAL COURT AND SOME RECOMMENDATIONS FOR UKRAINE IN THE LIGHT OF ITALY'S BEST PRACTICES AND THE PRINCIPLES OF THE VENICE COMMISSION

**ABSTRACT.** The procedure to select Judges of the Constitutional Court of Ukraine has recently been reformed.

The purpose of this article is to briefly describe the system of appointment/election of the Judges of the Corte costituzionale (the Italian Constitutional Court), first; but also to enrich existing studies by offering some recommendations for Ukraine. Notwithstanding the recent reform, some issues are still there, even at the level of the Ukrainian Constitution. The Italian system of appointment/election of the Judges of the Constitutional Court is rather similar to that of Ukraine (both being a hybrid system: one third of the Judges are appointed by the President of the Republic; one third are elected by Parliament; one third are in some way elected by the Judiciary). However, in Italy there is no procedure of competitive selection of candidates for the position of Judges, like that established in Ukraine: practices in Italy in this field are mainly regulated by conventions.

Methodologically speaking, the recommendations for Ukraine will be given here in the light of the best practices (according to the principles of constitutionalism) that have been experienced in Italy for the last seven decades but also in the light of the principles of the European Commission for Democracy through Law of the Council of Europe (Venice Commission).

The recommendations for Ukraine will be as follows: (i) the current hybrid system of appointment/election of Judges and the current procedure of competitive selection should be kept; (ii) the current countersignature (by the Prime Minister) of the presidential act of appointment of Judges should be kept; (iii) a qualified majority and a secret ballot (without discussion) for the election of Judges by Parliament should be introduced in the Constitution; (iv) provisions concerning the extension of the term of the office of Judges should be introduced in the Constitution; (v) the procedure of appointment/election should be set out more in detail in the Constitution (or at least in the implementing legislation), when it comes to the requisites to be appointed/elected as Judge.

Such recommendations could help Ukraine to establish a system of appointment/election of Judges of the Constitutional Court that would be in compliance with the principles of European constitutionalism and of the Venice Commission (and also to fulfil indirectly some commitments that have been required by the European Commission to grant Ukraine EU candidate status).

KEYWORDS: Corte costituzionale; Constitutional Court; Italy; appointment; election; Judges; Ukraine; European Commission for Democracy through Law of the Council of Europe (Venice Commission); EU candidate status.

### *Introduction*

The procedure to select Judges of the Constitutional Court of Ukraine has recently been reformed<sup>1</sup>.

The purpose of this article is to briefly describe the system of appointment/election of the Judges of the Italian Constitutional Court; and to enrich existing studies by offering some recommendations for Ukraine. Notwithstanding the recent reform in Ukraine, some issues are still there<sup>2</sup>, even at the level of the Ukrainian Constitution.

Methodologically speaking, the recommendations for Ukraine will be given here in the light of the best practices (according to the principles of constitutionalism) that have been experienced in Italy for the last seven decades and also in the light of the principles of the European Commission for Democracy through Law of the Council of Europe (Venice Commission).

These recommendations could help Ukraine to establish a system of appointment/election of Judges of the Constitutional Court that would be in compliance with the principles of European constitutionalism and in particular of the Venice Commission. Being some principles of the Venice Commission endorsed by the European Commission, such recommendations would also help Ukraine to fulfil some commitments that have been required by the European Commission to grant Ukraine EU candidate status.

### *The Italian system of appointment/election of the Judges of the Corte costituzionale (the Italian Constitutional Court)*

The Italian Constitutional Court (*Corte costituzionale*)<sup>3</sup> is composed of fifteen Judges. The Ukrainian Constitutional Court is composed of eighteen Judges. In both cases, Judges are appointed/nominated for nine years, they

<sup>1</sup> See the Law passed by the Ukrainian Parliament on 13 December 2022, signed by the Speaker on 14 December 2022 and promulgated by the President of Ukraine on 20 December 2022.

<sup>2</sup> See: Sergiy Panasyuk, 'Why the selection process for judges of Ukraine's Constitutional Court may become a stumbling block for EU membership' (*IACL-AIDC blog*, 23.02.2023) <<https://blog-iacl-aidc.org/2023-posts/2023/2/23/why-the-selection-process-for-judges-of-ukraines-constitutional-court-may-become-a-stumbling-block-for-eu-membership>> (accessed: 10.05.2023) (in English).

<sup>3</sup> On the Italian Constitutional Court, see: Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia, Andrea Simoncini, *Italian Constitutional Justice in Global Context* (OUP 2015).

cannot be re-appointed/elected and their mandate begins on the day of their oath (Article 135, Italian Constitution; Article 148, Ukrainian Constitution).

