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Constitutional Crisis in Ukraine: The Fallout from the Constitutional Court and Attempts at Judicial Reform During War

JACKELYN GITLIN†

I. INTRODUCTION

On October 27, 2020, the Constitutional Court of Ukraine issued a decision that sparked a crisis.¹ The Constitutional Court (“the Court”), the judicial body authorized to hear constitutional matters, stripped significant pieces of anti-corruption legislation of enforcement power following a controversial ruling. Following this ruling, the agencies monitoring and enforcing anti-corruption laws were effectively declared unconstitutional.² The decision by the Court was the latest in a series of steps aimed to dismantle anti-corruption reforms, launching Ukraine into a hotly contested debate over constitutional power.³ President Zelensky appealed to international

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† J.D. Candidate (2024), University of Maryland Francis King Carey School of Law. The author would like to thank her partner, Creighton Garson, for his endless support and valued translation assistance on this project, and in all things. She would also like to thank J. Sam Chase, Kate Leisner, Victoria Roman, and the rest of the staff of the *Maryland Journal of International Law* for their comments, support, and feedback throughout the writing and editing process. This paper is dedicated to the strength and bravery of those in Ukraine and the continued fight for justice. Слава Україні!

1. Mykhailo Minakov & William Pomeranz, *Constitutional Crisis in Ukraine: Looking for Solutions*, KENNAN CABLE, Mar. 2021, at 1, 1.

2. Konstytsiinyi Sud Ukrainy [Constitutional Court of Ukraine], Oct. 27, 2020, No. 13-r/2020 (Ukr.) [hereinafter, “Constitutional Court”].

3. See Mattia Nelles, *Ukraine Caught Between Constitutional Crisis and Counter-Revolution*, ATL. COUNCIL, (Nov. 5, 2020), <https://www.atlanticcouncil.org/blogs/ukrainealert/ukraine-caught-between-constitutional-crisis-and-counter-revolution>.

bodies for intervention and guidance.⁴ However, attempts to address the crisis stalled when Russia invaded the country on February 24, 2022.⁵ This constitutional crisis brought the issue of the Court operating with their own political motivations as a branch of power within Ukraine into sharp relief.

Ukraine is a new or “third wave” democracy that adopted democracy and constitutionalism after 1986. The role of constitutional courts in these new democracies is sometimes precariously balanced to both elevate the constitution and also to instill trust in the judiciary.⁶ Constitutional courts in new democracies often fulfill the principles of the rule of law and state-building, and thus, the study of these courts and their impact on the state and the political sphere is essential.⁷ However, these constitutional courts serve as a non-parliamentary form of constitutional review of law and have gradually taken on the features of political entities resulting in political consequences.⁸

In post-Soviet states, constitutional courts often wield political power beyond the scope of mere constitutional review and today are facing increased efforts to restrain that power through reforms. The Constitutional Court in Ukraine is one of these empowered courts, primarily designed to constrain the government, however the Court is now competing with the executive and legislative branches while wielding political power.⁹ This paper examines the issues surrounding

4. European Comm’n for Democracy Through Law (Venice Comm’n), Opinion 1012/2020 on the Legislative Situation Regarding Anti-Corruption Mechanisms Following Decision No. 13-R/2020 of The Constitutional Court of Ukraine, adopted by Venice Commission at its 125th Plenary Session, CDL-PL(2020)018, (Dec. 9, 2020).

5. Andrew Osborn & Polina Nikolskaya, *Russia’s Putin Authorizes ‘Special Military Operation’ Against Ukraine*, REUTERS (Feb. 24, 2022, 12:47 AM), <https://www.reuters.com/world/europe/russias-putin-authorises-military-operations-donbass-domestic-media-2022-02-24/>.

6. TOM GINSBERG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 6–8 (2003). Professor Ginsberg writes that a critical component of the constitutional courts’ roles in new democracies is to prevent dragging “the prestige of the constitution down to the level of adjudicators in the public eye.” *Id.* at 9–10.

7. Bohdan Kalynovskyi et al., *Constitutional Legality as a Legal Regime for the Exercise of State Power in Countries in Transition Democracies (Post-Soviet States)*, 19 ASTRA SALVENSIS - REVISTA DE ISTORIE SI CULTURA [Astra Salvensis – Review of History and Culture] 97, 99 (2022).

8. Jarosław Szymanek, *Constitutional Justice of Post-Soviet States against the Model Solutions in the Sphere on Non-Parliamentary Constitutional Review of Law*, in CONSTITUTIONAL COURTS IN POST-SOVIET STATES: BETWEEN A MODEL OF A STATE LAW AND ITS LOCAL APPLICATION 1, 22 (2019).

9. Judicial bodies with the power of judicial review, such as constitutional courts, are often intended to restrain future governments to ensure a lowered risk of political power-wielding that threatens the rule of law. See Tom Ginsburg, *Economic Analysis and the Design of Constitutional Courts*, 3 THEORETICAL INQ. L. 49, 51–55 (2002).

the Ukrainian Constitutional Court's decision of 2020 and the subsequent far-reaching political, legal, and economic consequences of exercising their interests as a high court. The paper will also specifically focus on how reform of the judiciary in light of this crisis can move forward beyond the country's systemic challenges during the Russian invasion. The Court in Ukraine is the first of the post-Soviet constitutional courts to face intensive reform attempts, spurred on by the pressures of war. This places Ukraine in a unique place within the narrative of high courts in Eastern Europe as they attempt new and emboldened reforms backed by international support.

Part II of this paper discusses the political context of constitutional law and constitutional review in Ukraine and the establishment and early exercising of the powers of the Constitutional Court.¹⁰ Part III examines the October 2020 decision that dismantled the anti-corruption legislation, analyzing the majority's reasoning and the dissent's disagreement.¹¹ Part IV analyzes how this decision speaks to the problematic nature of the Constitutional Court's scope of political power and attempts at reform prior to the invasion.¹² Part V discusses the unique approach Ukraine must take to enact reform under martial law while also attempting to address the Court's political impact and managing the country during the war.¹³

II. POLITICAL POWER OF THE COURT AND CONSTITUTIONAL LAW IN UKRAINE PRIOR TO DECISION NO. 12-4/2020

The context surrounding the politics of constitutional law and constitutional review in Ukraine is essential to understand the issues within this paper. The legislature of Ukraine, the Verkhovna Rada, adopted the modern Ukrainian Constitution on June 28, 1996.¹⁴ Ukraine extricated itself from the remnants of the Soviet Union and cemented that separation with the signing of an agreement brokered by the United States in 1994, giving up the nuclear weapons inherited from the now-defunct Soviet Union.¹⁵ In June of 1994, Ukraine signed a cooperation agreement with the European Union, the first post-Soviet

10. See discussion *infra* Part II.

11. See discussion *infra* Part III.

12. See discussion *infra* Part IV.

13. See discussion *infra* Part V.

14. Vitalii Kovalchuk, *Konstytutsiynna, Hromadianska ta Natsionalna Identychnist Cherez Pryzmu Formuvannia Politychnoi Natsii v Ukraini* [Constitutional, Civil and National Identity Through the Prism of The Formation of a Political Nation in Ukraine], 4 UKR. CONST. L. J. 65, 69 (2021) (Ukr.).

15. SERHII PLOKHY, *THE GATES OF EUROPE: A HISTORY OF UKRAINE* 326 (2015).

state to do so.¹⁶ The 1996 Constitution established a presidential-parliamentary regime, and despite the initial checks and balances formed, issues continued to arise regarding political partisanship and power struggles between the branches.¹⁷

The Constitutional Court, the main judicial body discussed in this paper, received its jurisdiction and powers through Chapter XII of the Constitution of Ukraine and is constrained to “resolve issues of compliance of the laws of Ukraine and . . . other acts with the Constitution of Ukraine, provide official interpretation of the Constitution of Ukraine and exercise other powers in accordance with this Constitution.”¹⁸ The Court’s judges are appointed by the President of Ukraine, the Verkhovna Rada, and the Congress of Judges of Ukraine, each of whom appoints six members of the Court to serve a nine-year term.¹⁹ Additionally, Chapter XII grants the “independence and immunity of judges of the Constitutional Court.”²⁰ According to the Constitution, judges cannot be kept under custody or arrested without the High Council of Justice’s (HCJ) consent.²¹ These chapters of the Constitution bear heavily upon the development of the Court and other courts’ interpretations of judicial power, leading to decisions seeking to establish a more independent and empowered judiciary free

16. *Id.*

17. Venice Comm’n Opinion 59/2010, *supra* note. 4, para. 2. The Venice Commission, a part of the Council of Europe, wrote: “While the text establishes a strong executive under the leadership of a powerful President, checks and balances are present which should prevent recourse to authoritarian solutions.” However, the Commission also noted that “several provisions of the Constitution remain unsatisfactory from a legal point of view. These inadequacies have political reasons and can be explained by the fact that it was necessary to reach a political compromise to have the Constitution adopted.” *Id.* at 2–3.

18. Konstytutsiia Ukrainy [CONSTITUTION OF UKRAINE] § XII, art. 147 (Ukr.).

19. *Id.* art. 148.

20. *Id.* art. 149.

