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Nekoliak, A.

DOI: 10.1163/15730352-bja10069

Publication date: 2022

Document Version: Final published version

Published in: Review of Central and East European Law

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Citation for published version (APA):

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‘Shaming’ the Court: Ukraine's Constitutional Court and the Politics of Constitutional Law in the Post-Euromaidan Era

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Abstract

Since the Euromaidan events of 2014, Ukraine has embarked on a reformist trajectory to ‘Europeanize’ the country and deliver the promise of good governance to its citizens. The series of legislative and public policy reforms that followed had financial and ideological support from Ukraine’s Western partners. To date, studies have focused on documenting and analyzing the course of international donors’ involvement in Ukraine’s reforms. What is lacking, however, is an analysis of the many different domestic responses to external pressure from donors to implement reforms. Examining Ukraine’s Constitutional Court case law on judicial self-government and anticorruption from 2020, this article examines this court’s legal response to the politics of reform led by international donors and domestic actors in Ukraine. It reveals the problematic nature of constitutional decision-making in a country that has recently been facing considerable pressure from political incumbents and civil society. The article identifies a pattern that characterizes the political process (a ‘troubled nexus’) around the reforms in Ukraine and draws a parallel between Ukrainian developments and the situation in Moldova and Georgia, two countries that have been confronted with similar reform challenges since the enactment of the respective Association Agreements with the EU in 2016.

Keywords
nexuses – law and politics – legal reform – international donors – Ukraine’s Constitutional Court

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1 Introduction

An examination of the politics of constitutional law, as exercised by Ukraine’s Constitutional Court, is needed for two reasons. First, Ukraine has seen a revision of the institutional and procedural components of constitutional adjudication in recent years. The constitutional reform of 2016 led to the adoption of a brand-new Law on the Constitutional Court, replacing the previous legislation from 1996. Following the institutional changes, new constitutional justices joined the bench, resulting in a new composition in 2016–2018. Political scientists have analyzed the post-Euromaidan judicial reform agenda focusing in particular on the adjudication by Ukraine’s Constitutional Court on ethno-political issues. At the time, neither political scientists nor lawyers had explored the substantive and procedural content and quality of constitutional decision-making in Ukraine. Moreover, following the Euromaidan transition of 2014, Ukraine implemented a series of governmental reforms across various areas of public life, from public procurement and administrative decentralization to anti-corruption measures and higher education. These reforms were encouraged by extensive support from international partners (foremost the EU), including financial and technical assistance. On a few notable occasions, Ukraine’s Constitutional Court was asked to adjudicate on the course of the new reforms, including questions pertaining to the legitimacy of this reformist trajectory. Based on these observations on the politics of constitutional law, this article seeks to contribute to the scholarship on legal and political

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1 The article is meant for the Special Issue “Troubled Nexuses between International and Domestic Law in the post-Soviet Space”, co-edited by Cindy Wittke (University of Regensburg, Germany) and Maryna Rabinovych (University of Agder, Norway)


changes in post-Euromaidan Ukraine and bring about a better understanding of domestic contestation over donor-assisted reforms.

It is important to note that the current Russian war of aggression against Ukraine will inevitably come to an end. Ukraine is already an EU candidate country. This status will necessitate further rule of law reform, a process that in all likelihood will be backed by partners outside of Ukraine. Against the backdrop of Russia’s aggression against Ukraine, the insight provided by this article is particularly relevant as it gives an indication of how the politics of reform might evolve in postwar Ukraine. Up to now, the literature has focused on the ‘input’ side of the reform processes in Ukraine after 2014. Studies that have analyzed the infrastructure of the EU support for the Ukrainian government, documented the impact as well as the empirical results of the reform processes themselves, or conducted process tracing for selected reforms from a public governance studies angle. This article takes a different perspective, instead placing the focus on the ‘output’ side of the reform process. By analyzing Ukraine’s Constitutional Court case law, this article will examine the legal profession’s response to cases surrounding recent reforms.

The article is divided into three main sections. The first discusses two reforms, one in the judicial sphere and one in the field of anti-corruption, both launched after 2014. It looks at the origins of the legislative reforms, the similarities and differences between the two reforms, and the link between

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them and the international donor community’s involvement in the reform processes. This section also takes a closer look at the changes prompted by the judicial reform that affected Ukraine’s Constitutional Court itself. The second part of the article turns to the legal interpretative side of constitutional adjudication related to the anti-corruption and judicial reforms. In actual fact, the Constitutional Court challenged the content of the two reforms in its rulings in 2020. In both cases, the Court strictly interpreted judicial independence to dilute the content of the reforms and play down the international donor factor. In the Discussion section of the article, I explain how domestic developments in Ukraine are indicative of the pattern characterizing the political process around reformist endeavors in the region and offer an initial comparison with the situation in Moldova and Georgia. Similar to Ukraine, these two countries entered into comprehensive Association Agreements with the EU and both encounter similar domestic challenges regarding the politics of reform. In the Conclusions and Outlook sections, the article reflects on the ‘troubled nexus’ between the legal interpretation and the broader political context of constitutional adjudication in post-Euromaidan Ukraine.