The Italian system of appointment/election of the Judges of the Constitutional Court is rather similar to the Ukrainian system. In both States the power to select the Judges is distributed among several public institutions<sup>4</sup>. From a slightly different perspective, both systems can be qualified as a hybrid system between election and direct appointment<sup>5</sup> (Article 135, Italian Constitution; Article 148, Ukrainian Constitution): both in Italy and in Ukraine, one third of the Judges are appointed by the President of the Republic; one third are elected by Parliament (in Italy, by Parliament in joint sitting, as the Italian Parliament is bicameral); one third are somehow elected by the Judiciary (in Italy, by the ordinary and administrative supreme courts; in Ukraine by the Congress of the Judges of Ukraine).

In Italy, those Judges who are elected by Parliament in joint sitting, are elected on a secret ballot by a majority of two thirds of the members of Parliament itself; from the fourth ballot, a majority of three fifths is sufficient (Article 3, Constitutional Act 22 November 1967, No. 2). In Ukraine, those Judges who are elected by Parliament, are elected on an open ballot by a majority of the members of Parliament, after a debate (Article 208-4, Rules of Procedure of the *Verkhovna Rada* of Ukraine).

In Italy, at the expiry of their term, Judges shall leave their office and the exercise of the functions thereof (Article 135, Italian Constitution). Similarly, in Ukraine, the authority of a Judge shall be terminated in case of expiry of the term of their office (Article 149, Ukrainian Constitution).

As for the requisites to be elected as Judges of the Italian Constitutional Court, Judges shall be chosen: (i) from among Judges, including those retired, of the ordinary and administrative higher Courts; (ii) from full university professors of law; (iii) from attorneys with at least twenty years practice (Article 135, Italian Constitution). As for Ukraine, a citizen of Ukraine who has command of the state language, attained the age of forty on the day of appointment, has a higher legal education and professional experience in the sphere of law no less than fifteen years, has high moral values and is a lawyer of recognised competence may be a Judge of the Constitutional Court (Article 148, Ukrainian Constitution).

In Italy there is no procedure of competitive selection of candidates for the position of Judges, like that established under the Law of Ukraine 'On the Constitutional Court of Ukraine' (Article 148 of the Ukrainian constitution delegates the law to regulate such a procedure): practices in Italy in this field are mainly regulated by conventions.

<sup>4</sup> Maartje de Visser, *Constitutional Review in Europe. A Comparative Analysis* (Hart Publishing 2014) 208.

<sup>5</sup> CDL-STD(1997)020-e The Composition of Constitutional Courts – Science and Technique of Democracy, no. 20 (1997) European Commission for Democracy through Law (Venice Commission) 5–6 <[https://www.venice.coe.int/webforms/documents/default.aspx?ref=cdl-std\(1997\)020&lang=EN](https://www.venice.coe.int/webforms/documents/default.aspx?ref=cdl-std(1997)020&lang=EN)> (accessed: 10.05.2023).

In Italy, Judges elected by Parliament in joint session are usually politicians (who have the aforementioned requisites). By unwritten convention, before the ballot, the Majority and the Opposition informally agrees on candidates that can reach a bipartisan support<sup>6</sup>. In any case, the qualified majority to elect Judges (two thirds during the first three ballots; three fifths from the fourth ballot) prevent the Majority from electing candidates that do not find the support of the Opposition. Not surprisingly, party leaders, former party leaders or politicians who have had strong party-political viewpoints, have never been elected as Constitutional Judges.

By unwritten convention, when the President of the Republic (who, in Italy, is elected by Parliament in joint session and mainly plays a politically neutral role) appoints the Judges of the Constitutional Court, they appoint people whose cultural and legal tendencies reflect those tendencies that have been left out by Parliament, when the latter elected the Judges. The rationale of this practice is establishing a Constitutional Court that reflects the various cultural and legal tendencies that are rooted in the Italian society.

*Some recommendations for Ukraine  
(in the light of Italy's best practices and the principles of the European  
Commission for Democracy through Law of the Council of Europe)*

Once the system of appointment/election of the Judges of the Italian Constitutional Court and the main differences with the Ukrainian system have been briefly described, it is now time to focus on giving some recommendations for Ukraine.

Methodologically speaking, the recommendations will be given here in the light of the best practices (according to the principles of constitutionalism) that have been experienced in Italy for the last seven decades. However, in doing so, such recommendations will also be given by taking into account the principles of European constitutionalism and in particular those established by the Venice Commission. Being some principles of the Venice Commission endorsed by the European Commission, such recommendations would also help Ukraine to fulfil some commitments that have been required by the European Commission to grant Ukraine EU candidate status.