21. *Id.* § VIII, art. 131. The HCJ’s functions can be found in Article 131 of the Ukrainian Constitution. It comprises 21 members appointed by the Congress of Judges, the President of Ukraine, the Verkhovna Rada, the Congress of Advocates, the All-Ukrainian Conference of Public Prosecutors, and the Congress of Representatives of Law Schools and Law Academic Institutions. *Id.* The HCJ presents submissions for judicial appointments, decides on any violations by a judge for incompatibility requirements, decides on dismissals of judges, reviews complaints on decisions of liability on judges and prosecutors, grants consent for the detention of judicial officers, and other powers defined by the Constitution. *Id.* The HCJ was renamed to the more Slavic Supreme Council of Justice in 2017. The High Council of Justice was “Vyshcha rada yustytisii” and became the Supreme Council of Justice “Vyshcha rada pravosuddia” while shifting some of the powers of the council to incorporate new legislation regarding the court’s functions. Daniel Bilak and Olga Vorozhbyt, *Amendments to the Constitution of Ukraine passed: Ukraine takes a major step towards a European System of Justice*, LEXOLOGY (June 9, 2016), <https://www.lexology.com/library/detail.aspx?g=212fa5f8-4f4b-4b4d-9d5a-693579e0c95e>.

from the interference from other governmental entities that culminated in the constitutional crisis of 2020.²²

In 2004, the first of several significant amendments to the Constitution passed due to the overwhelming public outcry over corruption in the 2004 Ukrainian presidential election.²³ Following an allegation of electoral interference and rigging, the Orange Revolution swept across Ukraine, protesting the rigged electoral process.²⁴ By December 8, 2004, the Rada passed Law No. 2222-IV, amending the Constitution to weaken the power of the President by removing the ability to nominate the Prime Minister and giving it to Parliament, weakening the executive branch.²⁵ The amendments entered into force on January 1, 2006; however, the Constitutional Court of Ukraine overturned these amendments in 2010 in the Decision of the Constitutional Court of Ukraine No. 20-rp/2010.²⁶

The Court exemplified the trend of constitutional courts in post-Soviet governments intervening in political affairs.²⁷ The Court acted beyond past precedent as decision No. 20-rp/2010 declared the 2004 amendments unconstitutional, despite the Constitution itself stating that the Court has a right to a *preliminary* review of a draft law on amendments but is *silent* on the possibility of the Constitutional Court's review of amendments after they have entered into force.²⁸ The decision to declare the 2004 amendments unconstitutional six years after their enactment was highly unusual as the Court found in prior cases that once amendments entered into force, they become part of the Constitution itself, which would make it impossible to sever them from the Constitution.²⁹ This sharply increased the scope of the Court's powers and swiftly allowed the Court to concentrate political power in

22. Ultimately, this issue would culminate in the Court's decision in October 2020. See Constitutional Court, *supra* note 2.

23. Andrew Wilson, *Ukraine's 'Orange Revolution' of 2004: The Paradoxes of Negotiation*, in *CIVIL RESISTANCE AND POWER POLITICS: THE EXPERIENCE OF NON-VIOLENT ACTION FROM GANDHI TO THE PRESENT* 335, 335 (Adam Roberts & Timothy Garton Ash eds., 2009).

24. *Id.* at 335.

25. ZAKON UKRAINY [LAW OF UKRAINE], No. 2222-IV, PRO VNESENIA ZMIN DO KONSTITUTSII UKRAINY [ON MAKING CHANGES TO THE CONSTITUTION OF UKRAINE] (2004) (declared unconstitutional Sept. 30, 2010, according to the Decision of the Constitutional Court N 20-pn/2010).

26. Constitutional Court, Decision No. 1-45/2010 (Sept. 30, 2010).

27. Trevor L. Brown & Charles R. Wise, *Constitutional Courts and Legislative-Executive Relations: The Case of Ukraine*, 119 POL. SCI. Q. 143, 155 (2004).

28. European Commission for Democracy Through Law (Venice Commission), Opinion 599/2010 on the Constitutional Situation in Ukraine, adopted by the Venice Commission at its 85th Plenary Session, CDL-AD(2010)044, (Dec. 20, 2010).

29. *Id.* at 6–7.

the Office of the President under then-president Viktor Yanukovych.³⁰ This type of overruling by the Court was unprecedented and highly controversial.³¹

The implications of this decision were far-reaching, as Yanukovych could wield far more power with the political cooperation of the Court. After consolidating this power, Yanukovych refused to sign the European Union-Ukraine Association Agreement, which formed a closer relationship between Ukraine and the EU and would have made significant progress toward EU membership.³² Ukraine's Constitution clearly states that the President of Ukraine is "a guarantor of the implementation of the strategic course of the state for gaining full-fledged membership of Ukraine in the European Union and the North Atlantic Treaty Organization."³³ Instead of following this course as dictated in the Constitution, Yanukovych, following a trip to Moscow and meeting with President Vladimir Putin, reneged on this pro-European stance and began steering Ukraine into association with Russia.³⁴

In November 2013, protesters took to the streets of Kyiv to proclaim their dissatisfaction with Yanukovych's decision and desire for Ukraine to follow through on the integral course of European integration as defined in the Constitution.³⁵ These protests in Independence Square in Kyiv, also known as the Euromaidan, were the next steps in shaking the constitutional order of Ukraine after the tumult of amendments and nullifications of 2004 and 2010.³⁶ The broad public support for the protesters saw immediate backlash as Yanukovych deployed the Berkut riot police to violently put down the protests.³⁷ Protesters and the Berkut clashed for months, resulting in the deaths of 108 protesters.³⁸

30. *Id.*

31. MYKHAILO MINAKOV ET AL., FROM "THE UKRAINE" TO UKRAINE: A CONTEMPORARY HISTORY, 1991–2021, 18 (2021).

32. David R. Marples, *Introduction*, in UKRAINE'S EUROMAIDAN: ANALYSES OF A CIVIL REVOLUTION, SOVIET & POST-SOVIET POLITICS & SOCIETY 1, 9 (David R. Marples & Frederick V. Mills eds., 2015).

33. CONST. OF UKR. § V, art. 102.

34. Marples, *supra* note 32, at 9.

35. *Id.* at 9–10.

36. Nadia Diuk, *Euromaidan: Ukraine's Self-Organizing Revolution*, 176 WORLD AFFS. 9, 10 (2014).

37. *Id.* at 12.

38. U.N. Off. of the High Comm'r for Hum. Rts., Rep. on Accountability for Killings in Ukraine from January 2014 to May 2016, 9 (2016), <https://www.ohchr.org/en/documents/country-reports/accountability-killings-ukraine->

Following the Euromaidan, the Constitution of Ukraine would undergo another amendment process, returning to the 2004 amendments that separated power between the President and Parliament, yet still needed to address the judiciary's powers.³⁹ Other critical pieces of legislation passed, including changes to the Criminal Code in September 2014 to include anti-corruption laws.⁴⁰ The new anti-corruption laws established the National Anti-Corruption Bureau (NABU) to oversee, investigate, and prosecute state officials who accepted bribes and influenced legislation and court proceedings for political allies by establishing the National Agency for the Prevention of Corruption (NAPC), tasked with helping shape legislative policy and collecting financial declarations from public officials.⁴¹

However, the amendments and new legislation following the involvement of the European Union faced negative responses from the Constitutional Court.⁴² The backlash against international intervention into Ukraine's politics culminated in the Court's decision No. 13-r/2020, which followed a strict interpretation of judicial independence that again stretched the powers of the Court similarly to their nullification of the 2004 amendments. The Court hollowed out the architecture of the anti-corruption reforms and attempted to preclude any judiciary oversight by government or international experts, placing the Court and judicial review above any attempts for oversight or constraint.⁴³

III. THE DECISION AND DISSENTS

In 2020, forty-seven members of the Verkhovna Rada filed an appeal to the Constitutional Court regarding the constitutionality of the Law of Ukraine, "On Prevention of Corruption," in the Criminal Code.⁴⁴ This was not the first attempt by anti-reformers to dismantle

january-2014-may-2016. Public outcry over the violence and brutality of the Berkut, Yanukovich's corruption, and the death toll led to a strong push for the election of an interim government, and Yanukovich eventually fled the country to Russia while new elections were held. See Andrew Roth, *Ukraine's Ex-President Viktor Yanukovich Found Guilty of Treason*, THE GUARDIAN (Jan. 25, 2019), <https://www.theguardian.com/world/2019/jan/25/ukraine-ex-president-viktor-yanukovich-found-guilty-of-treason>.

39. Verkhovna Rada Ukrainy [Supreme Council of Ukraine] No. 742-VII (2014) (Ukr.) [hereinafter, "VVR"].

40. VVR, No. 1700-VII (2014) (Ukr.).

41. Minakov & Pomeranz, *supra* note 1, at 2.

42. Andrii Nekoliak, 'Shaming' the Court': Ukraine's Constitutional Court and the Politics of Constitutional Law in the Post- Euromaidan Era, 47 REV. OF CENT. & E. EUR. L. 298, 309 (2022).

43. *Id.* at 313.

44. Constitutional Court, *supra* note 2, at 2.

the anti-corruption framework post-2014, but it was the most successful.⁴⁵ The Court took up the appeal and decided the case on October 27, 2020, striking down the anti-corruption framework.⁴⁶ The Court held that the NACP's statutory purpose was to collect financial declarations of public officials for corruption and stipulate that it is illegal for public officials to make false statements that endanger the independence of the judiciary.⁴⁷ The Court also found that the statute granting authority to the NABU to investigate and prosecute these statements was unconstitutional, as the NABU was a law enforcement agency outside the executive branch's control.⁴⁸ According to the Court, agencies such as the NABU were required to be under the control of the executive as proscribed by the constitution.⁴⁹

In an 11-4 decision, the Court held that the statutes raised in the petition and multiple other statutes not at issue were unconstitutional.⁵⁰ In reviewing the statutes, the Court proclaimed that a "fundamental and integral element" of the Ukrainian Constitution is the independence of the judiciary as a branch of government.⁵¹ According to the Court, the exclusivity of the judiciary in its powers and importance as the arbiter of constitutional interpretation is paramount.⁵² In the Court's view, the restrictions on the ability to hold judges liable in criminal or civil cases or investigations must be maintained separately from the powers given by the legislature to the NABU and NACP to oversee, investigate, and collect financial information on public officials, which included judges.⁵³ The rationale for this, according to the Court, is that the judicial branch is "the least dangerous for democratic governance . . . as it has the least opportunity

45. In February 2019, the Constitutional Court struck down a provision on illicit enrichment that undermined over sixty investigations of high-ranking officials. See, Michael Hornsby, *Constitutional Court Ruling Undermines Anti-Corruption Achievements in Ukraine*, TRANSPARENCY INT'L (Mar. 1, 2019), <https://www.transparency.org/en/press/constitutional-court-ruling-undermines-anti-corruption-achievements-in-ukra>.