2 The Post-Euromaidan Anti-Corruption and Judicial Reforms

This section examines the post-Euromaidan reforms in the legislation on anti-corruption and the judiciary. It looks at the origins of and the similarities and differences between the two reforms, as well as the influence of donor support. In terms of their origins, the two Ukrainian reforms relied on the international donor’s (EU’s) input, which either made donor support conditional on conducting domestic reform or defined the narrative of the domestic changes to be implemented. First, in 2014, the EU’s reliance on achieving leverage through financial assistance played out in the context of the changes to anti-corruption legislation. In relation to this, the EU created a narrative around the issue that presented its input as state-building support to transform inefficient Ukrainian state structures and tied the provision of financial assistance to the Ukrainian government to the adoption of this legislation. A few years later, the role of the international donor factor increased in importance when Ukraine launched its reform of the judiciary and made it legal for foreign nationals to partake in judicial self-government (see section 2.2 of this article). The mechanism of the internationalized mandate for judicial nominations

8 See the introductory article in this special issue by Cindy Wittke and Maryna Rabinovych.
was first tested in the creation of a dedicated anti-corruption court in 2018. Thereafter, the 2019 reform implemented by the Zelensky administration attempted to apply the internationalized mandate to the procedures of judicial self-government. Thus, the two reforms varied in the scope and degree of international donor input. The 2014 reform was in keeping with the strategy of conditionality and various ‘leverages’ discussed in the EU enlargement literature, only in this case Ukraine was not a candidate country for EU membership at the pre-accession stage. At the same time, the reform of the judiciary included a concession on national sovereignty to facilitate more in-depth participation of the international donor community in Ukraine’s domestic affairs.

Second, the reforms differed in terms of the scope of the changes introduced. The anti-corruption reform was a legislative reform requiring a one-time passage of a new legal framework to fulfill the requirements for macro-financial assistance stipulated by the EU. The judicial reform was more extensive and comprised the adoption of multiple pieces of legislation or extensive amendments to existing legislation. This completely overhauled existing judicial institutions or created brand-new ones. Moreover, the judicial reform spanned several years and was executed under different post-Euromaidan governments and presidents (the first wave of reform being under President Petro Poroshenko in 2016–2018; and the second wave under President Volodymyr Zelensky in 2019). Nevertheless, the changes in presidents and governments had no impact on the increasing involvement of the international donor community in Ukraine’s domestic reform process. In fact, as section 2.2. will show, the political willingness to increase the international donor input in domestic affairs has continued to grow under President Zelensky.

Third, both reforms were widely supported and advocated by pro-Euromaidan civil society organizations and activists. In addition, the judicial reform relied on a participatory mode of engagement between civil society and international donors for the purpose of influencing the policy agenda of the Ukrainian government. The original impetus for an internationalized mandate for the Ukrainian judiciary came from domestic civil society actors who pushed for the issue to appear on the agenda of international donors, and the latter made this a condition for supporting the Ukrainian government. These observations resonate with previous findings by Samokhvalov and Strelkov, as

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10 Thus, Ukraine’s situation could be considered a case of ‘self-imposed’ conditionality, as described by Tom Casier, “The EU’s Two-Track Approach to Democracy Promotion: the Case of Ukraine,” 18(4) *Democratization* (2011), 956–977.
well as by Wolczuk, that show reform processes in post-Euromaidan Ukraine to be a complex entanglement of the agency of the EU, domestic “reform enclaves”, and political incumbents. This article takes these earlier findings and further unpacks how, with the support of international donors, representatives of civil society have become players in the politics of constitutional law in Ukraine. To illustrate this new domestic situation, the subsequent sections will take a closer look at the content of the domestic reforms and the developments (legislative and political) related to Ukraine’s Constitutional Court.

2.1 The 2014 Anti-Corruption Law
When it came to combating corruption, the EU’s involvement in Ukrainian affairs took the form of providing financial and budgetary assistance to the Ukrainian government. The aim was to consolidate the anti-corruption infrastructure and create a corresponding legal framework for prosecuting corruption crimes. In spring 2014, the European Commission outlined its conditions for providing budgetary assistance to the Ukrainian government. One of the primary objectives was the implementation of structural reforms to help deal with corruption in the country. At policy level, the European Commission stipulated that effective anti-corruption legislation be adopted. In particular, the State-Building Contract for Ukraine, the main instrument used by the EU to support the domestic reform process, tied the provision of financial assistance to the launch of an anti-corruption agency within the executive branch. A further requirement stipulated in the State-Building Contract was that changes must be made to Ukrainian criminal legislation to deal with specific corruption violations. According to the EU, Ukraine’s new legal framework had to meet these two requirements to qualify for financial assistance.

In fall 2014, to meet the EU’s requirements, the Ukrainian government drafted the Anti-Corruption Law, which was then adopted by the Verkhovna

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11 Samokhvalov and Strelkov, op.cit. note 6, at 12–13; Wolczuk, op.cit. note 4.
This law introduced the anti-corruption framework that went on to be developed further in subsequent years with EU involvement. The 2014 law envisaged a two-fold approach to tackle high-profile corruption in public service. On the one hand, the law set up the National Agency on Corruption Prevention (NACP), a governmental agency endowed with an array of functions and responsibilities enabling it to conduct financial monitoring of mid-level and high-level public servants (including from the Ukrainian judiciary and judicial self-government bodies), to address conflicts of interests in public service, and to propose other innovations in line with international practices. In particular, the NACP was tasked with controlling and reviewing the annual tax returns of public servants by supervising a public register of such returns. On the other hand, in line with the EU requirements specified in the State-Building Contract, the Anti-Corruption Law introduced punitive measures for public servants that break the law. The most notable change was in the introduction of Article 366-1 to the Ukrainian Criminal Code. Under this amendment, public servants eligible for financial monitoring by the NACP would be held to account for failing to submit or providing misinformation in their annual tax return.
2.2 Zelensky's Judicial Self-Government Law of 2019