*1. The hybrid system and the procedure for competitive selection*

The current hybrid system of appointment/election of Judges in Ukraine should be kept.

The hybrid system is like a lake, whose water is derived from three different tributaries. In such a way, the water of the lake would always be mild: never too

<sup>6</sup> Alec Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (OUP 2000) 46–8.

cold, never too hot. In other words, as was pointed out by the former President of the Italian Constitutional Court Marta Cartabia, ‘Italian constitutional law is intensely relational – it speaks of cooperation, interdependence, interaction, links, networks, and the like’. ‘Relationality’, she wrote, ‘is imprinted in the very structure of the Court’. Therefore, all the branches of the State have a say in the appointment/election of the Judges. As Cartabia stated, ‘Although the members of the Court are fully independent and do not answer to their “constituencies”, they proceed from different bodies. This fact matters’<sup>7</sup>.

After all, hybrid systems have been welcomed by the Venice Commission that has recommended ‘establishing mechanism which help to ensure a balanced composition of constitutional courts’<sup>8</sup>. In the 2016 Opinion on the proposed amendments to the Constitution of Ukraine, the Venice Commission expressly stated that the Ukrainian hybrid system ‘deserves to be supported’<sup>9</sup>.

The Venice Commission also noted that:

Constitutional justice must, by its composition, guarantee independence with regard to different interest groups and contribute towards the establishment of a body of jurisprudence which is mindful of this pluralism. The legitimacy of a constitutional jurisdiction and society’s acceptance of its decision may depend very heavily on the extent of the court’s consideration of the different social values at stake, even though such values are generally superseded in favour of common values. To this end, a balance which ensures respect for different sensibilities must be entrenched in the rules of composition of these jurisdictions<sup>10</sup>.

Such a system should be favoured, the Venice Commission stated, over an elective system, as the latter ‘is reliant on a political agreement, which may endanger the stability of the institution if the system does not provide safeguard’ when a position becomes vacant<sup>11</sup>. In Hungary and Poland, the possibility for the Parliament to elect *all* the Judges of the Constitutional Court (moreover, with no special majority in Poland and with the abolition of the *equal* committee to select candidates in Hungary in 2010), has led to the ‘capture’ of the Constitutional Court by the ruling party in Parliament. At the end of the day, this system has contributed to the establishment of ‘illiberal democracies’ since 2010 in Hungary and since 2015 in Poland<sup>12</sup>.

<sup>7</sup> Marta Cartabia, ‘Of Bridges and Walls: the “Italian Style” of Constitutional Adjudication’ (2016) 8 *The Italian Journal of Public Law*, 37, 44–5.

<sup>8</sup> CDL-AD(2016)001-e Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016) para 116 <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)001-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e)> (accessed: 10.05.2023).

<sup>9</sup> CDL-AD(2015)027-e Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015 adopted by the Venice Commission at its 104th Plenary Session (Venice, 23–24 October 2015) para 24 <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)027-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)027-e)> (accessed: 10.05.2023).

<sup>10</sup> CDL-STD(1997)020-e (n 5) 21.

<sup>11</sup> *Ibid* 7.

<sup>12</sup> Giacomo Delledonne, ‘Appointing and Electing Constitutional judges: An Evolving Comparative Landscape’ in Belov Martin (ed), *The Role of courts in Contemporary Legal Orders* (Eleven International Publishing 2019) 161.

Also the current procedure for competitive selection of Judges in Ukraine should be kept.

In the 2013 Opinion on the proposed amendments to the Constitution of Ukraine, the Venice Commission expressly stated that the selection of the candidates for the position of Judges done through contest 'is to be welcomed as corresponding to the best practices in the international and European legal standard on the judiciary'<sup>13</sup>.

*2. The appointment by the President of the Republic:  
the countersignature by the Prime Minister*

As already mentioned, when the President of the Republic in Italy appoints the Judges of the Constitutional Court, they appoint people whose cultural and legal tendencies reflect those tendencies that have been left out by Parliament, when the latter elected the Judges.

Should it be the same for the President of the Republic in Ukraine?

The composition of the Constitutional Court should be inspired by the principle of pluralism. Thus, also the appointment of Judges of the Constitutional Court by the President should be carried out with the aim of reflecting the pluralism of society within the Constitutional Court.

However, in Italy the President of the Republic is elected by Parliament in joint session and plays a politically neutral role. In Ukraine the President of the Republic is directly elected by the people and plays a role that is not politically neutral. This would lead to a different conclusion with the Ukrainian case, then.

That said, the powers of the President of the Republic cannot be unlimited.