46. Constitutional Court, *supra* note 2 at 12.

47. *Id.*

48. *Id.*

49. As described in the Constitution, the prosecutorial powers rest under Article 131, in which the Prosecutor General and public prosecutors are appointed by the President of Ukraine and generally would fall under the executive branch as the Prosecutor General, and the Constitution establishes its office. A Parliamentary committee conducts the NABU within the legislative branch, not under an executive office, and recommends prosecution directly to the Specialized Anti-Corruption Prosecutor's Office, a blend of legislative and executive powers to which the Court objects. See generally CONST. OF UKR. § VIII, art. 131.

50. Constitutional Court, *supra* note 2, at 2.

51. *Id.* at 3.

52. *Id.*

53. *Id.* at 4.

to violate or adversely affect [other branches of state power].”⁵⁴ The notion that the Court has less opportunity to cause harm is in reference to the restriction on who may bring appeals to the Court, which was expanded in 2016, but still is a lengthy and demanding process.⁵⁵ However, the Court does not elaborate on how they are the “least dangerous” governmental body beyond mentioning their use of objective review and interpretation and that they are not part of the “political interests and party preferences.”⁵⁶ Despite the intended nature of the Court to be as non-partisan as possible, there is some indicia of apparent political interference by the Court.⁵⁷ In the early 2000s, there was alleged bribery for favorable rulings.⁵⁸ The activities of the judges on the Court were tied down with the political corruption involved in the regimes in power like Yanukovich, with whom the Court assisted in political power consolidation.⁵⁹

Despite the lack of transparency over the Court’s reasoning behind its standing as a lesser power, the opinion continued to delineate the powers of other branches and agencies who were overstepping on the Court. In the Court’s opinion, the Law of Ukraine “On Prevention of Corruption” strips protections from the judiciary by allowing the NAPC, an executive agency, and outside agencies like the NABU, which is not under executive control, to investigate and prosecute members of the judiciary who knowingly falsify or fail to disclose financial information required by the law establishing the NAPC and NABU.⁶⁰ The Court believes that executive agencies were authorized by the statute to effectively place political pressure on a

54. *Id.*

55. Before 2016, the process for appealing a case to the Court was incredibly limited, only available to petitioning members of the Rada or the President. After 2016, individuals and companies could bring constitutional complaints upon exhaustion of all other domestic legal remedies under Article 55 of the Amended Constitution. Daniel Bilak & Olga Vorozhbyt, *Amendments to the Constitution of Ukraine passed: Ukraine takes a major step towards a European System of Justice*, LEXOLOGY (June 9, 2016)

<https://www.lexology.com/library/detail.aspx?g=212fa5f8-4f4b-4b4d-9d5a-693579e0c95e>.

56. Constitutional Court, *supra* note 2, at 4.

57. The appointment of Constitutional Court Justices was intended to come from an even distribution of the President, the Rada, and the Congress of Judges of Ukraine and have limited terms of office and keep individuals from accessing the Court. *See generally* Minakov & Pomeranz, *supra* note 1, at 2.

58. Corruption of the Constitutional Court has been of concern following attempts by political entities to gain “control” of the justices on the court through influence or corrupt means, especially by former president Viktor Yanukovich to roll back the 2004 amendments to the constitution. *See* MINAKOV, *supra* note 31, at 324.

59. *Ukraine Court Boosts Powers of President Yankukovich*, BBC (Oct. 1, 2010), <https://www.bbc.com/news/world-europe-11451447>.

60. Constitutional Court, *supra* note 2, at 7.

judge by misusing a corruption investigation, which they hold to be unconstitutional.⁶¹ Imposing criminal charges for any act should only be allowed after considering the following factors: (1) the social threat posed by the act, (2) the possibility of the spread of such an act through society if not criminalized, (3) the effectiveness of other legal means of affecting these actions, and (4) the impossibility of “less repressive methods.”⁶²

According to the Court, making false declarations regarding financial information by public officials should not be a criminal offense.⁶³ While the Court acknowledges that “corruption is one of the main threats to Ukraine’s national security,” they held that the provisions in the statute were not in line with constitutional principles as criminal liability is “an excessive punishment” for falsifying the financial declarations of judges or beginning corruption investigations against members of the judiciary.⁶⁴ For the Court, the imposition of the 2014 anti-corruption laws effectively “controls” judges by harshly punishing them by an executive branch agency, which violates their independence and is proscribed in the Constitution.⁶⁵

The dissenting opinions point out that there is a startling lack of foundation for this decision.⁶⁶ The four dissenting justices (Justices Holovaty, Lemak, Kolisnyk, and Pervomayskyi) all point out that there was a lack of proper justification in the majority’s opinion.⁶⁷ Justice Holovaty states, “the thesis applied in the [majority’s] decision has no legal grounds.”⁶⁸ He points out that the powers of the NAPC to investigate, access, and hold judges criminally liable for corruption “is in no way ‘control over the judge,’” and invalidating the entirety of the law expands the scope of the Court’s powers far too considerably.⁶⁹ The majority nullifies, wholesale, the ability of the NAPC to verify financial declarations of *all* public officials, not just the judiciary, which weakens the judicial independence argument. Justice Kolisnyk, in dissent, writes that the majority applies its own subjective vision of constitutional review and of the law, without proper justification.⁷⁰

61. *Id.* at 9.

62. *Id.* at 11.

63. *Id.*

64. *Id.* at 12.

65. *Id.*

66. Constitutional Court, *supra* note 2 (Holovaty, J., Lemak, J., Kolisnyk, J., and Pervomayski, J. dissenting).

67. *Id.* at 18 (Kolisnyk, J. dissenting).

68. *Id.* at 14 (Holovaty, J. dissenting).

69. *Id.* at 19.

70. *Id.* at 3 (Kolisnyk, J. dissenting).

Justice Holovaty points out that if the independence of judges is the concern, why comprehensively invalidate the crime of knowingly falsifying documents from applying not only to judges, but Members of Parliament, service members, civil servants, officials of executive bodies, and others?⁷¹ Justice Pervomayskyi agrees and states that the majority “focuses on implementation problems . . . and monitoring exclusively in relation to judges . . . and ignored the facts that the [legislation] . . . concerned *all* ‘officials,’ i.e. persons authorized to perform functions of the state.”⁷²

Regarding the importance of the international agreements and the majority’s silence on conforming with international anti-corruption standards, Holovaty cites *Wypch v. Poland* in the European Court of Human Rights, which held that financial declarations of public officials are a requirement in a democratic society to hold civil servants, including judges, accountable.⁷³ Holovaty also leans on the notion from the Council of Europe’s Parliamentary Assembly of 2008, which stated that judges and other public officials have a special status in society as the majority intimates. However, that role “automatically puts increased pressure on their privacy.”⁷⁴ While Justice Lemak agrees with the majority that inappropriate influence on judges is a concern, the Court should have considered not only the judges’ perspective but also how an outside observer may perceive the alleged influence.⁷⁵

Deterrent sanctions and punishments for knowingly and intentionally failing to declare or falsify declarations are at the heart of the International Monetary Fund (IMF) requirements⁷⁶ and the European Union for Ukraine moving forward for further integration into the European fold.⁷⁷ For Holovaty, striking this down threatens this progress, laid out in the Preamble of the Constitution regarding

71. *Id.* (Holovaty, J., dissenting).

72. *Id.* at 9 (Pervomayskyi, J. dissenting).

73. *Id.* at 14. (citing *Wypch v. Poland*, App. No. 2428/05, 2005 Eur. Ct. H.R. (admissibility decision)).

74. *Id.*

75. *Id.* at 19 (Lemak, J., dissenting).

76. The IMF requested the creation of the NAPC and the NABU as a commitment to fight corruption within Ukraine to continue the Stand-by Agreements establishing loans for Ukraine from the IMF. The European Commission also required anti-corruption legislation within Ukraine’s commitments in the EU-Ukraine Association Agreement of 2014, which entered into force in 2017. *See* International Monetary Fund, Ukraine: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding (Sept. 1, 2016), available at <https://www.imf.org/external/np/loi/2016/ukr/090116.pdf>.

