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Promoting the Rule of Law in Ukraine: Hanna Suchocka's Contribution

Five years after gaining its independence, Ukraine was the first and only nation among the former Soviet republics that enshrined the notion of *the rule of law* in its Constitution (1996). This was a major achievement, given that Ukraine joined the Council of Europe in 1995 still constitutionally governed by the Soviet Basic Law of 20 April 1978. In 1997, the Venice Commission stated that “the important elements of the rule of law have found proper expression” and in Chapter I (General Principles) and “the principles of the Rule of law are well reflected in the text of the Constitution”.¹

Significantly, the term “Rule of Law” was described the term in the Ukrainian language as “*verkhovenstvo prava*” – to be congruent with the original in English. It reflected the desire of Ukraine’s new democratic elite to cement western democratic core principles into the new national constitutional order to replace the concept of *the principle of supremacy of a law* (*verkhovenstvo zakonu*), meaning the supremacy of an ordinary statute. The notion of the supremacy of a law formed the backbone of *socialist legality* – the Soviet political and legal doctrine that underpinned Soviet political practice and jurisprudence. Indeed, the very legitimacy of the Soviet state rested on obedience by the people to laws passed by the government, leading to the abuse of power and human rights.

Indeed, at the time of drafting and adopting the Constitution of independent Ukraine in the early 1990s, Ukrainian jurists knew nothing about the origins of the notion of “the Rule of Law,” or its genuine meaning. We were not aware that, after arduous and thorough efforts, the debate among the International Commission of Jurists culminated in 1959 with the definition of “the Rule of Law” as

“[t]he principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of men.”²

Therefore, the challenges to institutionalizing the *Rule of Law* from the very early days of independent Ukraine were rooted in the historical, cultural and institutional factors that shaped the country’s modern constitutional development. Twenty-five years later, the constitutional shape of Ukraine has significantly evolved to conform to accepted European standards. This was, in large measure, due to the intense and fruitful cooperation between

¹ Opinion on the Constitution of Ukraine, CDL-INF (97) 2, pp. 2, 13.

² *The Rule of Law in a Free Society: a report on the International Congress of Jurists. New Delhi, India, January 5–10, 1959, prepared by Norman S. Marsh, with a foreword by Jean-Flavien Lalive, International Commission of Jurists, Geneva 1959, p. 197.*

the Venice Commission and the Ukrainian authorities. In this process, the remarkable role played by Ms Hanna Suchocka stands out. Ms. Suchocka's contribution is evident in over 40 major Opinions of the Venice Commission firmly upholding the European standards to be implemented in Ukraine's Constitution and national legislation. Her perseverance and commitment to removing the rudiments of the Soviet system and the constitutional "innovations" of Ukraine's post-Soviet leaders has immeasurably contributed to Ukraine's emergence as a modern European democracy governed by the rule of law.

Hanna Suchocka's efforts are particularly germane to three key areas of Ukraine's constitutional Rule of Law development and de-sovietization: 1) the reform of the General Procurator's (Prosecutor's) Office (GPO); 2) the reform of the judicial system, and 3) the strengthening of the Constitutional Court.

At the start, Ms Suchocka tackled the most intractable part of Ukraine's unreconstructed legal system – the status and powers of the **Procuracy**. There is no analogous institution in a democratic state. A natural embodiment of the concept of *verkhovnistvo zakona*, according to which "Law draws its force, and obtains its content, from the state".³ The procuracy was established by Stalin to conduct the show trials as part of the Great Terror in the 1930s and became known as the Sword and Shield of the Communist Party. The draft of Ukraine's 1996 Constitution retained both the institution of the procuracy and its Soviet-type supervision powers in the section on Transitional Provisions:

"9. The procuracy continues to exercise, in accordance with the laws in force, the function of supervision over the observance and application of laws and the function of preliminary investigation, until the laws relating the activity of state bodies in regard to the control over the observance of laws are put into force, and until the system of pre-trial investigation is formed and the laws regulating its operation are put into effect".