In the post-Euromaidan era, the reform of the judiciary reset Ukraine's courts and judicial self-government systems. In the immediate post-transition years, the major constitutional reform of 2016 under President Poroshenko aimed at increasing the role of judicial self-government in creating courts, nominating candidates to the courts, disciplining the judiciary, and eliminating the role of the president in these processes. Moreover, new laws on the status of judges in Ukraine, the High Council of Justice (HCJ), and the Constitutional Court followed in 2016–2017. These changes led to the formation of a new Supreme Court composed of four cassation chambers. The new Court went live after an open, competitive judicial appointment process. A new law on the HCJ, adopted in 2017, reset the institution under the expanded mandate provided by the constitutional reform.

The impetus coming from international stakeholders in the field of judicial reform affected the consolidation of law enforcement agencies. In 2018, Ukraine's parliament mandated the creation of the High Anti-Corruption Court (HACC) to deal with high-profile corruption in the country. The prospect of Ukraine receiving macro-financial assistance from the International Monetary Fund (IMF) and the EU was the main incentive for domestic reformers to create a new court. Moreover, the involvement of foreign experts in the establishment of the HACC reflects the increasing role played by civil society in reform processes. Civil society representatives that pushed the EU officials to make support for the Ukrainian government conditional argued that the creation of a new court should rely on foreign involvement. Back in 2017, civil society stakeholders in favor of creating a Supreme Court were not happy with the credibility of some of the nominations made to the Court.

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19 See section 2.3 of this article for a discussion on the changes to constitutional adjudication.
20 Wolczuk, op.cit. note 4; Wolczuk and Žeruolis, op.cit. note 4; Pehlman, op.cit. note 5; Peacock and Gordner, op.cit. note 6, at 86.
crisis was the main reason behind the idea of bringing the international donor community to the table.

Thus, in Ukraine's domestic public political discourse on judicial reform, it was assumed that the involvement of neutral and highly experienced representatives of international organizations could make the process of judicial nominations to the HACC more objective. Responding to this impetus from domestic actors, the IMF placed the Ukrainian government under pressure to allow foreign experts to oversee the creation of the anti-corruption court.23 Moreover, the Venice Commission shaped a narrative on the legislative reform that would enable an internationalized mandate for supervising judicial reform to be put in place.24 In particular, the Venice Commission argued that “temporarily, international organizations and donors active in providing support for anti-corruption programs in Ukraine should be given a crucial role in the body which is competent in selecting specialized anti-corruption judges”.25

The 2018 HACC Law established a body of foreign experts, commissioned by international organizations in Ukraine, who participated in the process of nominating and vetting candidates for the new court.26 In the process of proposing candidates for the new court, this body of international experts had power of veto, which took precedence over the role of the High Qualification Commission for Judges (HQ CJ).27 The list of candidates for the expert body was

23 Kuz and Stephenson, op.cit. note 20, at 7.
25 Ibid., para. 73. Moreover, following the creation of the HACC in 2018, the Venice Commission called for the mandate of the international donor community to be extended with regard to the appointment procedure of candidates to the Constitutional Court. See European Commission for Democracy through Law (Venice Commission), Opinion No. 1012/2020 CDL-PI(2020)019 (10 December 2020) para. 79–80; Opinion No. 1024/2021 CDL-AD(2021)006 (22 March 2021) para. 84. Later, the Venice Commission also recommended enabling the participation of individual donor countries funding anti-corruption programs in Ukraine in addition to international organizations: Opinion No. 1029/2021 CDL-PI(2021)004 (5 May 2021) para. 28.
corroborated and endorsed after negotiations between the Ukrainian Ministry of Foreign Affairs (MFA) and a number of international organizations.\textsuperscript{28} The body of six international experts, chaired by former Lord Justice of Appeal (England and Wales) Sir Anthony Hooper, convened for one month in Kyiv in January 2019, reviewing the applications, interviewing, and vetting the prospective candidates to the HACC. The provision of staffing and technical assistance to the body of experts was organized by the International Development Law Organization (IDLO) and the EU.\textsuperscript{29}

Drawing on this experience with the HACC, President Zelensky successfully pushed for a bill that would extend the application of an internationalized mandate to the process of judicial nominations in fall 2019. First and foremost, the new law sought to apply a similar mechanism involving foreign experts in the formation of the HQCJ. Moreover, a new ethics body was to be created within the HJC to further internationalize the procedures of judicial self-government\textsuperscript{30} (henceforth: the Zelensky Law; for the full title of the law, see footnote 29). These legislative changes warrant closer attention because Zelensky’s judicial reform, and especially the internationalized mandate for overseeing the judiciary, were challenged before the Constitutional Court.