77. Constitutional Court, *supra* note 2, at 19 (Holovaty, J., dissenting).

“the irreversibility of the European and Euro-Atlantic course of Ukraine.”⁷⁸ He also claims criminal liability cannot be decided to be too repressive a punishment so suddenly and without basis.⁷⁹ The Court previously held that the Preamble of the constitution is an essential element of the constitutional order and that the nature and text of the Preamble is only able to be changed via the will of the people due to the special and foundational nature of the Preamble to the Constitution.⁸⁰ The Court emphasized in those prior decisions that the Preamble is so crucial to the foundations of Ukraine that the only acceptable change to the text would need to come from a popular referendum.⁸¹

The progress towards integration of Ukraine into the European Union are values *expressis verbis*, or explicitly stated, within the constitution’s text which make them paramount to the structure and foundation of law in Ukraine.⁸² Justice Lemak asserts that “it is one thing to ‘have questions’ about the quality of the law, but it is a completely different thing to establish non-compliance of its provisions with the Constitution of Ukraine.”⁸³ Parliament, not the court, is the proper venue to ensure the effectiveness of statutes and policy and enacting and deciding the types of punishments is the prerogative of Parliament as elected by the people.⁸⁴ Invoking Justice Antonin Scalia of the U.S. Supreme Court, Lemak writes that judicial judgment cannot be substituted for political distaste, and the Court must not strike down the entirety of the law as unconstitutional for their dislike of the statute.⁸⁵

Justice Holovaty and Lemak agree that the majority’s inappropriate justifications based on personal animus towards the

78. The Preamble to the Ukrainian Constitution states: “The Verkhovna Rada of Ukraine, on behalf of the Ukrainian people - citizens of Ukraine of all nationalities, expressing the sovereign will of the people, based on the centuries-old history of Ukrainian state-building and on the right to self-determination realised by the Ukrainian nation, all the Ukrainian people . . . confirming the European identity of the Ukrainian people and the irreversibility of the European and Euro-Atlantic course of Ukraine, striving to develop and strengthen a democratic, social, law-based state, aware of responsibility before God, our own conscience, past, present and future generations.” (emphasis added). CONST. OF UKR. pmbl.

79. Constitutional Court, *supra* note 2, at 18 (Holovaty, J., dissenting).

80. Constitutional Court, November 22, 2018, Decision No. 3-v/2018 at 5 (separate opinion Melnyk, J.).

81. *Id.*

82. Op. No. 13-r/2020 at para. 3 (Lemak, J., dissenting).

83. *Id.* para.1.

84. *Id.*

85. *Id.* para. 3 (Referencing Justice Scalia’s dissent in *Romer v. Evans*, 517 U.S. 620 (1996)).

legislation threaten constitutional order and values.⁸⁶ Justice Lemak points out that the Court overstepped into the legislatures' territory as the statutes regarding official documents and their requirements "not only obviously belong to the constitutional authority of the Parliament, but also actually cannot be established with the help of legal arguments in a judicial proceeding. Following the doctrine of the 'political issue,' the Court should have refused to consider such issues."⁸⁷ Lemak points out that past decisions of the Court highlight that:

[T]he first rule is to try to interpret the controversial provisions of the law in such a way that would as much as possible bring them into accordance with the Constitution of Ukraine (constitutionally conforming interpretation). Such provisions are acknowledged as unconstitutional only provided that even interpretation does not allow in any way to understand them jointly with the values of the Constitution of Ukraine.⁸⁸

The Court failed to follow this rule in interpreting the statutes at hand in the petition. It even included parts of the 2014 statutes that were absent in the petition under review, inappropriately expanding the scope of their review beyond the Constitutional authority granted in Article 151 of Chapter XII of the Constitution.⁸⁹

The Court does not explain in its decision any constitutionally protected public or private interest that was disproportionately affected by Article 366 to explain its expansion of scope or its decision on the law. Dissenting Justice Pervomayskyi is troubled by this expansion of power, stating that the motivation of the majority to consider the constitutionality of legislation not submitted by the members of Parliament is suspect and speaks to bias on the majority's part regarding the anti-corruption legislation.⁹⁰ This failure of transparent interpretation is outrageous in the face of the Court's refusal to recuse four Constitutional Court judges who had an explicit conflict of interest regarding investigations into their financial disclosures and

86. *Id.* paras.1 and 6.

87. Op. No. 13-r/2020 at para.1 (Lemak, J., dissenting).

88. *Id.* para. 2.

89. The Constitution defines the authority of the Constitutional Court as only deciding on the conformity and official interpretation of the issues presented under petitions to the Court by "the President of Ukraine; not less than forty- five People's Deputies of Ukraine; the Supreme Court; Authorized Human Rights Representative of the Verkhovna Rada of Ukraine; the Verkhovna Rada of the Autonomous Republic of Crimea." *Konstytutsiia Ukrainy [Constitution of Ukraine]* June 28, 1996, §XII, art. 151 (Ukr.). See Venice Comm'n Opinion 1-12/2020, *supra* n. 4, paras. 25–29 (commenting on such powers).

90. Op. No. 13-r/2020 at para. 17 (Pervomayskyi, J. dissenting).

wrongdoing, according to the NAPC.⁹¹ The Court explicitly mentioned that Article 366.1 of the Criminal Code did not conform to “requirements of clarity and unambiguity,” yet their own decision lacked clarity, as pointed out in the report of the Venice Commission.⁹² The Court needed to identify which parts of Article 366.1 needed more clarity. For the majority, the focus is exclusively on the “repressive methods” of criminal consequences within the Article as knowingly making false financial declarations “are not capable of causing significant harm to a natural or legal person, society or the state” and therefore should not be subject to criminal punishment.⁹³ However, Articles 366.1 and 366.2 of the Criminal Code did not make all falsification of information in official documents, such as financial declarations, subject to harsh criminal liability.⁹⁴ Article 366 outlined that knowingly falsifying information in any official document “shall be punishable by a fine up to four thousand tax-free minimum incomes, or restraint of liberty for a term up to three years, with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years” and that “the same act that caused any grave consequences, shall be punishable by the imprisonment for a term of two to five years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.”⁹⁵ For the Court to claim that such guidelines are unconstitutional due to the severity of the punishment ignores the range of liability, which includes both fines and incarceration. Contrary to the Court’s claims of a lack of clarity, the Venice Commission found these provisions “sufficiently clear,” stating that “it does not appear that public officials in Ukraine do not know whether or not they are required to submit declarations,” according to Article 366.⁹⁶

While the Court’s decision lays out important reasons for judges to have a special place in the government of Ukraine, it ignores

91. Oleg Sukhov, *Agency Says Constitutional Court Has Conflicts of Interest in Ruling on Big Cases*, KYIV POST (Oct. 10, 2020, 6:56 PM), <https://www.kyivpost.com/ukraine-politics/agency-says-constitutional-court-has-conflicts-of-interest-in-ruling-on-big-cases.html>.

92. Venice Comm’n Opinion 1012/2020, *supra* no. 4, para. 17.

93. Venice Comm’n Opinion 13-r/2-2-, *supra* no. 4, at 11.

94. Kryminalnyi Kodeks Ukrainy [Criminal Codex of Ukraine], art. 366.1-366.2.

95. *Id.* art. 366.

96. Ukraine Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Legislative Situation Regarding Anti-Corruption Mechanisms Following Decision No. 13-R/2020 of the Constitutional Court of Ukraine, Euro. Comm’n for Democracy Through Law, Op. No. 1012/2020, para. 33 (Dec. 9, 2020).

the importance of ensuring public trust in the judiciary.⁹⁷ The dissents agree that judges must be free to perform their duties and functionalities of their role; however, this does not give them immunity across the board for activities that do not directly impact their functionality.⁹⁸ Holovaty writes that pieces of legislation at issue

[A]re in no way interference in the professional activities of judges - administering justice, but aimed at achieving a legitimate goal - to prevent corruption in the state, including by way of verifying, molding the integrity of persons who perform certain functions of state or local government which is extremely necessary in a democratic society.⁹⁹

Lemak agrees and pushes further, stating: “Control over legality of income and property status of judges by established executive bodies based on laws of Ukraine is not an interference into the independence of judges and courts that is guaranteed by the Constitution of Ukraine.”¹⁰⁰

IV. ANALYSIS OF THE DECISION’S IMPACT AND INITIAL REFORM ATTEMPTS

The decisions of the Constitutional Court are binding, final, and may not be challenged.¹⁰¹ The day after the decision, following the immediacy of the implementation of the decision, the NAPC cut access to the declarations system, leaving the banking sector, the public, and the rest of the government in a spiral over how to respond.¹⁰² Public outcry over the perceived influence of Russia over the Court grew louder following an investigative report that revealed that Chairman of the Court, Oleksandr Tupytskyi, owned property in Russian occupied-Crimea acquired under Russian law.¹⁰³ The public was dissatisfied that

97. *Id.* para. 53.

98. Op. No. 13-r/2020 at para. 3 (Holovaty, J., dissent); *see also* Op. No. 13-r/2020 at para. 5 (Lemak, J., dissenting).

99. Op. No. 13-r/2020 at para. 3 (Holovaty, J., dissent).

100. Op. No. 13-r/2020 at para. 5 (Lemak, J., dissenting).

101. Konstitutsiia Ukrainy [Constitution of Ukraine] June 28, 1996, §XII, art. 151.2 (Ukr.).

102. *Ukraine’s Judiciary on the Brink of Arbitrariness: What Went Wrong with the Constitutional Court’s Ruling*, UKRAINE CRISIS MEDIA CTR. (Oct. 30, 2020, 10:11 PM), <https://uacrisis.org/en/ukraine-judiciar>.

103. Additionally, Oleksander Tupytskyi claimed he had only done so due to his ignorance over filing documents within Crimea, ignoring the implication that doing so would give legitimacy to the Russian occupation of the region. *Ukraine’s Constitutional Court*

these decisions threatened the country's standing with the E.U. under the Association Agreement that provided financial aid and visa-free travel.¹⁰⁴ President Zelensky criticized the decision, and the Rada proposed multiple attempts to reform the rules surrounding the Constitutional Court.¹⁰⁵

Reactions to this decision and the blow to anti-corruption reform in Ukraine were swift and far-reaching. As the Court's opinions are final and unable to be appealed in domestic courts, President Zelensky appealed for an intervention by the Venice Commission of the Council of Europe to investigate and report on the decision.¹⁰⁶ The National Bank of Ukraine also published a warning that by striking anti-corruption legislation, the decision put their standing with the IMF at risk almost immediately.¹⁰⁷ In their 2020 Stand-by-Agreement, the IMF outlined a requirement for clear anti-corruption measures for continued funding, and the decision of the Court threw Ukraine into perilous territory with its largest lender.¹⁰⁸ International bodies responded to the decision and offered guidance, while President Zelensky and the legislature also attempted to provide reforms to address the constitutional crisis swallowing the country.¹⁰⁹

By reversing prior precedent and throwing constitutional law in Ukraine into chaos, the Constitutional Court's decision exemplifies

Attacks Anti-Corruption Laws, THE ECONOMIST (Nov. 14, 2020), <https://www.economist.com/europe/2020/11/14/ukraines-constitutional-court-attacks-anti-corruption-laws>.