It is therefore not surprising that in its Opinion regarding Ukraine's 1996 Constitution, the Venice Commission was highly critical of these provisions, wondering "why a specific chapter of the Constitution was devoted to the procuracy".⁴ After the adoption of the Constitution, the *Verkhovna Rada* (the Parliament) of Ukraine attempted to amend the Law on the General Procurator adopted in 1991. The Venice Commission, based largely on the comments of Hanna Suchocka in particular, stated that "(...) the existing law establishes a very powerful institution whose functions considerably exceed the scope of functions performed by a prosecutor in a democratic law-abiding state. In effect it provides for a **Soviet-style 'prokuratura'**".⁵ And having examined the draft Law which had to pursue the aim to transform the role and functions of the public prosecutor's office to bring it into line with European democratic standards,

³ A. Vyshynsky, *The Law of the Soviet State*, Translated from Russian by Hugh W. Babb, Introduction by John N. Hazard, Macmillan, New York 1954, p. 5.

⁴ CDL-INF (97) 2, p. 8.

⁵ Opinion on the Draft law amending the Law of Ukraine on the Office of the Public Prosecutor. Adopted by the Commission at its 60th Plenary session (Venice, 8–9 October 2004) on the basis of comments by Ms H. Suchocka (Member, Poland), Mr J. Hamilton (Substitute Member, Ireland). CDL-AD (2004) 038, para. 8 (*all further references to the opinions of the Venice Commission will be described as CDL, which will reflect those opinions in which Ms Hanna Suchocka participated as one of the team of experts; individual comments of Ms Hanna Suchocka will be referred to in a full description*).

The Venice Commission concluded that for a number of reasons (namely, because it continued to centralize too much power in the hands of the procuracy; it continued to infringe the principle of separation of powers; it conferred powers on the procuracy which would more appropriately exercised by the judiciary; the position of the Prosecutor was not in conformity with the Recommendation Rec(2000)19; there was no independent check on the operation and management of the Prosecutor's Office etc.) the draft Law "cannot be regarded as a fundamental reform of the existing procuracy".⁶

However, during the political crisis which had arisen after presidential elections in 2004 and which was resolved by the so-called *Orange Revolution*, the *Verkhovna Rada* of Ukraine amended the main text of the Constitution (Article 121) to restore the function of a Soviet-type of *Prokuratura* by conferring a fifth function on the Prosecutor:

"to supervise the observance of human and citizens' rights and freedoms, and the observance [of] of laws on these matters by bodies of state power, local self-governments, their officials and functionaries."

This proposal to amend the Constitution was adopted despite the strongly expressed contrary opinion of the Commission.⁷ Regardless, the Venice Commission, based on Ms. Suchocka's opinion, persisted in recommending that the Ukrainian authorities make clear that "the prosecutor's office is not a separate (fourth) pillar of state power, as was the case previously in the Soviet system", thereby diminishing "the risk of returning to the system of *Prokuratura*".⁸ Given the specific situation of Ukraine, the Venice Commission welcomed "the option in favour of an independent prosecution service in the framework of judicial power".⁹ The Venice Commission considered that the best solution to break with the Soviet model of *Prokuratura*¹⁰ would be "to limit the role of procuracy to criminal prosecution".¹¹ Indeed, the Commission upbraided the Ukrainian authorities that "none of the major criticisms made by the Venice Commission in its earlier opinions of 2001, 2004 or 2006 have been taken on board" by them and that the new draft law examined by the Venice Commission retained "the features which were objected to by the Venice Commission in its earlier opinions".¹²

While examining the draft Constitution of Ukraine prepared by a group of scholars during the Presidency of Victor Yushenko, Hanna Suchocka welcomed the move to include the regulation on procuracy into Chapter VII on Courts and Justice and stated that it "can be seen as positive solution" in view that "the procuracy should be closer connected with the courts, not with executive power". Nevertheless, she has also indicated that "the entire concept of the new prosecutor's office is not yet completely elaborated".¹³ In another commentary on the draft law amending the Constitution, Ms Suchocka positively assessed the amendment which excluded the power to remove the Prosecutor General by the Parliament, noting that "it helps avoid politicization of the prosecutor's office".¹⁴

⁶ *Ibidem*, para. 35.