Following the reset of the HJC under a new law in 2017, the Zelensky Law reformed the institution once more. This new law set out the creation of an Integrity and Ethics Board under the auspices of the HJC.\textsuperscript{31} The new ethics body was tasked with reviewing the integrity of the candidates for and current members of the HJC and the HQCJ and had the authority to release them from service.\textsuperscript{32} The Zelensky Law allowed the internationalization of disciplinary measures for the judicial corpus in Ukraine. It was envisaged that the new ethics body would be composed of six members, three members of the HJC and three members provided by international organizations involved in anti-corruption monitoring with which Ukraine has concluded international agreements before. Thus, the composition of the ethics board enabled the internationalization of the system of judicial self-government in Ukraine. Further, the Zelensky Law also favored international experts in its proposed decision-making mechanism for the ethics board. In this regard, if a simple

\begin{itemize}
\item \textsuperscript{28} The organizations that provided the experts were the EU, CoE, EAFO, EBRD, and OSCE. See Kuz and Stephenson, \textit{op.cit.} note 20, at 7.
\item \textsuperscript{29} Kuz and Stephenson, \textit{op.cit.} note 20, at 8.
\item \textsuperscript{31} \textit{Ibid.}, Article 28-1.
\item \textsuperscript{32} \textit{Ibid.}
\end{itemize}
majority could not be reached to take the decision, Article 28-1, which was added to the HCJ Law of 2017 by the Zelensky Law, specified that in such cases, preference shall automatically be given to the decisions by the international experts.33

In relation to the Supreme Court, the new ethics body was given the authority to discipline justices in the event of them committing disciplinary or ethical violations. The Zelensky Law specified that once the ethics board had commenced its work, it could review the activities of the justices of the Supreme Court in order to check their compliance with the disciplinary and ethical standards of a judge. The ethics board was given a six-year mandate to conduct its activities from the date of the enactment of the Zelensky Law. By reviewing the activities of a judge, the Law understood “monitoring of information about Supreme Court judges in order to identify violations, gross systematic neglect of a judge’s duties incompatible with the status of a judge”.34 In particular, the ethics body could look into the origins of the financial assets of the Supreme Court justices by requesting and retrieving all relevant or necessary information and could file motions against justices who failed to prove the lawfulness of the origins of any and all financial assets and property owned by them. Moreover, the new ethics board, a collegial body within the HCJ, was tasked with reviewing the integrity of HCJ and HQCJ members and taking decisions against the members should they violate the ‘ethical standards’ of the judicial profession.35 It is important to note that, in addition to this proactive competence, the Interim Provisions of the Zelensky Law established that after the new ethics board was created, it would automatically review incumbent members of the HCJ and HQCJ.

In relation to the HCJ and HQCJ, the Zelensky Law created a decision-making mechanism for the ethics board, which also favored international experts. Under Article 24 of the new version of the HCJ Law, decisions regarding the dismissal of HCJ and HQCJ members shall be taken in the joint session of the HCJ and the Integrity and Ethics Board. Significantly, such a decision was considered adopted if the majority in the joint session did not overrule the decision of the ethics board and provided that at least two international experts voted in favor of the decision during the joint session.36 In other words, in terms of disciplinary procedures, Zelensky’s reform of judicial self-government allowed for an internationalized mandate for disciplining the Ukrainian judiciary.

33 Ibid.
34 Ibid.
35 Ibid.
36 Ibid., Article 24.
By and large, there was a trend toward increasing the input of the international donor community, primarily the EU, in post-Euromaidan reforms. This trend is related to the interplay between domestic civil society and political incumbents, which aims at facilitating more donor input, even at directly involving foreign nationals in the reform processes. As the next section will show, donor-supported change sparked a negative response from the legal profession, epitomized by the rulings of the Constitutional Court. The next section also provides a brief overview of the developments around the judicial institution to demonstrate how the Constitutional Court was, at times, blocked by domestic reformist and political pressures in post-Euromaidan Ukraine.

2.3 Constitutional Court Reform of 2017 and Developments Around the Court

As part of the post-Euromaidan reforms of the judiciary in 2016–2017, the Constitutional Court itself was reformed. In 2017, the Verkhovna Rada adopted a new Law on the Constitutional Court in line with constitutional changes that redrew the scope of the constitutional review. The jurisdiction of the Court includes, first and foremost, reviewing the constitutionality of national legislation. The changes in the constitutional text curtailed the ability of the institution to issue interpretation of ordinary domestic laws. Since 2016, the Court has only been able to issue interpretations of the Constitution. This has reduced the potential for policy-oriented decisions by the judicial institution. As argued in previous research, the Court was able to decide on the implementation of laws by issuing binding legal opinions on how to interpret ordinary legislation.\(^{37}\) Further, if asked by the president, members of parliament, or the government, the Court could decide on the constitutionality of constitutional amendment bills, of the wording of national referendum questions, and of international agreements Ukraine is about to enter into.\(^{38}\)

Moreover, the new framework Law on the Constitutional Court allowed for individual constitutional complaint, thus significantly increasing the involvement of individuals in constitutional adjudication.\(^{39}\) That said, the new mode allows such a complaint to be reviewed after the final court ruling on the case.

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39 Before 2016, individuals were able to request official interpretation of ordinary legislation, provided inconsistences existed in how public bodies of power or Ukrainian courts applied national legislation. See Law of Ukraine On the Constitutional Court of Ukraine (16 October 1996), 422/96-BP, Article 94, available at https://zakon.rada.gov.ua/laws/show/422/96-%D5%B2%D9%80#Text.
has been made and when the subject of the complaint is violations of the constitutional norms in ordinary laws (if these ordinary laws were before applied by ordinary courts to resolve the dispute in question).\textsuperscript{40} In other words, collegiums of the Constitutional Court were granted the right to start constitutional proceedings once such cases had passed through the cassation stage following review by the Supreme Court of Ukraine.