104. *Id.*

105. Euro. Comm'n for Democracy Through Law, *supra* note 96, paras.11–12.

106. Euro. Comm'n for Democracy Through Law, *supra* note 96, para.1.

107. *NBU Says No IMF Tranche for Ukraine This Year*, BNE INTELLINEWS (Nov. 14, 2020), <https://www.intellinews.com/nbu-says-no-imf-tranche-for-ukraine-this-year-196579/>.

108. Ukraine is one of the IMF's four largest borrowers and the removal of IMF funding would see billions of dollars stripped from the economy. *See* Member Financial Data, Total IMF Credit Outstanding, IMF, <https://www.imf.org/external/np/fin/tad/balmov2.aspx?type=TOTAL>; *see also* Press Release No. 22/69, Int'l Monetary Fund, IMF Executive Board Approves US\$1.4 Billion in Emergency Financing Support to Ukraine (Mar. 9, 2022), <https://www.imf.org/en/Publications/CR/Issues/2022/03/10/Ukraine-Request-for-Purchase-under-the-Rapid-Financing-Instrument-and-Cancellation-of-Stand-514148>. The Stand-By Agreement between the IMF and Ukraine was canceled in March of 2022 to receive funding under a Rapid Financing Instrument (RFI). Momentum under the IMF's Stand-By Agreement with Ukraine was diminishing as of January 2022, while reserves lowered after non-resident investors removed \$500 billion from Ukraine's economy. Ukraine was forced to cancel the agreement in March of 2022 following the Russian invasion due to concerns over its ability to conform to IMF requirements in wartime. Following the cancellation of the Stand-By Agreement, the IMF pledged \$1.4 billion to support Ukraine during the conflict.

109. Euro. Comm'n for Democracy Through Law, *supra* note 96, paras. 11–12.

the political power wielded by the judiciary and the problems of judicial empowerment in Central and Eastern Europe in post-Soviet states.¹¹⁰ While legislatures in these states have oversight roles, they have remained mainly dormant in exercising such power over the judiciary, allowing far-east states such as Ukraine struggling to find oversight mechanisms in the face of a long-empowered court.¹¹¹ However, the history of a dormant parliament in the face of a far-reaching judiciary is waning, as evidenced by multiple reform attempts over the past twenty-five years. The immediacy of both the legislature and President Zelensky's catalyzing reform attempts highlight the problem of such unilateral court decisions on the long-term standing of Ukraine with the E.U. and the IMF. International bodies responded to the decision and offered guidance and advice, and both President Zelensky and the legislature also attempted to provide reforms to correct the constitutional crisis now swallowing the country.¹¹²

A. International Attempts to Solve the Crisis: The Venice Commission and Transnational Constitutional Policies

On November 25, 2020, President Zelensky requested an urgent opinion from the Venice Commission, the advisory body of the Council of Europe made up of independent experts on constitutional law.¹¹³ Ukraine first entered into cooperation with the Venice Commission in 1992 and adopted the recommendations of the Commission in the past.¹¹⁴ Previously, the Commission issued warnings and recommendations regarding the state and principles of legal certainty related to the constitution in 2004 and 2010.¹¹⁵ The Commission has maintained consistency in the issues they see within the constitutional relationships in Ukraine.¹¹⁶

110. Cristina E. Parau, *The Dormancy of Parliaments: The Invisible Cause of Judiciary Empowerment in Central and Eastern Europe*, 49 J. REP. DEM. 267, 274 (2013).

111. *Id.*

112. Euro. Comm'n for Democracy Through Law, *supra* note 96, paras. 11–12.

113. *Id.* para.1.

114. See Victoria Dubas, *Ukrainskyi Shliakh Rozvytku Konstytutsionalizmu: Venetsiiskyi Aspekt* [The Ukrainian Way of Development of Constitutionalism: The Venetian Aspect], 1 UKR. CONST. L. J. 46, 50 (2022).

115. See generally Venice Comm'n, Opinion on the Draft Law on Election of People's Deputies of Ukraine Draft introduced by People's Deputies M. Rudkowsky and V. Melnychuk. Adopted by the Venice Commission at its 57th Plenary Session (Dec. 12-13 2003); see also Venice Comm'n, Opinion on the Constitutional Situation in Ukraine adopted by the Venice Commission at its 85th Plenary Session, Venice (Dec. 17-18 2010).

116. *Id.*

Some Scholars criticize intervention by international bodies and the transnational diffusion of constitutional review.¹¹⁷ While scholars have argued that states do not adopt or shift their practices of constitutional review due to the activities of other states,¹¹⁸ in the case of Ukraine, there is ample evidence that their practices have evolved because of international recommendations and norms due to the importance of the European trajectory in the Constitution's Preamble.¹¹⁹ The Constitutional Court system is not immune to this as the Venice Commission has written extensive reports and opinions on the activities of the Court and recommended draft laws and measures adopted by the legislature. The Venice Commission's recently published opinions and *amicus curiae* briefs are overwhelmingly related to the Court, judicial reform, and legislative and presidential action regarding the 2020 decision.¹²⁰ Previously, international intervention saw backlash directly from the Court in Ukraine, though given the direct response to Court action, this backlash was stymied.¹²¹

In their response to Decision No. 13-r/2020, the Venice Commission laid out three issues with the Court: (1) conflicts of interest; (2) the scope of the decision; (3) and the immediate annulment of the allegedly unconstitutional provisions and legislation.¹²² First, the Commission critiqued the apparent conflict of interests held by four justices who sat on the case. Three of the justices were contacted by the NAPC before the decision for their incomplete financial declarations and were asked to recuse themselves due to conflicts of interest with pending anti-corruption investigations.¹²³ The Court dismissed the recusal requests, which the Commission believed violated Article 60 of the Law on the Constitutional Court.¹²⁴ The Court claimed they adopted six rulings concerning the four justices in

117. See Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 29 U. VA. PUB. L. & LEGAL THEORY RSCH. PAPER SERIES 1, 3 (2013).

118. *Id.*

119. For a comprehensive list of opinions and publications by the Venice Commission on Ukraine dating back to 1993, see Venice Comm'n, Documents: Opinions for Ukraine <https://www.venice.coe.int/webforms/documents/?country=47&year=all>.

120. See, e.g., Ukraine *amicus curiae* Brief on the Limits of Subsequent (*a posteriori*) Review of Constitutional Amendments by the Constitutional Court, Euro. Comm'n for Democracy Through Law [Venice Commission], 131st Plenary Session, Op. No. 1070/2021 (June 20, 2022).

121. Andrii Nekoliak, 'Shaming' the Court': Ukraine's Constitutional Court and the Politics of Constitutional Law in the Post-Euromaidan Era, 47 REV. OF CENT. AND E. EUR. L. 298, 312–313 (2022).

122. Euro. Comm'n Democracy Through Law, *supra* note 96, at 5.

123. *Id.* at 6.

124. *Id.* at 6 (referencing VVR, No. 2136-VIII, amended by Law No 2147-VIII (2017)).

question but did not make those rulings accessible to the public, with the only reason noted that the impartiality of the Court was essential for the judges.¹²⁵ Second, the Commission noted that the Decision went beyond the petition by the members of Parliament who appealed to the court.¹²⁶ The Decision did address the challenged provisions but also invalidated six other sections of the statute not challenged without explaining why they expanded the scope of their interpretation beyond their powers to review cases under the constitution.¹²⁷ Third, the Court did not use its power to establish a timeline for implementation as is customary in altering anti-corruption legislation.¹²⁸

In past decisions upholding or altering anti-corruption legislation, the Court allowed a three-month timetable for the change so that a proper response could be created and anti-corruption work integral to the agency's functioning could continue.¹²⁹ Decision No. 13-r/2020 was implemented immediately and forced multiple investigations and criminal cases to close or be overturned.¹³⁰ The combination of these factors speaks to questionable conduct by the justices authoring the decision, and the Commission offered several possible reforms for Ukraine moving forward, including (1) requiring the development of a reasoning standard for CCU decisions; (2) amending the Law on the Constitutional Court ensuring transparent methods of acknowledging and responding to recusal requests and defining situations to avoid *non-liquet*¹³¹ issues; (3) developing disciplinary sanctions and proceedings for judges; (4) revising the process of appointing judges to the Constitutional Court to demystify the balkanized method of each of the appointing bodies; (5) and introducing the possibility of re-opening CCU cases.¹³² These issues and the critique of the Court helped spur legislative and presidential

125. *Id.* at 12–13.

126. UKR. CONST. Sec. XII, art. 150–151 (stating that “the Constitutional Court of Ukraine, upon submission of the President of Ukraine or not less than forty-five People’s Deputies of Ukraine, or the Cabinet of Ministers of Ukraine, provides opinions on compliance with the Constitution of Ukraine of international treaties of Ukraine that are in effect, or the international treaties submitted to the Verkhovna Rada of Ukraine for granting agreement on their binding nature and that “the issues referred to in clauses 1 and 2, part 1 of this Article shall be considered upon constitutional submissions.”).