Both in Italy (Articles 87 and 89, Italian Constitution) and in Ukraine (Article 106, Ukrainian Constitution), the act of appointment of the Judges of the Constitutional Court shall be countersigned by the Prime Minister. Countersignature is a fundamental tool under the principles of the European Constitutionalism: first, it assures that the political responsibility of that act is taken by the Minister before the Parliament; secondly, it assures a control (although focussed on evident legal errors only) by the Minister on the act of the President of the Republic. If only the countersignature was invented at that time, Emperor Caligula would not have been allowed to appoint his horse as Senator, perhaps...

This is the reason why the countersignature in Ukraine should be kept, especially when it comes to such a relevant act such as the appointment of Judges of the Constitutional Court.

<sup>13</sup> CDL-AD(2013)014-e Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14–15 June 2013) para 27 <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)014-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)014-e)> (accessed: 10.05.2023).

Another indirect limit to the powers of the President of the Republic is the hybrid system itself: the President cannot appoint *all* the Judges of the Constitutional Court but only one third of them.

However, there is still a huge risk. As said, the ruling party in the Parliament could easily elect one third of the Judges. If the President of the Republic and the Majority in the Parliament belong to the same party, two thirds of the Judges of the Constitutional Court would be chosen by the same political majority, with no say of the Opposition.

This is the reason why it would be essential to introduce in the Ukrainian Constitution a qualified majority for the election, by Parliament, of one third of the Judges of the Constitutional Court, as will be examined in the next Section.

### *3. The election by Parliament: a qualified majority and a secret ballot (without discussion) in the Constitution*

As already mentioned, in Italy, those Judges who are elected by Parliament in joint sitting, are elected on a secret ballot by a majority of two thirds of the members of Parliament themselves; from the fourth ballot, a majority of three fifths is sufficient. The same can be found in Germany and Spain: as Stone Sweet noted, analysing these countries, 'Where election systems are used a qualified, or super, majority (a 2/3 or 3/5 vote) within a parliamentary body is necessary for appointment'<sup>14</sup>. On the contrary, in Ukraine, those Judges who are elected by Parliament, are elected on an open ballot by a majority of the members of Parliament, after a debate.

A qualified majority for the election of Judges by Parliament should be introduced in the Ukrainian Constitution. As already noted, the qualified majority to elect Judges in Italy has prevented the Majority from electing candidates that would not find the support of the Opposition<sup>15</sup>.

As has been noted with regards to some Post-Yugoslav States where no supermajority to elect Judges is required (viz. Bosnia and Herzegovina, North Macedonia, Serbia and Slovenia), the lack of such a supermajority 'can be criticized due to fact that the constitutional courts should have the highest possible legitimacy'<sup>16</sup>.

In the *Rule of Law Checklist* of the Venice Commission (2016), one of the questions about constitutional adjudication is as follows: 'If constitutional judges are elected by Parliament, is there a requirement for a qualified majority and other safeguards for a balanced composition?'<sup>17</sup>.

<sup>14</sup> Stone Sweet (n 6) 46.

<sup>15</sup> de Visser (n 4) 209.

<sup>16</sup> Đorđe Marković, 'Procedures and Conditions for the Selection of the Constitutional Court Judges in the Post-Yugoslav States' (2019) 67 *Anali Pravnog fakulteta u Beogradu* 3, 283.

<sup>17</sup> CDL-AD(2016)007-e Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016) 27 <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e)> (accessed: 10.05.2023).

In 2015 the Venice Commission expressly recommended that Ukraine introduced a qualified majority to elect Judges of the Constitutional Court. The Venice Commission underlined the risk of having two thirds of the Judges of the Constitutional Court chosen by the same political majority (i. e., that of the President of the Republic and of the Majority in the Parliament), just as warned here in the previous Section. As in Ukraine the President is not a politically neutral institution, the Venice Commission noted, ‘there could therefore arise a situation in which twelve judges are chosen by the same political majority’<sup>18</sup>.

Such a recommendation to Ukraine has been repeated by the Venice Commission in 2020<sup>19</sup>, in November 2022<sup>20</sup> and in December 2022<sup>21</sup>.