Following the political turmoil of the Euromaidan events, new justices were appointed to fill the bench in the judicial institution. This helped overcome some of the functional paralysis caused by the preceding political events. In late February 2014, the Verkhovna Rada revoked the mandates of five incumbent constitutional justices in one of its first decisions following the demise of the Yanukovych government.\textsuperscript{41} In the act of dismissal, members of parliament argued that these constitutional justices had played an active role in the usurpation of power by the ousted president. The Verkhovna Rada called on the Prosecutor's office to investigate the Yanukovych-era encroachments on the rule of law in the country and alleged that high-profile justices had contributed to the abuse of law during the Yanukovych era. The Verkhovna Rada called for other subjects with the right to appoint constitutional justices (the president and the Congress of Judges) to take similar decisions regarding the remaining incumbent justices and, thus, to reset the institution.\textsuperscript{42} While neither investigations nor further dismissals followed, due to a reduced number of incumbent justices, the Court was barely able to issue rulings on matters of constitutionality, resulting in a decline in the overall number of rulings issued by the Court over the next few years.\textsuperscript{43} Further, since the end of the nine-year term of office of pre-Euromaidan appointees to the Court in 2016, eight new justices joined the bench.

Moreover, the position of the chairperson of the Court has proven to be contentious in post-Euromaidan Ukraine. In recent years, two chairpersons of the Constitutional Court left the position in the wake of controversial incidents. From spring 2017 to early 2018, the Court operated without an elected chairperson. In February 2018, the position was filled by Stanislav Shevchuk, ad hoc judge of the ECHR in 2009–2012 and constitutional justice since spring

\textsuperscript{40} Constitution of Ukraine (with amendments introduced by the Law of Ukraine On Amending the Constitution of Ukraine, 2 June 2016, 1401-VIII), Article 151-1.
\textsuperscript{42} Ibid., para. 7.
\textsuperscript{43} For two pre-Euromaidan years (2012 and 2013), the Court issued 18 and 12 rulings respectively. For 2014, 2015, and 2016, it issued 7, 5, and 6 respectively.
2014. However, a year later, by a decision of the Court, Justice Shevchuk was expelled from the bench and thus removed from both the chairperson and the justice positions. Other justices reported ethical violations on the part of Shevchuk, invoking Article 149-1 of the Constitution on disciplinary misconduct by a judge of the Constitutional Court, an article which, under the 2016 constitutional amendment, became a prerequisite for dismissal.44 Since then, Justice Shevchuk has been contesting his dismissal from service before the Kyiv Administrative District Court. And while this ruling may seem to be an indication of more cohesion within this judicial body, it must not be taken as a sign that the institution is free from external pressure. Indeed, high-profile backlash from political incumbents does play a role in developments relating to the Constitutional Court.

The removal of Oleksandr Tupitsky from the position of chairperson, a politically loaded move, followed in March 2021, after the Court reversed the Anti-Corruption Law with its ruling (discussed in section 3.2 of the article). High-profile backlash was sparked by presidential decrees interfering with the work of incumbent justices and was largely supported by pro-reform civil society networks. President Volodymyr Zelensky placed Oleksandr Tupitsky, chairperson of the Constitutional Court since September 2019, on administrative leave, in doing so precluding a constitutional justice from exercising his administrative and judicial functions. The presidential decree invoked the provision of the Code on Criminal Procedure that gives a president the right to dismiss presidential appointees from incumbent provisions.45 In other words, the presidential decree followed the same legal logic as the immediate post-Euromaidan dismissals of constitutional justices carried out by the Verkhovna Rada in spring 2014. It is important to note that neither the Constitution nor the 2017 Law on the Constitutional Court envisage administrative leave as a form of dismissal for an incumbent justice of the Court. Moreover, a few months later, permanent dismissals were carried out by the president. In late March 2021, a new presidential decree permanently removed Oleksandr Tupitsky and another constitutional judge, Oleksandr Kasminin, from incumbent positions.46 Given that both justices were appointed by President Viktor Yanukovych back in 2013 for a nine-year term of office, the presidential decree revoked the legal force of the original documents regarding their appointments. The new decree justified the dismissals on the grounds of the need to guarantee national

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security and advance transitional justice measures to address the conduct of the Yanukovych-era Court appointees.47

A notable feature of these developments was the role of pro-reform civil society actors in normalizing the instances of political backlash and institution ‘shaming’. In particular, civil society actors that emerged on the wave of Euromaidan protests, and have since been involved in rule of law and anti-corruption monitoring, criticized the institution publicly and protested against individual constitutional justices.48 Civil society and policy organizations argued that the Court had no institutional or individual credibility (in particular, due to being staffed with Yanukovych-era appointees) when it came to making decisions on the reformist path of post-Euromaidan Ukraine after the reform reversal and indeed was itself in need of reform.49 The intensity and intentionality of this attack on the institution signified the low credibility of constitutional jurisprudence in the eyes of political incumbents and civil society.

3 The 2020 Court Reversals of the Legislative Reforms

This section examines the rational and legal arguments of the Constitutional Court in the matter of the constitutionality of the 2014 Anti-Corruption Law and Zelensky’s judicial reform of 2019. The Court took an anti-reformist stance in both cases and adhered to a strict doctrinal interpretation of constitutional law when dealing with the legitimacy of the international donor factor. To revoke the two reforms, the Court used the separation of powers argument. As the analysis below shows, by doing so, Ukrainian constitutional justices introduced a political theory of government with a rigid interpretation of judicial independence at its core to preclude the reformist trajectory of the country.