127. Euro. Comm’n Democracy Through Law, *supra* note 96, at 6–7.

128. *Id.*

129. *Id.* at 8.

130. *Id.*

131. *Non-liquet*, BLACK’S LAW DICTIONARY (11th ed. 2019). “No applicable law.” The term refers to when a judicial body fails to decide the merits of an admissible case.

132. Euro. Comm’n Democracy Through Law, *supra* note 96, at 10–18.

action to reform the Court and the more significant judiciary issues highlighted by the 2020 decision.

B. Domestic Attempts: Presidential and Legislative Reform

Three days after the decision, President Zelensky issued a draft law to Parliament declaring Decision No. 13-r/2020 null and void and implicating the justices in a conflict of interest, which would effectively terminate the powers of the Court within a day of approval.¹³³ Parliament rejected the proposal, and Zelensky withdrew the bill; however, Parliament did partially restore the anti-corruption legislation, including criminal punishments for falsifying declarations in December 2020.¹³⁴ At the end of the month in December 2020, President Zelensky suspended Chairman of the Constitutional Court Oleksander Tupytskyi for two months upon request by the Prosecutor General's office for Tupytskyi's failure to appear for police questioning regarding witness tampering.¹³⁵ Eventually, Zelensky issued a presidential decree dismissing Tupytskyi from the Court entirely.¹³⁶ The suspension of the Chairman and draft law suspending the justices brought constitutional questions of their own, as the Ukrainian Constitution only outlines one removal method for Constitutional Court justices.¹³⁷ Dissatisfaction over the stringent and antiquated constitution had led to reform and amendments from the legislature and executive.¹³⁸ In the past, however, Zelensky's actions

133. *Zelensky asks Rada to sack all Constitutional Court judges following controversial ruling*, UNIAN (Oct. 30, 2020), <https://www.unian.info/politics/zelensky-asks-rada-to-sack-all-constitutional-court-judges-following-controversial-ruling-11200502.html>.

134. *Ukraine's parliament defies court ruling and restores anti-corruption legislation*, EURONEWS (Apr. 12, 2020), <https://www.euronews.com/my-europe/2020/12/04/ukraine-s-parliament-defies-court-ruling-and-restores-anti-corruption-legislation>.

135. *Zelensky suspends Constitutional Court chair for two months*, UNIAN (Dec. 29, 2020), <https://www.unian.info/politics/constitutional-crisis-zelensky-suspends-ccu-s-chief-judge-11271860.html>; *see also Top Ukraine judge probed for witness tampering*, DEUTSCHE WELLE (Dec. 28, 2020), <https://www.dw.com/en/ukraine-top-judge-investigated-for-witness-tampering/a-56077432>.

136. Ukaz Prezydenta Ukrainy Pro Deiaki Pytannia Zabezpechennia Natsionalnoi Bezpeky Ukrainy [Decree of The President of Ukraine on Some Issues of Ensuring the National Security of Ukraine] No. 124/2021, Mar. 27, 2021 (Ukr.).

137. UKR. CONST. Sec. XII, art. 149 (“Dismissal of a judge of the Constitutional Court of Ukraine from his or her office is decided by not less than two-thirds of its constitutional composition.”).

138. The Constitution of Ukraine may be amended through submission to Parliament by the President as detailed in Section XIII, Article 154 “Introducing Amendments to the Constitution of Ukraine” of the Constitution which states: “A draft law on introducing amendments to the Constitution of Ukraine may be submitted to the Verkhovna Rada of Ukraine by the President of Ukraine, or by no fewer National Deputies of Ukraine than one-

were not submitted as an amendment at the time, and therefore the Supreme Court of Ukraine found them to be overreaching his constitutional authority.¹³⁹

In responding to the Court, Zelensky highlighted the nature of the reform conflict, the judiciary versus the other branches' powers. The independence of the judiciary was a key provision of the Court's reasoning in the 2020 decision and this constitutional tension has carried over into all reform attempts by the executive and legislative branches. The nature of the Court and its place in the state at the outset of the constitution's formation had a vague and often less defined role in the context of a balanced arrangement of powers.¹⁴⁰ The judiciary of Ukraine occupied an in-between status within the scope of government powers, as intended to be outside the political forces and yet are still influenced by them. Mykola Savenko, former Justice of the Court, admitted that the justices often received political honors and housing in exchange for favorable rulings in the past.¹⁴¹ Widespread political influence over Ukraine's judiciary led to distrust of the system as the mechanisms of power led to intense corruption when political forces exerted influence over judges.¹⁴² Despite the Court's explanation that their decision of 2020 sought to regain an independent judicial body, they failed to address the historical evidence to the contrary of providing an adequate explanation of how dismantling the anti-corruption framework would achieve such a goal.

President Zelensky, to supplement his direct reform efforts, also created a Commission on Legal Reform following Decision No. 13-r/2020 to audit prior reform attempts and investigate incorporating the advice of the Venice Commission.¹⁴³ President Zelensky devised a strategy document implemented in 2021 to reform the judicial system

third of the constitutional composition of the Verkhovna Rada of Ukraine." UKR. CONST. Sec. XII, art. 154.

139. Verkhovnyi Sud Ukrainy [Supreme Court of Ukraine] No. 9901/96/21, 49 (July 14, 2021) (Ukr.).

140. Alexei Trochev, *Meddling with Justice: Competitive Politics, Impunity, and Distrusted Courts in Post-Orange Ukraine*, 18 DEMOKRATIZATSIYA: THE J. OF POST-SOVIET DEMOCRATIZATION 122, 125 (2010).

141. *Id.*

142. *Id.* at 130.

143. *Justice Is Impossible Without Effective and Independent Work of the Law Enforcement and Judicial Systems in Ukraine*, OFF. OF THE PRES. OF UKR. (Nov. 11, 2020, 6:58 PM),

<https://www.president.gov.ua/en/news/spravedlivist-nemozhлива-bez-efektivnoyi-ta-nezalezhnoyi-rob-65061>.

and constitutional justice.¹⁴⁴ In the face of Zelensky's attempts, pro-Russian news channels owned by Victor Medvedchuk, a Russian Oligarch with connections to Putin, began calling for his impeachment for overstepping his presidential power, turning the constitutional arguments back on the President.¹⁴⁵ The struggle for political power between the courts and the office of the President only furthered the constitutional crises as members of Parliament called for censure against Zelensky's attempts at reform and the Court's continued lack of transparency.¹⁴⁶

The Verkhovna Rada attempted to intervene as constitutional tensions rose between the President and the Court. The Verkhovna Rada wrote draft Law No. 5068, which established an Ethics Council to reform the appointment process for the High Council of Justice and judicial bodies that would side-step the need to amend the constitution.¹⁴⁷ The Rada hoped to avoid the conflict between the Office of the President and the Court entirely while also encouraging international participation in the process for oversight and guidance, a move approved by the Venice Commission.¹⁴⁸ In 2021, the Rada adopted the law creating the Ethics Council, which provides the Verkhovna Rada with an opinion on the compliance of each judicial candidate with professional ethics and integrity, as well as a list of candidates recommended for election as a member of the Supreme Council of Justice.¹⁴⁹ However, the Ethics Council has been hindered by internal resistance to reform.

On February 22, 2022, days before the Russian invasion, a majority of the members of the HCJ resigned after the Ethics Council attempted to assess the ethics and integrity standards of the HCJ.¹⁵⁰ The

144. Olena Akulenko, *Zelensky enacts strategy for development of justice system*, UNIAN (June 12, 2021), <https://www.unian.info/politics/judiciary-zelensky-enacts-strategy-for-development-of-justice-system-11451790.html>.

145. Minakov & Pomeranz, *supra* note 1, at 3, 6.

146. Minakov & Pomeranz, *supra* note 1, at 6.

147. John Lough, *Is Ukraine About to Cut the Gordian Knot of Judicial Reform?*, ATLANTIC COUNCIL (May 10, 2021), <https://www.atlanticcouncil.org/blogs/ukrainealert/is-ukraine-about-to-cut-the-gordian-knot-of-judicial-reform/>.

148. *Id.*

149. VVR, No. 5068, Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo poriadku obrannia (pryznachennia) na posady chleniv Vysshoi rady pravosuddia ta diialnosti dystsyplynamykh inspektoriv Vysshoi rady pravosuddia [On making changes to some legislative acts of Ukraine regarding the procedure for election (appointment) of members of the High Council of Justice and activities of disciplinary inspectors of the High Council of Justice] (2021).

150. Oleg Sukhov, *Most Members of Main Judicial Body to Resign Over Reform*, THE KYIV INDEP. (Feb. 10, 2022), <https://kyivindependent.com/national/most-members-of-main-judicial-body-to-resign-over-reform>.

members of the HCJ who resigned did so voluntarily to not be subject to the integrity assessment of the Ethics Council process.¹⁵¹ The resignations made one of the Ukrainian judiciary's most important and influential institutions unfunctional. Thus, when Russia invaded, the HCJ was left bereft of a necessary quorum to operate or give instructions.