⁷ CDL-AD (2006) 029, para. 8.

⁸ CDL-AD (2006) 029, para. 9.

⁹ CDL-AD (2006) 029, para. 12.

¹⁰ CDL-AD (2006) 029, para. 19.

¹¹ CDL-AD (2006) 029, para. 24.

¹² CDL-AD (2009) 048, para. 7.

¹³ CDL (2008) 066, para. 7.

¹⁴ CDL (2009) 094, para. 18.

Ms Hanna Suchocka was also one of the experts regarding the opinion of the Venice Commission when it underlined why it was inappropriate to place the role of the public prosecutor's office outside the criminal justice system in the Ukraine context; the only historical model existing in Ukraine was the Soviet (and czarist) model of "prokuratura"; this model "reflected a non-democratic past and was not compatible with European standards and Council of Europe values".¹⁵

Hanna Suchocka's determined efforts, as expressed in numerous opinions of the Venice Commission, finally resulted in the transformation of the General Prosecutors Office in Ukraine during the Constitutional reform of 2016. Experts of the Venice Commission, Ms Suchocka among them, positively assessed the amendments, finding that "Chapter VII of the current Constitution is repealed, and a new system of prosecution is proposed as part of the judiciary".¹⁶ In addition, it was noted that "the removal of the much-criticized supervisory powers of the Public Prosecutor under Article 121(5) (...) adequately responds to the recommendations previously expressed by the Venice Commission (...) within the framework of Ukraine's Council of Europe accession commitment that "the role and functions (...) will change (...) in accordance with Council of Europe standards".¹⁷

Ms. Suchocka's contribution to the reform of the **Judiciary** was also substantial. Since 1997, the Venice Commission prepared numerous Opinions on the reform of the judiciary in Ukraine. Most of these were prepared with the insights and inputs of Ms Suchocka. They consistently highlighted that the judiciary "is of the highest importance for the establishment and consolidation of the rule of law in Ukraine"¹⁸ and that "the guiding principles of the rule of law require the guarantee of an independent judicial system".¹⁹ In this regard, the Commission recommended that the Ukrainian authorities "undertake a profound constitutional reform, aiming to lay down the solid foundation for a modern and efficient judiciary in full compliance with European standards".²⁰

While the section in the 1996 Constitution regarding the judiciary initially received a positive assessment from the Venice Commission,²¹ some provisions remained unsatisfactory. For example, the 1996 Constitution provided that the courts should be established by the President (Article 106.23). This meant that courts could be established at the President's will based on a presidential decree (*Ukaz*), potentially leading to political influence over the judiciary. In addition, Articles 85(27) and 128 of the 1996 Constitution provided that the *Verkhovna Rada* (Parliament) had the power to appoint judges for life. The Venice Commission criticized such procedure many times, considering it politicized.²²

Profound constitutional reform was needed because of inconsistencies and contradictions in the original 1996 Constitution.²³ Hanna Suchocka remarked in 2001 that the Constitution gave the *Verkhovna Rada* (the Parliament) the prerogative to deprive a judge of

¹⁵ CDL-AD (2013) 025, para. 27.

¹⁶ CDL-AD (2015) 026, para. 39.

¹⁷ *Ibidem*, para. 40.

¹⁸ CDL-INF (2000) 5, p. 2.

¹⁹ CDL-AD (2010) 003, para. 7.

²⁰ *Ibidem*, para. 119.

²¹ CDL-INF (97) 2, p. 8.