47 Ibid.
In the first case, the Court revoked the changes to the criminal legislation intended to address corruption in the civil service as well as other major areas of the reform. It did not rule on whether or not the Ukrainian government could accept financial assistance from international or transnational organizations subject to the implementation of domestic reforms. Instead, the Court effectively hollowed out the content of the anti-corruption reform, indirectly playing down the international donor factor. In the judicial legislation case, the Court protected the integrity of judicial self-government, precluding the possibility of oversight of the judiciary by international experts. On the legal interpretative side of the dispute, responding to the trend toward increased donor support for Ukrainian reforms, the Court expressed its clear disapproval of involving foreign experts in the domestic procedures of judicial self-government. By and large, the concern over the integrity of the judiciary became the legal interpretative basis for precluding or hollowing out donor-supported change led by post-Euromaidan Ukrainian elites.

3.1 The Judicial Reform Dispute and Its Outcomes

As discussed in the previous section, the crux of Zelensky’s reform of judicial self-government was to allow an internationalized mandate for overseeing the Ukrainian judicial corpus. This legislative amendment came under fire from the Constitutional Court, which considered it an impermissible infringement on the sovereignty of the Constitution and went on to revoke the amendment along with some other components of the reform. In its ruling, the Court argued that the creation of such an oversight mechanism had no legal basis in the Constitution. Interpreting this as an alleged mismatch between constitutional provisions concerning the judiciary and the 2019 amendment, constitutional justices argued that the prospect of international expert involvement in nominating and disciplining the judiciary in Ukraine was unconstitutional. In response to the Supreme Court appeal over the Zelensky Law, the Constitutional Court decision signified a negative evaluation of the international donor factor by the Ukrainian legal profession.

A look at the sequence of events in this case is needed here. A month after the adoption of the Zelensky Law in October 2019, the Supreme Court of Ukraine appealed the law before the Constitutional Court on the grounds that it was unconstitutional. Among other things, the appeal argued that the intended reduction in the number of justices in the Supreme Court constituted a violation of their terms of incumbency and, by extension, of their

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judicial independence. Moreover, with regard to changes in judicial self-government, the Supreme Court was warned about the potential risk of institutional paralysis resulting from the planned relaunch of the HQCJ. Supreme Court justices were also concerned about the prospect of an internationalized mandate for overseeing the judiciary in Ukraine. The Plenum of the Supreme Court questioned the constitutional basis of the creation of an additional body to discipline justices in the framework of the HCJ. Moreover, in the view of the justices, the prerogative of the ethics body to monitor the activities of Supreme Court justices, including the origins of their financial assets, had infringed on the judicial independence of the institution.

In the decision, the Court repealed the provisions of the Zelensky Law concerning the Integrity and Ethics Board along with other legislative amendments. The Court also ruled that the reduction in the number of justices in the Supreme Court was not substantiated by a functional necessity and further to this was in violation of the HCJ constitutional prerogative to be consulted before legislation on matters related to the organization of the judicial system is amended. Regarding the new ethics body, the Court argued that the constitutional status of the HCJ and the guarantees of independence granted to Ukrainian judges under Articles 126 and 131 of the Constitution, respectively, presuppose the exclusive role of the HCJ in disciplining the judicial corpus, including justices of the Supreme Court. According to the Court, the creation of an additional ethics commission, as envisaged by the Zelensky Law, had no constitutional basis.

Furthermore, the Court reasoned that a systemic interpretation of Article 131 of the constitutional text revealed that public bodies cannot delegate their constitutional obligations to other bodies. In the context of the Zelensky Law, the Court’s view was that the constitutional provision did not allow for the ethics board to replace the HCJ, the main body of judicial self-government in Ukraine, in part of its exclusive mandate to discipline a Ukrainian judge. Moreover, the Court established that a subordinate body within a constitutional body should

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51 Supreme Court of Ukraine, The Act of the Plenum of the Supreme Court of 15 November 2019.
52 Constitutional Court, op.cit. note 49, para. 3.1.
53 Article 126 of the Constitution states the “independence and immunity” of Ukrainian judges prohibits “influencing judges in any manner” and maps out an exhaustive list of grounds for dismissing a judge from their incumbent position. Article 131 outlines the prerogatives of the HCJ in disciplining judges and prosecutors in Ukraine, elaborates on the composition of this body of judicial self-government, and lists the criteria for becoming a member of the body.
54 Constitutional Court, op.cit. note 49, para. 6.1.
never exercise a control function over the latter.\footnote{Ibid.} In other words, the ethics body within the HCJ must not review the activities and conduct of the HCJ or its members, as the existence of the latter is set down in constitutional text. Therefore, the Court argued, there was a mismatch between what was allowed under the constitutional provisions on the institutional framework for disciplining judges, on the one hand, and the proposed legislative changes framing the issue in terms of integrity of the judicial self-government system, on the other.