The constitutional crisis sparked by the dismantling of the anti-corruption reform laws brought questions of the Court's suitability and the Constitution's structure into focus. One scholar wrote: "Усе це переконливо свідчить на користь того, що офіційна конституційна доктрина України все ще знаходиться в незбалансованому чи навіть гарячому стані вулканічної магми." ["All this strongly suggests that the official constitutional doctrine of Ukraine is still in an unbalanced or even hot state of volcanic magma."]¹⁵²

V. REFORMS TODAY UNDER MARTIAL LAW

Following Russia's invasion on February 24, 2022, President Zelensky issued a decree introducing martial law in the entire territory of Ukraine.¹⁵³ Several courts were suspended due to security concerns and shifting borders of the hostilities.¹⁵⁴ The Verkhovna Rada amended the legislation "on the Judiciary and the Status of Judges" to allow for flexibility in the operation of courts and territorial jurisdiction, authorizing the transfer of cases, postponement of trials, and taking steps to ensure the safety of court staff.¹⁵⁵

Reform to solve the constitutional and judiciary corruption crisis is paramount for Ukraine and required by the European Commission to continue moving forward with EU candidacy.¹⁵⁶ This

151. *Judicial Reform in Action: Most Members Of The High Council Of Justice Have Resigned*, DEJURE (Feb. 22, 2022), <http://en.dejure.foundation/tpost/m2ec3xumi1-judicial-reform-in-action-most-members-o>.

152. Vsevolod Rechytskyi, *Konstytutsiia, konstytutsiina doktryna, konstytutsiinyi protses i viina* [Constitution, Constitutional Doctrine, Constitutional Process and War], 2 UKR. CONST. L. J. 53, 55 (2022) (Ukr).

153. Prezydent Ukrainy [Office of the President of Ukraine], Decree No. 64/2022.

154. See *Rozporiadzhennia pro vyznachennia terytorialnoi pidsudnosti sprav* [Order on determination of territorial jurisdiction of cases], SUP. CT. OF UKR. (2022), https://supreme.court.gov.ua/supreme/gromadyanam/terutor_pidsudnist/?fbclid=IwAR3jm3bGmr_HpwqTqo_gxFZ5dWkYCsCWGGDc6G9y0b6odiA-ocFq0U7uFy4 (Ukr.).

155. VVR, *Zakon Ukrainy, Pro sudoustrii i status suddiv* [On the Judiciary and Status of Judges], June 2, 2016, No. 1402-VIII (Ukr).

156. UKR. CONST. § 3, art. 83 (stating that in the event of the expiration of the term of office of the Verkhovna Rada of Ukraine during a state of war or emergency,

is all the more paramount in the face of the war, which has encouraged even faster movement by the Ukrainian government to implement these reforms and maintain their standing for EU candidacy. Ukraine under martial law demonstrates an important example of how a modern, more recently established, democracy can respond and continue to reform their highest courts during active warfare.

A. *Reform of the Judiciary in the Face of the Constitutional Crisis in Wartime*

To successfully understand the issues of reform in wartime, it is crucial to understand how constitutions exist and change in periods of crisis. According to Eli Salzberger, there are three modes of functionality for the rule of law: periods of normality, periods of an emergency when special norms are applied and established ex-ante, and periods of emergency when unforeseen crises occur, and the previous legal framework is insufficient to take adequate measures.¹⁵⁷ The Ukrainian Constitution provides safeguards that the constitution cannot be changed under conditions of war or emergency,¹⁵⁸ thus making the current situation more complex when establishing precise reform methods for the ongoing constitutional crisis.¹⁵⁹ The safeguards constrain the potential changes in periods of emergency; however, they do not entirely proscribe special norms for the current emergency. According to the Venice Commission, this constraint disallows constitutional amendments, the most preferred option.¹⁶⁰ The operations of the executive ministers, the Verkhovna Rada, and the Office of the President are then left to handle the wartime continuation of reforms. The Rada has constitutionally protected and strengthened powers under martial law so that the legislation and government of

Parliament continues to perform its duties until the election of a new Verkhovna Rada after the lifting of the martial law or state of emergency) (Ukr.).

157. Eli M. Salzberger, *The Rule of Law Under Extreme Conditions and International Law*, MOHR SIEBECK CONTRIBUTIONS TO THE 14TH TRAVEMÜNDE SYMPOSIUM ON THE ECONOMIC ANALYSIS OF LAW, 26–28 (2014).

158. UKR. CONST. § XIII, art. 157 (“The Constitution of Ukraine shall not be amended if the amendments foresee the abolition or restriction of human and citizen’s rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine. The Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency”) (Ukr.).

159. See Constitutional Court, June 16, 2015, No. 1-in/2015 (Ukr.). A similar issue arose in 2015 following Russia’s annexation of Crimea; however, the Constitutional Court established a formal criterion for assessing amendments in light of Article 157 and held that at the time, there was no declared state of emergency, and therefore there were no legal grounds to make it impossible to amend the constitution. See *id.*

160. Venice Comm’n, *Ukraine Urgent Opinion on the Reform of the Constitutional Court*, 125th Sess., Op. No. 1012/2020, 8–9 (2020).

Ukraine may continue functioning despite interruptions to other aspects, such as election results or expiration of terms.¹⁶¹

Currently, the Rada continues to draft and adopt legislation to address the consequences of the crisis sparked by the Court. Additionally, bodies like the Ethics Council continue addressing judicial and anti-corruption reforms during the conflict. As both areas of reform are requirements by the European Union for admittance beyond Ukraine's candidate status, the government continues to develop solutions through legislative and administrative bodies to ensure international compliance.¹⁶² These measures can move quickly to facilitate the reforms necessary to maintain Ukraine's international status as an EU candidate and a recipient of the IMF.¹⁶³ The Verkhovna Rada adopted the Law of Ukraine No. 2128-IX on March 15, 2022, to resolve the impasse on the functionality of the High Council of Justice and their powers to oversee courts, including the Constitutional Court, during martial law following mass resignation before the outset of the war.¹⁶⁴

Under the legislation, during martial law and thirty days thereafter, the Chief Justice of the Supreme Court will be entrusted with the powers of the High Council of Justice.¹⁶⁵ Additionally, the law shifts the powers concerning the designation of the number of judges and territorial bodies to the State Judicial Administration of Ukraine¹⁶⁶ to stabilize the process.¹⁶⁷ These emergency measures allowed the Chief Justice to immediately take leadership and change vital operational issues such as the jurisdiction and directions in newly occupied territories.¹⁶⁸ The reallocation of powers under emergency conditions allowed the judiciary processes to continue, despite

161. UKR. CONST. § IV, art. 8.

162. Dan Peleschuk, *Ukraine's parliament enacts reform laws recommended by EU – Speaker*, REUTERS (Dec. 14, 2022), <https://www.reuters.com/world/europe/ukraines-parliament-enacts-reform-laws-recommended-by-eu-speaker-2022-12-14/>.

163. See, e.g., *Opinion on Ukraine's Application for Membership of the European Union*, EUR. COMM'N (June 16, 2022), https://neighbourhood-enlargement.ec.europa.eu/opinion-ukraines-application-membership-european-union_en.

164. VVR, Law on March 15, 2022, No. 2128-IX (Ukr.).

165. *Id.*

166. Created in 2002 and adjusted in 2010 through legislation, the State Judicial Administration of Ukraine is responsible for supervisory, administrative, and operational support services to the judicial system throughout the country. See generally *The State Judicial Administration Of Ukraine: Structural Assessment and Recommendations* USAID (Nov. 10, 2012), https://newjustice.org.ua/wp-content/uploads/2018/06/SJA_Structural_Assessment_MZ_eng.pdf.

167. VVR, *supra* note 39.

168. Halya Chyzyk, *Judicial Reforms in Times of War*, VERFASSUNGSBLOG (Dec. 21, 2022), <https://verfassungsblog.de/judicial-reform-in-times-of-war/> (Ger.).

airstrikes and electricity blackouts, under swift leadership, bypassing the absence of the HCJ quorum.¹⁶⁹ The work of the Ethics Council, created to appoint members of the High Council of Justice, continued under martial law, despite the earlier resignations. As of November 9, 2022, the Ethics Council completed the evaluation of members of the HCJ and over 80 candidates for the judiciary.¹⁷⁰ The continuation of these prior reform attempts spurred by legislation has made progress under martial law possible, despite an inability to amend the constitution in wartime.

In a prime example of the increase in efficacy under martial law, the Verkhovna Rada liquidated the District Administrative Court of Kyiv (DACK), a court frequently heralded as the most corrupt court in Ukraine.¹⁷¹ This followed moves by the United States to sanction one of DACK's most notorious judges, Pavlo Vovk, who had solicited bribes for his obstruction of the judicial process.¹⁷² Intense societal pressure following the Constitutional Court's decision in October 2020 increased public scrutiny over the judiciary and has seen swift action to address these reforms given the distrust by the public and pressure from international bodies. Moreover, international and domestic groups have praised this swift progress during wartime as Ukraine moves towards extricating its judiciary from widespread corruption.¹⁷³ The importance of judicial reform in the face of over-politicization of the Constitutional Court is a direct move against the previous dormancy of political bodies mentioned in Part IV of this paper. Now more than ever, Ukraine's political branches must balance the need for reform and oversight of the judicial branch to maintain stability, ensure public trust in the equity of the judicial process, and gain the vital status of a future member of the EU.

169. *Id.*

170. Sudova vlada Ukrainy [Judicial Power of Ukraine], Etychnii radi - ody rik. Velyka robota зроблена і shche bilshi vyklyky poperedu [The Ethics Council - One Year. Great Work Has Been Done and Even Greater Challenges Lie Ahead], Nov. 9, 2022, <https://ec.court.gov.ua/ec/pres-centr/news/1343849/> (Ukr).

171. Oleg Sukhov, *Zelensky Signs Law to Liquidate Ukraine's Most Notorious Court*, KYIV INDEP. (Dec. 13, 2022), <https://kyivindependent.com/national/parliament-approves-liquidating-ukraines-most-notorious-court>.