²² CDL-AD (2007) 003, para. 23; CDL-AD (2010) 003, para. 45.

²³ CDL-AD (2011) 033, para. 79.

immunity and not to the judicial self-governing body, the High Judicial Council, that had been established by the Constitution. In Ms Suchocka's view, this constitutional regulation could "politicize the process of resolving cases of stripping judges of their immunity" and, "rather than becoming an element guaranteeing the independence of judges, it may become an element of political bargaining, of various political options in parliament exerting their influence on the judge".²⁴ Referring to the main challenges confronting all post-communist countries, Ms Suchocka highlighted the need for the "genuine separation of the three branches of government and firm institutional arrangements for judicial independence" which "would be able to prove effective in shielding courts and judges from a somewhat immature political process". In assessing ways to best guarantee the independence of judges in Ukraine, she argued that "[t]he crucial question since the beginning of this transformation was how to secure the independence of judges. How to diminish the role of executive power towards judges. How to create a system of guarantees for independence of judges, in both senses: – the individual, personal independence of judges, and – the autonomy, independence of judiciary vis vis-à-vis other state organs, especially executive power. What kind of independent body should be established to better guarantee the independence of judges".²⁵ In a later review, Ms Suchocka reinforced her concerns regarding the competence of the *Verkhovna Rada* to approve the detention or arrest of judges, underlining that the decision in this regard "should be taken by the court or by the HCJ [High Council of Justice] not by parliament".²⁶ She felt that "the institution of judges appointed for a limited period of time (...) should be replaced by judges elected for permanent terms".²⁷

In general, there were quite a number of areas where the Ukrainian system did not comply with European standards due to: (a) involvement of political institutions in establishing the court structure, appointment and dismissal of judges; (b) initial appointment of a judge with a probationary period; (c) dismissal of a judge for a "breach of oath"; (d) inadequate role for the High Council of Justice; (e) lifting a judge's immunity by parliament and the scope of immunity; (f) inadequate organization of courts; (g) lack of the role of judiciary in the budgetary process; and (h) a high level of corruption in judiciary.

The Venice Commission took the position that the power of the President to establish and liquidate courts should be removed from the Constitution and that "this should be considered as a legislative matter",²⁸ pointing out that that courts must be established "by law", which meant that the decisions should be made by the *Verkhovna Rada*, not by the Executive.²⁹

Accordingly, the Venice Commission criticized the constitutional framework within which the President exercised discretionary powers regarding the selection and appointment of judges, as well as the power to remove and dismiss a judge.³⁰ The Commission pointed out that as long as these powers remained in the Constitution,

²⁴ CDL (2001) 55.

²⁵ CDL (2007) 035, para. 2.

²⁶ Comments on the draft Constitution of Ukraine (prepared by a Working Group headed by Mr V. M. Shapoval) by Ms Hanna Suchocka (Member, Poland). CDL (2008) 066, para. 7.

²⁷ *Ibidem*, para. 8.

²⁸ CDL-AD (2015) 007, para. 92.

²⁹ CDL-AD (2015) 026, para. 18.

³⁰ CDL-AD (2010) 003, para. 63.

the potential for politicization will always be present.³¹ On the other hand, the Venice Commission had no objection against the *pro forma* appointment of judges by the president as Head of State, “when the latter is bound by a proposal of the judicial council and acts in a ‘ceremonial’ way, only formalizing the decision taken by the judicial council in substance”.³² The idea was that the President only ratifies a decision of the judicial council and his decision therefore has the effect of a “notary”.³³

In several opinions based on the reasoning of Ms Suchocka, the Venice Commission was strongly critical of a provision of Article 126 (5) of the Constitution, which allowed the dismissal of a judge for a “breach of oath”.³⁴

A significant level of criticism was expressed by the Venice Commission regarding the inadequate role of the High Council of Justice set out in the 1996 Constitution, including that judges constituted a minority of its composition. It was recommended to change the composition of the High Council of Justice, providing that “a majority or at least a substantial part of the members are judges elected by their peers”.³⁵ It was also recommended that “judicial training must be part of the judicial branch” and come “under the control of an independent body of judicial self-administration”,³⁶ namely, under the High Council of Justice.