To sum up, the Court’s decision ruled out the possibility of an internationalized mandate for overseeing the judicial corpus in Ukraine. This was followed by a call for an internationalized approach to disciplining the Ukrainian judiciary to be explicitly rejected. A dissenting opinion posited by one constitutional justice expanded on the legal interpretative component of the decision. While Justice Kasminin agreed with the decision in substance, he argued that an internationalized mandate envisaged by the law should have been explicitly condemned by the Court as infringing on the ‘constitutional sovereignty’ of the domestic order by allowing foreign citizens to participate in the formation of the judiciary in Ukraine.\footnote{Justice Oleksandr Kasminin, \textit{Dissenting Opinion on the Ruling of the Constitutional Court of 11 March 2020}.} This more explicit evaluation by a judge, based on legal doctrine, was not used in the final decision. However, the opinion indicated the existence of an additional resource which could potentially be used in the argumentative arsenal of the Court in the future.

\subsection{The Criminal Legislation Dispute and Its Outcomes}

Ukrainian parliamentarians also initiated another constitutionality complaint about the 2014 Anti-Corruption Law, which, among other things, introduced Article 366-1 on corruption in the civil service to the Criminal Code. The appeal, which was lodged in August 2020, came from the “Opposition Platform” deputies, an oppositional faction in the Verkhovna Rada contesting the reformist trajectory of the country after the Euromaidan transition of 2014. In many respects, the appeal by the parliamentarians resonated with the aforementioned appeal by the Supreme Court concerning judicial self-government procedures. In this regard, both appeals anticipated the narrative of constitutional justices by explicitly positioning the Court to react against the donor-supported reforms.

When it came to the Anti-Corruption Law, the Court supported the arguments put forward by the minority faction deputies and took an anti-reformist
stance by positioning its reasoning against the backdrop of the notion of judicial independence. The Court decision consisted of two parts. In the first part, constitutional justices reiterated the guarantees granted to the judiciary under the Constitution and ordinary law to ensure the separation of powers and non-interference in judicial independence.\textsuperscript{57} They argued that the special status of the judicial profession necessitated a special review and disciplinary regime for the judiciary to ensure that the executive branch does not have disproportionate administrative leverage over the judicial corpus. In the context of the anti-corruption policy, this means the judiciary requires a separate legal framework to deal with issues of integrity and corruption within the profession.\textsuperscript{58}

Against the backdrop of this narrative, the Court went on to review the anti-corruption reform. On the one hand, referring to the institutional guarantees granted to the judiciary, the Court considered the prerogatives of the NACP with regard to monitoring public servants’ tax returns and posited that these prerogatives concerned the judicial branch as well. Yet, in the context of the separation of the judicial branch from the executive, this was inadmissible in the view of the constitutional justices. The legal interpretative basis of the Court’s decision was underpinned by two articles of the Constitution guaranteeing the independence of the judicial profession to identify NACP prerogatives in relation to Ukrainian judges that violate the independence of the judicial branch as a whole.\textsuperscript{59}

The most important, albeit also most controversial, part of the decision concerned the abrogation of the 2014 amendment to the Criminal Code. The Court argued that the criminal liability envisaged for public servants for failing to submit an annual tax return or providing false information in this document is not in line with the societal harm caused by said actions.\textsuperscript{60} In the view of the Court, the Ukrainian legislature failed to substantiate why the actions at stake warranted the highest degree of criminal responsibility and penal sanction. In the view of the Court, the criminalization that was established under Article 366-1 of the Criminal Code could have been substituted with a lesser form of legal responsibility that is commensurate with the actual societal harm caused

\textsuperscript{57} Constitutional Court of Ukraine, \textit{Ruling of 27 October 2020, No1–24/2020.}
\textsuperscript{58} \textit{Ibid.}, para. 13.
\textsuperscript{59} These were general constitutional guarantees of judicial independence envisaged by Articles 126 and 149 of the Constitution. The former declares the “independence and immunity” of the judicial corpus in the exercise of justice, the latter reiterates the same in relation to justices of the Constitutional Court.
\textsuperscript{60} Constitutional Court, \textit{op.cit} 56, para. 17.
by the actions under consideration. The Court called for a lesser (administrative) form of legal responsibility to be instituted for violation of the 2014 Anti-Corruption Law.61

It is important to highlight that this admission on the part of constitutional justices was not based on an examination of the case of the 2014 amendment as compared to the constitutional text, i.e. there was nothing in the constitutional text or constitutional principles to imply that this should be decriminalized. While the decision reiterated some of the criteria for criminalization (‘considerable’ societal harm, misconduct being widespread in society), it did not state whether the 2014 criminal amendment met these criteria or not. Nor did the decision offer a coherent legal theory of criminalization which the Ukrainian legislature could use in the future. In other words, constitutional justices surmised that the actions in question were over-criminalized by the legislative reform. Moreover, regarding the protection of the judiciary, the decision relied predominantly on the interpretation that judicial independence precludes the anti-corruption agency from overseeing Ukrainian judges’ compliance with anti-corruption laws. Thus, similar to the case of the Zelensky Law dispute, this Court decision demonstrated a lack of formal legal reasoning in its substance. Its contestation of post-2014 legislative reforms also triggered a high-profile backlash against the Constitutional Court in the aftermath of the reversal (on this, see the discussion in section 2.3).