172. *Id.*

173. Veronika Melkozerova, *Ukraine Takes Two Steps Forward, One Step Back in Anti-Corruption Fight*, POLITICO (Dec. 26, 2022), <https://www.politico.eu/article/ukraine-takes-two-steps-forward-one-step-back-in-anti-corruption-fight-constitutional-court-reform/>.

B. The Reform and Operation of the Constitutional Court during Wartime

Despite the complicated and contentious events following the 2020 decision, the Court took a new and more removed approach during the war. The Constitutional Court remains operational during the war, though Chairman Oleksandr Tupytski fled the country illegally.¹⁷⁴ Justice Serhiy Holovaty now serves as Acting Chairman¹⁷⁵ and the Court continues to hear petitions. On December 7, 2022, during a special plenary session, three justices of the Court resigned, leaving only thirteen justices on the Court, which still meets the constitutional requirements of at least twelve justices for a quorum.¹⁷⁶ This has introduced new vacancies to the Court; however, new appointments are backlogged by efforts to reform the selection process.

With new vacancies on the Court and pressure to reform the entire judicial selection process, the Verkhovna Rada introduced a controversial law regarding the selection of candidates for the Constitutional Court: An Advisory Group of experts will check candidates for a position on the Court.¹⁷⁷ The Advisory Group will comprise six members—three independent experts and three appointed by the President, Parliament, and the Congress of Judges. Mykhailo Zhernakov, Chairman of the Board of the DEJURE Foundation, called on Ukrainian MPs to amend the law, stating that the lack of a seventh independent member “threatens democracy and European integration” as it does not ensure the independence of the decision-making process with three political appointees.¹⁷⁸ The law follows controversial consultation with the Venice Commission, which approved the three-

174. *Former Constitutional Court Head Declared Wanted After Allegedly Illegally Leaving Ukraine*, THE KYIV INDEP. (May 27, 2022), <https://kyivindependent.com/uncategorized/former-constitutional-court-head-declared-wanted-after-allegedly-illegally-leaving-ukraine>.

175. Tupytskyi’s suspension and dismissal in 2020 led to the naming of Holovaty as Acting Chairman on December 29, 2020. Serhii Lashyn, *Court without a Head: The Manifold Crisis of Ukraine’s Constitutional Court*, VERFBLOG (Sept. 15, 2021), <https://verfassungsblog.de/court-without-a-head/>, DOI: 10.17176/20210915-173536-0.

176. Konstytutsiyni Sud Ukrainy [Constitutional Court of Ukraine], Trokh suddiv zvilнено z posady suddi Konstytutsiinoho Sudu Ukrainy u vidstavku [Three judges were dismissed from the post of judge of the Constitutional Court of Ukraine and retired], Dec. 2, 2022, <https://ccu.gov.ua/novyna/troh-suddiv-zvilнено-z-posady-suddi-konstytucijnogo-sudu-ukrayiny-u-vidstavku> (Ukr.).

177. VVR, Law on Dec. 13, 2022, No. 2846-IX (Ukr.).

178. Mykhailo Zhernakov, *We Call on International Partners Not to Delegate the Members of the AGE and the MPs to Amend the Law on the CCU Immediately*, DEJURE (Dec. 20, 2022), <https://en.dejure.foundation/tpost/v277544a01-we-call-on-international-partners-not-to>.

to-three structure in light of current circumstances.¹⁷⁹ However, criticism by the Anti-Corruption Action Center and the DEJURE Foundation highlights that politicizing the selection process without independent members outnumbering the political appointees is antithetical to the need for a politically neutral Constitutional Court.¹⁸⁰ Zhernakov reiterated that the importance of the Constitutional Court as one of the only institutions that can limit political power through their decisions makes it paramount that it should remain a politically neutral force instead of one controlled by the government.¹⁸¹ The European Commission spokesperson, Ana Pisonero, agreed that a seventh member would support an independent Advisory Group and facilitate a more balanced and restrained Court.¹⁸²

The lack of transparency has made the Constitutional Court and other courts a sore spot of distrust for many in Ukraine, and with the insistence of the European Commission, these reforms feel at times chaotic.¹⁸³ The anxieties over a politically empowered and influenced Court threatens to turn the Court into a political phantom, a judicial body at the whims of politics instead of conforming to constitutionality.¹⁸⁴ A continuing obstacle to reforming Ukraine's Constitutional Court is the need for more transparency. According to a poll of Ukrainians in September, almost 70% believe that citizens should participate in selecting Constitutional Court judges.¹⁸⁵ While the invasion shook the country and the government, Ukraine has demonstrated remarkable resilience and efficiency as they continue their efforts to remold the Constitutional Court and wider judiciary. The anti-corruption agencies within Ukraine continue to investigate

179. *On Amending Some Legislative Acts of Ukraine Regarding Improving Procedure for Selecting Candidate Judges of The Constitutional Court of Ukraine on A Competitive Basis*, EUR. COMM'N FOR DEMOCRACY THROUGH L., 133rd Plenary Session, Dec. 19, 2022, No. 1109/2022, 11 (2022).

180. Halyna Chyzyk & Mykhailo Zhernakov, *Ukraine's Constitutional Court Reform on Brink of Catastrophe – And Venice Commission Is to Blame*, EUROACTIV (Dec. 15, 2022), <https://www.euractiv.com/section/europe-s-east/opinion/ukraines-constitutional-court-reform-on-brink-of-catastrophe-and-the-venice-commission-is-to-blame/>.

181. Melkozerova, *supra* note 173.

182. *The E.U. Is Waiting for Ukraine to Change the Law on The CSU, Adopted Contrary To The Recommendations of the Venice Commission*, EUROPEAN PRAVDA (Dec. 23, 2022), <https://www.euointegration.com.ua/news/2022/12/23/7152991/>.

183. Melkozerova, *supra* note 173.

184. S. Prylutskyi, *Konstytutsiyni Sud Ukrainy Ta Yoho Instytutsiyna (Ne) Vyznachenist: Aktualni Problemy Vitchyznianoho Derzhavotvorennia [The Constitutional Court of Ukraine and Its Institutional (Un-)Certainty: Current Problems of Domestic State Building]*, 120 BULL. TARAS SHEVCHENKO NAT'L U. KYIV LEGAL STUD., 60, 64 (2022) (Ukr.).

185. *70% of Ukrainians believe that civil society should participate in the selection of judges of the Constitutional Court*, DEJURE (Sept. 26, 2022), <http://en.dejure.foundation/tpost/tgpyt3ag71-70-of-ukrainians-believe-that-civil-soci>.

and arrest members of the judiciary during wartime regarding corruption, including the arrest of the head of the Supreme Court of Ukraine.¹⁸⁶ The Supreme Court stripped the chief of his position after the announcement, however he remains a judge and must await a decision by the High Council of Justice for removal orders.¹⁸⁷ Ukraine has additionally passed legislation praised by the Venice Commission regarding the selection process for Constitutional Court justices to remain in compliance with EU standards for continued international support.¹⁸⁸ Time will tell if the continued efforts of anti-corruption agencies and task forces in Ukraine and the new processes of the High Council of Justice will operate as hoped during and after the war.

VI. CONCLUSION

The ongoing war between Ukraine and Russia complicated an already fraught constitutional and judicial reform crisis within Ukraine. The actions of the Constitutional Court and the lack of public trust in the judiciary sparked an outpouring of criticism and movements to reform the system threatening Ukraine's status within international financial and political communities.¹⁸⁹ While the intensity of frustration with the ongoing corruption and complex judicial rulings continued, Russia's invasion of the country threatened Ukraine's territorial integrity and stability. The Constitutional Court exercised its political powers broadly and sparked a crisis in how constitutional power should be implemented, made more difficult by the restrictions on the amendment process during the war.

In the face of these challenges, Ukraine has not only managed to withstand armed aggression by Russia and make massive territorial advances but also push forward reforms with nearly unprecedented swiftness to propel the country into compliance with European

186. Daniel Victor, *The Chief Of Ukraine's Supreme Court Has Been Detained And Accused Of Taking A \$2.7 Million Bribe*, N.Y. TIMES (May 16, 2023), <https://www.nytimes.com/2023/05/16/world/europe/ukraine-supreme-court-chief-bribery.html>.

187. *Id.*

188. Venice Comm'n, Follow-Up Opinion to The 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" (Draft Law No. 9322 Of 25 May 2023). Adopted by the Venice Commission at its 135th Plenary Session (Venice, 9–10 June 2023).

189. *It's Time To Start Treating Ukraine's Corrupt Judiciary As A Criminal Syndicate*, ATLANTIC COUNCIL (Dec. 1, 2020), <https://www.atlanticcouncil.org/blogs/ukrainealert/its-time-to-start-treating-ukraines-corrupt-judiciary-as-a-criminal-syndicate/>.

standards.¹⁹⁰ This speed and prompt fulfillment of reform requirements are facilitated by martial law, which leaves Ukraine unable to reform the constitution itself and places the power for these changes in the hands of Parliament, Cabinet Ministers, and the President. However, the issues regarding the influence of politics in the Court and courts of Ukraine continue to develop. Challenges continue to arise, especially concerning political transparency and maintaining a neutral judiciary. The end of the DACK court and arrest of the Chief of the Supreme Court of Ukraine demonstrated that bold steps forward with international support are possible; however, the selection process for key positions of power in the Constitutional Court leaves room for political influence that could lead the process right back to where it started. An empowered Constitutional Court under the influence of politics remains a potential threat. Reform attempts continue to grapple with where Ukraine will land on the role the Court will have both during and after the war. However, the powers of the Court have been pulled back by public and international pressure with increased emphasis after the war began. The Constitutional Court's position may serve as the first test-case of an empowered post-Soviet high court to face intensive reforms at the behest of international and domestic pressure.

190. Melkozerova, *supra* note 173.