It has been noted above what happened in Hungary and Poland. No qualified majority for the election of Judges of the Constitutional Court is required by the Constitution in Poland. In Hungary the *equal* committee (composed of one member for each parliamentary group) to select, on consensus basis, candidates as Judges of the Constitutional Court was abolished in 2010<sup>22</sup>. This led to the ‘capture’ of the Constitutional Court by the ruling party in Parliament and has contributed to the establishment of ‘illiberal democracies’ in those countries<sup>23</sup>. As said, in Hungary and Poland the Parliament can elect the whole Constitutional Court on its own. However, also having two thirds of the Constitutional Court chosen by the same political majority (i.e., that of the President of the Republic and the Majority in the Parliament) with no qualified majority for Parliament, as could happen in Ukraine, would also be dangerous for the independence and the pluralism of the Constitutional Court. Obviously, such a qualified majority could be hard to obtain (as the Venice Commission admitted in 2015)<sup>24</sup>. However, in Italy, the qualified majority lowers from two thirds to three fifths from the fourth ballots.

<sup>18</sup> CDL-AD(2015)027-e (n 9) para 25.

<sup>19</sup> CDL-AD(2020)039-e Ukraine – Urgent opinion on the Reform of the Constitutional Court, issued pursuant to Article 14a of the Venice Commission’s Rules of Procedure on 9 December 2020, endorsed by the Venice Commission on 11 December 2020 at its 125th online Plenary Session (11–12 December 2020) para 72 <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)039-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)039-e)> (accessed: 10.05.2023).

<sup>20</sup> CDL-AD(2022)046-e Serbia – Joint Opinion of the Venice Commission and the OSCE/ODIHR on the constitutional and legal framework governing the functioning of democratic institutions in Serbia – Electoral law and electoral administration, approved by the Council for Democratic Elections at its 75th meeting (Venice, 15 December 2022) and adopted by the Venice Commission at its 133rd Plenary Session (Venice, 16–17 December 2022) para 64 <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2022\)046-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)046-e)> (accessed: 10.05.2023).

<sup>21</sup> CDL-AD(2022)054-e Ukraine – Opinion on the draft law “On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis”, adopted by the Venice Commission at its 133rd Plenary session (Venice, 16-17 December 2022) para 67 <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2022\)054-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)054-e)> (accessed: 10.05.2023).

<sup>22</sup> See Kriszta Kovács, Gábor Attila Tóth, ‘Hungary’s Constitutional Transformation’ (2011) 7 European Constitutional Law Review, 183, 193.

<sup>23</sup> On Poland, see Wojciech Brzozowski, ‘Can the Constitutional Court Accelerate Democratic Backsliding? Lessons from the Polish Experience’ in Martin Belov (n 12) 371.

<sup>24</sup> CDL-AD(2015)027-e (n 9) para 25.



From the perspective of the Italian experience, also a secret ballot should be introduced in Ukraine for the election of the Judges of the Constitutional Court. And also the debate in Parliament should be removed.

Debates and public ballots should be carried out when the person/body to be elected is not politically neutral, such as the Prime Minister and the Government (i. e., confidence vote). In that case, the confidence relationship between the Parliament and the Executive is just founded on the public ballot and the debate in Parliament. In other words, the Majority and the Opposition (i.e., who are the MPs who belong to the Majority and who are the MPs who belong to the Opposition) are legally and politically defined just thanks to such a debate and public ballot. On the contrary, there is no confidence relationship between the Parliament and the Judges of the Constitutional Court. The latter are neither representatives of the former nor of the Majority.

A public ballot does not help Judges to get their independence, once elected. First, because they could appear as the Judges that were elected by *that* Majority, by *that* party or by *those* MPs. Secondly, because, even worse, those MPs who elect the Judges, could influence the Judges themselves, if the name of the electors were known.

It is very likely that a debate would see MPs opposing one another along party-political lines, when it comes to electing Judges. Once again, this should not be the criterion to choose Judges for the Constitutional Court. As has been noted, 'parliamentary hearings and legislative appointments do not guarantee genuine debate, competition or transparency in the course of the nomination or appointment process'<sup>25</sup>.

#### 4. *The extension of the term of the office of Judges in the Constitution*

As already noted, both in Italy and in Ukraine, the authority of a Judge shall be terminated in the event of expiry of the term of their office.

However, such a provision has not been welcomed by the Venice Commission. In some States, Judges continue to serve on the Constitutional Court after the expiry of their term of office and until their successor is appointed (in Latin, such a continuation is called '*prorogatio*'). As the Venice Commission noted, the *prorogatio* 'effectively prevents a stalemate in the appointment process from destabilizing the composition of the court'<sup>26</sup>.

A stalemate might occur when political forces cannot reach an agreement within Parliament, especially when a qualified majority to elect Judges is required by the Constitution. Stalemates have happened several times in Italy: in 2015 Parliament voted thirty-two times before being able to reach an

<sup>25</sup> Renáta Uitz, 'Judicial Appointments to Supreme Courts and Constitutional Courts: What Do We See and What Are We Fated to Miss?' in Renáta Uitz (ed), *Arguments that Work: Strategies, Contexts and Limits in Constitutional Litigation* (Eleven International Publishing 2013) 152.