The Venice Commission was also highly critical of the provisions of the 1996 Constitution establishing a four-instance court system comprising local courts, courts of appeal, high specialized courts and the Supreme Court of Ukraine. Instead, the Commission proposed to merge the levels of the high specialized courts and the Supreme Court into one, establishing a three-tier system according to European norms.³⁷

With respect to the judicial budget, it was recommended that an autonomous body with substantial judicial representation should play a significant role in presenting and defending the judicial budget before parliament.³⁸

These efforts culminated in the reforms of 2016 which are described below. Their impact, importance and scope need to be considered in the context of the third area in which Ms Suchocka made a substantial contribution to Ukraine’s Rule of Law development – the place and the role of the **Constitutional Court**. The Constitutional Court was created as a completely new institution in Ukraine’s post-Soviet legal system. Established by the 1996 Constitution, it was structurally placed within the system of the general courts. This ran counter to European and Rule of Law standards. Hanna Suchocka joined the team of Venice Commission experts to help rewrite these provisions³⁹ and continued to work in this area during the period

³¹ CDL-AD (2011) 033, para. 61.

³² CDL-AD (2013) 034, para. 16.

³³ CDL-AD (2010) 003, para. 38.

³⁴ CDL-AD (2009) 024, para. 90. See also: CDL-AD (2010) 029, para. 43; CDL-AD (2011) 033, para. 63; CDL-AD (2013) 014, para. 24; CDL-AD (2013) 034, para. 54; CDL-AD (2015) 007, paras. 51, 52.

³⁵ CDL-AD (2010) 026, para. 130(3). See also: CDL-AD (2015) 007, paras. 83, 92.

³⁶ CDL-AD (2010) 003, para. 103.

³⁷ CDL-AD (2010) 003, para. 21.

³⁸ CDL-AD (2007) 003, para. 82; CDL-AD (2010) 003, para. 79; CDL-AD (2010) 004, para. 55; CDL-AD (2015) 026, para. 30.

³⁹ See, for ex.: Comments on the Draft Constitution of Ukraine. Prepared by a Working Group headed by Mr V. M. Shapoval by Ms Hanna Suchocka (Member, Poland). CDL (2008) 066.

of the major reforms to the Constitution of 2015–2016 amending the constitutional jurisdiction.

These efforts culminated in significant new changes to the functions and operation of the Constitutional Court and courts of general jurisdiction in the post-Maidan constitutional reforms of 2016. Most of the previous recommendations of the Venice Commission designed to bring Ukrainian constitutional justice in line with general European legal standards were implemented in the Constitution as well as in national legislation. These included:

- Removing the power of the *Verkhovna Rada* and the President to appoint and dismiss judges;
 - Limiting the role of the President in the establishment and dissolution of courts;
 - Strengthening guarantees of judicial independence by eliminating the initial 5-year appointment of judges in favour of a lifetime appointment for all judges and giving the judiciary a greater role in the budgetary process;⁴⁰
 - Abolishing a “breach of oath” as a ground for dismissal of judges;
 - Bringing the composition of the High Council of Justice into line with European standards, with more than a half of its member judges elected by their peers;
 - Empowering the High Council of Justice to take all decisions regarding a judge’s career (promotions, transfers, dismissals);
 - Making the High Council of Justice responsible for the training of judges and prosecutors;
 - Limiting judicial immunity to a judge’s conduct on the bench, thereby promoting greater judicial accountability;
 - Abolishing the system of high specialized courts and transforming them into divisions within the Supreme Court;
 - Installing the Supreme Court as the highest judicial body in the system of courts of general jurisdiction, and having the role of ultimate guarantor of the uniformity of the jurisprudence of all courts;
 - Balancing the composition of the Constitutional Court, with its members being appointed by the President, the *Verkhovna Rada* and the Congress of Judges following a competitive selection of candidates whose qualifications are listed in the Constitution;⁴¹
 - Constitutional Court judges were to “enjoy inviolability and functional immunity”;⁴²
 - Introducing a constitutional compliant process for individuals to challenge the constitutionality of laws after exhaustion of domestic remedies (even if it did not go “as far as establishing a full constitutional compliant against individual acts”, as recommended by the Venice Commission previously⁴³);
 - Giving the Constitutional Court control over the termination or dismissal of its judges based on a two-thirds vote of the Court’s members themselves.⁴⁴
- Some of the Commission’s recommendations remain works-in-progress, including:

⁴⁰ CDL-AD (2015) 026, para. 45.

⁴¹ CDL-AD (2015) 027, para. 24.

⁴² CDL-AD (2015) 026, para. 44.

⁴³ CDL-AD (2013) 034, para. 11.

⁴⁴ CDL-AD (2015) 026, para. 46.

- Removing the power of the *Verkhovna Rada* regarding a vote of non-confidence vote in the Prosecutor General;
- Implementation of a special, qualified majority regarding the appointment of the Prosecutor General and the election of two members of the High Council of Justice and one-third of the members of the Constitutional Court by the Parliament;
- Requiring the vote of a qualified majority of members of the Congress of Judges regarding the appointment of one-third of Constitutional Court judges⁴⁵ and of a full constitutional complaint.⁴⁶

These issues await future amendments to the Constitution. Nevertheless, the 2016 constitutional reforms mark a colossal breakthrough in the institutionalization of the Rule of Law and European values in Ukraine. The opinions and recommendations of the Venice Commission, to which Ms Hanna Suchocka's contribution was invaluable, promoted the integration of the concept of the Rule of Law into Ukrainian legal thought, doctrine and, ultimately practice.

Ms Suchocka's legacy in the evolution of Ukrainian constitutionalism and the application of Rule of Law standards remains secure beyond the three areas discussed above. She also contributed to democratic parliamentarism (in particular, regarding amendments to the Rules of Procedure of the *Verkhovna Rada*⁴⁷) and the development of anti-corruption mechanisms,⁴⁸ including the liability of public officials for inaccurate asset declarations.⁴⁹

Ms Suchocka's significant intellectual contribution to the expert opinions of the Venice Commission were matched by her practical contribution and unyielding commitment to the establishment and development of institutions created to strengthen the Rule of Law in Ukraine. For example, Ms Suchocka readily agreed to become a member of the competitive selection committee established by presidential decree in 2017 regarding the selection and appointment of Constitutional Court judges. As a result of that process (widely hailed as honest and transparent), the President of Ukraine appointed two judges to the Constitutional Court – the first appointments under the new reforms.

Given the challenges of implementing Rule of Law standards as part of Ukraine's democratic transformation, confronting and overcoming the legacy of more than three centuries of influence of Russian absolutism and Marxism proved to be more difficult than was initially expected at the time of the country's accession to the Council of Europe. Indeed, is difficult to imagine Ukraine as the dynamic democracy it is today without the Venice Commission keeping the country on a "straight and narrow" democratic path. There is no doubt in my mind that it was the guidance of the Venice Commission, with Hanna Suchocka's constant guidance and perseverance, that has helped shape Ukraine's modern constitutional development.

It is safe to say that Ukraine's unalterable integration back into the European family of democratic nations has been largely achieved through the indefatigable efforts and influence of Hanna Suchocka and her colleagues at the Venice Commission.

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⁴⁵ CDL-AD (2016) 034, para. 25.

⁴⁶ CDL-AD (2016) 034, para. 39.

⁴⁷ CDL-AD (2017) 026.

⁴⁸ CDL-AD (2020) 038.

⁴⁹ CDL-AD (2021) 028.