<sup>26</sup> CDL-STD(1997)020-e (n 5) 7.

agreement and elect a Judge; in 2002 the Constitutional Court was unable to carry out its tasks because there was a legitimate impediment for some Judges on that day but at the same time two seats were vacant (i. e., Parliament was not able to reach the agreement to elect two Judges)<sup>27</sup>.

This issue is rather controversial. On the one hand, the expiration of the powers of the Judges in case of expiry of their office prevents Judges from exercising their powers longer than their mandate allows. However, the risk of blocking the functioning of the Constitutional Court due to a political stalemate in electing new Judges is too big.

This is the reason why in 2006 the Venice Commission recommended that Ukraine provides that a Judge remains in office until their successor takes office<sup>28</sup>. Such a constitutional provision would be even more necessary if a qualified majority for Parliament to elect Judges was introduced in the Constitution, as recommended here: with such a qualified majority, a stalemate could be always possible. However, the quorum required for the election could be lowered in case of prolonged inaction<sup>29</sup>, as is set in the Italian Constitution (the qualified majority lowers from two thirds to three fifths from the fourth ballots, as already mentioned).

*5. A more-detailed procedure of appointment/election in the Constitution (or at least in the implementing legislation), when it comes to the requisites to be appointed/elected as Judge*

As mentioned, in Italy there is no procedure of competitive selection of candidates for the position of Judges, whereas in Ukraine the procedure of selection is set out under the Law of Ukraine ‘On the Constitutional Court of Ukraine’ (Article 148 of the Ukrainian Constitution delegates the law to regulate such a procedure).

However, in 2020 the Venice Commission stated with regards to Ukraine that:

While the general principle of competitive selection by screening committees applies to all three appointing bodies, the appointment procedure applied by the three appointing bodies do not ensure the highest level and professional qualification of the candidates. Each of the appointing bodies can determine its own procedure<sup>30</sup>.

<sup>27</sup> Elena Malfatti, Saule Panizza, Roberto Romboli, *Giustizia costituzionale* (Giappichelli 2021) 49.

<sup>28</sup> CDL-AD(2006)016-e Opinion on possible Constitutional and Legislative Improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine adopted by the Venice Commission at its 67th Plenary Session (Venice, 9–10 June 2006) para 21(b) <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2006\)016-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)016-e)> (accessed: 10.05.2023).

<sup>29</sup> CDL-STD(1997)020-e (n 5) 22.

<sup>30</sup> CDL-AD(2020)039-e (n 19) para 74.

In particular, the Venice Commission recommended that Ukraine established a screening body (for candidates for the office of Judges of the Constitutional Court) with an international component, which could include international human rights experts and participation from civil society, to ensure the moral and professional qualities of the candidates<sup>31</sup>.

Such a body was established by the Law passed by the Ukrainian Parliament in December 2022: that is the Advisory Group of Experts (AGE), composed of three national and three 'international' members, that assists the subjects responsible for appointing Judges of the Constitutional Court with evaluation of moral qualities and level of competence.

However, while examining the draft bill, the Venice Commission recommended that the number of the AGE members should be increased from six to seven in order to prevent a stalemate in the decision and that the seventh member should be on the international quota<sup>32</sup>. The Venice Commission also recommended that candidates who are judged by the AGE to be 'not suitable' are to be excluded from further consideration and must not be chosen by the appointing bodies<sup>33</sup>.

These two last recommendations have not been followed by Ukraine in the Law passed in December 2022, as the President of the Venice Commission noted on 25 January 2023<sup>34</sup>. Neither the bill, registered in the Verkhovna Rada in April 2023 to amend the aforementioned Law, followed those recommendations. According to some commentators, this bill would even deepen the problems<sup>35</sup>.

According to some commentators, with the Law passed in December 2022 Ukraine would not be in compliance with the commitments required by the European Commission to grant EU candidate status<sup>36</sup>. As noted, the European Commission, in its communication on Ukraine's application for membership of the European Union (17 June 2022), recommended that EU candidate status should be granted to Ukraine on the understanding that (among other steps) the following step is taken: 'enact and implement legislation on a selection procedure for judges of the Constitutional Court of Ukraine, including a pre-selection process based on evaluation of their integrity and professional skills, in line with Venice Commission recommendations'<sup>37</sup>. In its Statement (13 January 2023), the Spokesperson of the Delegation of the European Union

<sup>31</sup> Ibid paras 77-81 and 102.

<sup>32</sup> CDL-AD(2022)054-e (n 21) para 60.

<sup>33</sup> Ibid para 63.

<sup>34</sup> President of the European Commission for Democracy through Law (Venice Commission), *Letter to the Chairman of the Verkhovna Rada*, Ukraine J.Dem. 50 – SGM/sm.

<sup>35</sup> M Zhernakov, S Berko, H Chyzhyk, K Butko, 'Ukrainian Players Aim to Control Constitutional Court, Forcing Europe to Greenlight It' (*European Pravda*, 24.04.2023) <<https://www.euointegration.com.ua/eng/articles/2023/04/24/7160397>> (accessed: 10.05.2023).

<sup>36</sup> Panasyuk (n 2).

<sup>37</sup> European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council – Commission Opinion on Ukraine's application for membership of the European Union* COM(2022) 407 final 20 <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022DC0407>> (accessed: 10.05.2023).

to Ukraine noted that the EU was closely monitoring the alignment of the reform of the Constitutional Court of Ukraine with the recommendations of the Venice Commission. In particular, it underlined that the Venice Commission recommended that an exclusion of Constitutional Court candidates should also be done on the ground of professional competence and that the number of the AGE should be increased to seven, with the seventh member coming from the international quota<sup>38</sup>.

Some general reflections could be carried out here.

In order to have a common procedure that could ensure the highest integrity and professional qualification of the candidates, the requisites to be appointed/elected as Judge should be set out more in detail in the Constitution (or at least, in the implementing legislation). Moreover, those requisites should be legally binding and the decision of the AGE concerning the lack of such requisites should prevent the candidates, who has passed the evaluation of the AGE with a negative result, to be appointed/elected Judges.

As mentioned, Article 148 of the Ukrainian Constitution requires ‘high moral values’ and ‘recognised competence’ to be appointed/elected as Judge of the Constitutional Court. However, what do exactly ‘high moral values’ or ‘recognised competence’ mean? This should be set out more in detail in the Constitution (or at least in the implementing legislation).

Under the Law of Ukraine ‘On the Constitutional Court of Ukraine’, ‘high moral qualities’ means ‘integrity’, as well as ‘no reasonable doubts about legality of sources of origin of property, compliance of the level of life of the candidate or his/her family members with the declared income, compliance of the candidate’s lifestyle with his/her status’. ‘Recognised level of competence in the sphere of law’ means that the candidate ‘possesses necessary knowledge to fulfil authorities of the judge of the Constitutional law’. Such definitions do look rather tautological, though.

It is true that the Venice Commission stated that requisites such as ‘high professional qualities’<sup>39</sup> or ‘recognised legal competence’<sup>40</sup> are adequate, although they might be difficult to ascertain with precision in practice. It is also true that the Venice Commission stated that ‘there is no requirement as such that the procedure for appointments to the judiciary be described in detail in the Constitution itself’. However, since the appointment of Judges is of vital importance for guaranteeing their independence and impartiality, with regards

<sup>38</sup> Delegation of the European Union to Ukraine, *Statement by the Spokesperson on the appointment of High Council of Justice members and the reform of the Constitutional Court*, 13 January 2023.

<sup>39</sup> CDL-AD(2017)011-e Armenia – Opinion on the draft Constitutional Law on the Constitutional Court, adopted by the Venice Commission at its 111th Plenary Session (Venice, 16–17 June 2017) para 13 <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)011-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)011-e)> (accessed: 10.05.2023).

<sup>40</sup> CDL-AD(2016)034-e Ukraine – Opinion on the draft Law on the Constitutional Court, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9–10 December 2016) para 11 <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)034-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)034-e)> (accessed: 10.05.2023).

to Ukraine, ‘it is recommended to regulate the procedure of appointment in more detail in the Constitution’<sup>41</sup>.

Not surprisingly, in 2022 the Venice Commission noted that the concepts of ‘moral qualities’ and ‘legal competences’ that the AGE shall assess, are not defined. The Venice Commission also stressed the importance of developing the methodology to assess moral qualities and legal competences based on the best international practice<sup>42</sup>.

The Italian Constitution could be used as a model. As already mentioned, the Italian Constitution clearly sets out in details the requisites (at least, when it comes to competence) to be elected as Judges of the Italian Constitutional Court: (i) being a Judge, including those retired, of the ordinary and administrative higher Courts; (ii) being a full university professor of law; (iii) being an attorney with at least twenty years practice.

As mentioned, these requisites concern the ‘level of competence’. However, such a way of drafting the requisites could be followed also when it comes to ‘high moral qualities’.

### Conclusions

The purpose of this article was to briefly describe the system of appointment/election of the Judges of the Italian Constitutional Court; but also to enrich existing studies by offering some recommendations for Ukraine. Notwithstanding the recent reform in December 2022, some controversial issues are still there, even at the level of the Ukrainian Constitution.

Methodologically speaking, the recommendations for Ukraine has been given here in the light of the best practices (according to the principles of constitutionalism) that have been experienced in Italy for the last seven decades but also in the light of the principles of the European constitutionalism and in particular of the Venice Commission.

At the end of the day, the recommendations for Ukraine are as follows:

- (i) the current hybrid system of appointment/election of Judges and the current procedure of competitive selection should be kept;
- (ii) the current countersignature (by the Prime Minister) of the presidential act of appointment of Judges should be kept;
- (iii) a qualified majority and a secret ballot (without discussion) for the election of Judges by Parliament should be introduced in the Constitution;
- (iv) provisions concerning the extension of the term of the office of Judges should be introduced in the Constitution;
- (v) the procedure of appointment/election should be set out more in detail in the Constitution (or at least in the implementing legislation), when it comes to the requisites to be appointed/elected as Judge.

<sup>41</sup> CDL-AD(2016)034-e Ukraine – Opinion on the draft Law on the Constitutional Court, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9–10 December 2016) (n 40) para 10.

<sup>42</sup> CDL-AD(2022)054-e (n 21) paras 52–3.

Such recommendations could help Ukraine to establish a system of appointment/election of Judges of the Constitutional Court that would be in compliance with the principles of European constitutionalism and of the European Commission for Democracy through Law of the Council of Europe.

Moreover, enacting and implementing legislation on a pre-selection process based on evaluation of their integrity and professional skills in line with Venice Commission recommendations, would also very practically mean fulfilling one of the commitments that have been required by the European Commission to grant Ukraine EU candidate status.

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## ПРИЗНАЧЕННЯ/ОБРАННЯ СУДДІВ КОНСТИТУЦІЙНОГО СУДУ ІТАЛІЇ ТА ДЕЯКІ РЕКОМЕНДАЦІЇ ДЛЯ УКРАЇНИ У СВІТЛІ ПЕРЕДОВОГО ДОСВІДУ ІТАЛІЇ ТА ПРИНЦИПІВ ВЕНЕЦІЙСЬКОЇ КОМІСІЇ

АНОТАЦІЯ. Порядок відбору суддів Конституційного Суду України (КСУ) нещодавно було реформовано.

Мета статті – коротко описати систему призначення/обрання суддів *Corte costituzionale* (Конституційного Суду Італії), збагатити існуючі дослідження, запропонувати деякі рекомендації для України. Незважаючи на нещодавню реформу, деякі питання все ще існують, навіть на рівні Конституції України. Італійська система призначення/обрання суддів Конституційного Суду досить подібна до української (обидві системи є змішаними: одна третина суддів призначається Президентом Республіки, одна третина обирається парламентом, один треті певним чином обираються судовою владою). Однак в Італії відсутня процедура конкурсного відбору кандидатів на посади суддів, подібна до тієї, що встановлена в Україні: практика Італії у цій сфері переважно регулюється конвенціями.

Методологічно кажучи, рекомендації для України будуть надані у світлі найкращих практик (відповідно до принципів конституціоналізму), які були напрацьовані в Італії за останні сім десятиліть, а також у світлі принципів Європейської комісії “За демократія через право” (Венеційська комісія).

Рекомендації для України будуть такими: (i) поточну гібридну систему призначення/обрання суддів і діючу процедуру конкурсного відбору слід зберегти; (ii) поточний підпис (прем’єр-міністра) президентського акту про призначення суддів повинен зберігатися; (iii) кваліфікована більшість і таємне голосування (без обговорення) для обрання суддів парламентом мають бути введені в Конституцію; (iv) положення щодо продовження строку повноважень суддів мають бути внесені до Конституції; (v) процедура призначення/обрання повинна бути більш детально викладена в Конституції (або принаймні в імплементаційному законодавстві), коли йдеться про вимоги для призначення/обрання на посаду судді.

Такі рекомендації могли б допомогти Україні створити систему призначення/обрання суддів КСУ, яка б відповідала принципам європейського конституціоналізму та Венеційської комісії (а також опосередковано виконувати деякі зобов’язання, яких вимагала Європейська комісія про надання Україні статусу кандидата в Європейський Союз).

Ключові слова: *Corte costituzionale*; Конституційний суд; Італія; призначення; обрання; судді; Україна; Європейська комісія “За демократія через право” (Венеційська комісія); статус кандидата в Європейський Союз.