A few constitutional justices expressed dissenting opinions in their comments on this controversial decision. All of these opinions highlighted the unsubstantiated nature of the decision by the Court majority, which relied on admissions and argumentation that was flimsy in legal terms. Justice Serhiy Holovaty spoke out against the Court’s decision pointing to the non-legal nature of major parts of its argumentation. In the judge’s view, the argument by the Court majority regarding interference in the judiciary was neither persuasive nor substantiated by a concern that the NACP’s prerogatives to monitor annual income declarations of Ukrainian judges somehow interfered with the exercise of justice. In Justice Holovaty’s view, the latter would only amount to an actual breach of the constitutional principle of judicial independence.62

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61 Ibid. Following the decriminalization of Article 366-1, the Verkhovna Rada introduced administrative liability (a fine or obligatory community service) for failing to submit or providing false information in an annual income declaration with caveats about the amount of concealed financial income: Law of Ukraine On Amending Laws of Ukraine (4 December 2020) 1074-ix.

Otherwise, it is unclear as to why Ukrainian judges are treated preferentially by the Court compared to other professional public servants. Moreover, as other justices pointed out, the Court ruling infringed on the popular sovereignty of the Ukrainian legislature and the presumption that the lawmaker has legitimate authority to criminalize, with the Court majority taking a ‘quasi-judicial activist’ role in ruling over anti-corruption legislation.63

4 Discussion

Developments in Ukraine reflect a pattern of political process observed in other countries in the region. This pattern, centered on reformist endeavors, can be described as follows. The political class of reformers, enjoying the popular mandate and prompted by a comprehensive Association Agreement with the EU, embarks on a reform path. However, this reformist impetus is met with a negative response from the old economic and political elites who are trying to secure their own survival. The judiciary plays into this pattern of contesting the reformist class and facilitating bureaucratic survival and state capture.64 Moreover, judicial elites conform with insulation (often facilitated by closer alignment of a country with the EU and high standards of judicial autonomy) and become a driving force behind the obstruction of the reformist class. The reformers are left with an uneasy dilemma of how to break the deadlock created by the judiciary without undermining respect for the rule of law in a reforming society.65

Ultimately, the degree of political capture of the judiciary by previous elites is a predictor of the level of resistance to reforms and explains why the


65 My argument here coincides with the point made by Mendelski, who asserted that the ‘cycle’ of the promotion of rule of law reforms by the EU and domestic reformist classes has led to less respect for the rule of law in Southeast Europe. See Mendelski, op.cit. 63, at 334–336.
successes of the reformist classes vary with regard to domestic reform efforts. In Ukraine, the resistance to the reformist trajectory of the post-Euromaidan presidents and governments came from the judicial elite, which was well protected by the constitutional reform of 2017. Since they had the leverage of constitutional adjudication, constitutional justices negatively evaluated some of the most crucial policies and legislative reforms. The legal grounds for the repeal of these reforms are deemed dubious and demonstrate the distinct political role that the courts play in policymaking. The reformers of the Zelensky camp responded by shaming the Constitutional Court publicly and renewing their call for the reform of the institution in legislation-making. In the Ukrainian context, this practice meant exposing previous dubious Court records, individual biographies of constitutional justices, and the legacy of Yanukovych-era meddling in the judiciary in particular. The fact that political incumbents, but also civil activists, investigative journalists, and expert institutions alike participated in an intense public backlash makes the Ukrainian case particularly striking.

Moreover, the political process around reform in the countries of the region that signed Association Agreements with the EU displays similar dynamics to that of Ukraine. Having entered into Association Agreements with the EU in 2014, both Georgia and Moldova, led by reformist pro-EU forces, embarked on a reform path. Arguably, in both countries, the reforms of the judiciary were the most protracted and, in certain instances, met with a considerable level of resistance from the judicial elites.

In Moldova, it has long been argued that the state capture of the judicial sphere presents the biggest challenge to reform. The reforms of the judiciary, including the country’s Constitutional Court and the prosecution, were reportedly delayed after the Moldova-EU Association Agreement entered into force and there has since been “very limited progress” or no

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progress. Moreover, the class of popularly elected reformers brought to power in 2020 and led by the country’s president Maja Sandu met with notable resistance from Moldova’s judiciary. President Sandu’s decision recently being blocked by the country’s Supreme Court (a development that was accentuated by the political corruption controversy involving high-profile justices appointed by the previous ruling elite) is indicative of the broader pattern of political process around the endeavors of the reformers.

While Georgia has made more noticeable progress than Moldova with regard to constitutional and judicial reforms, concerns over the political capture of the judiciary have persisted since the Georgia-EU Association Agreement entered into force in 2016. In contrast to Ukraine and Moldova, where there is a more clear-cut distinction between the popularly elected reformist classes, led by Presidents Zelensky and Sandu respectively, and the judicial elites opposing them, the incumbent class in Georgia has so far been perceived as facilitating the capture of the judiciary. Therefore, if there is a change in political incumbents in Georgia during the next electoral cycle, the new political class will most likely come up against the resistance of an entrenched judicial elite that follows the same pattern of political process as in Ukraine and Moldova.


70 Dumitru Minzarari, “Justice Reform as the Battleground for Genuine Democratic Transformation in Moldova,” *SWP (Stiftung Wissenschaft und Politik) Comment* (27 April 2022).


74 The parliamentary and presidential elections in Georgia are set to take place in 2024.
5 Conclusion and Outlook

This article has shown the type of politics of constitutional law emerging in post-Euromaidan Ukraine. It has assessed the evidence of how change supported by international donors has taken root in the country’s reformist trajectory since 2014. By discussing two notable examples of the anti-corruption and judicial reforms, the article has shone a spotlight on the link between donor support and the domestic politics of reform. In response to the reformist trajectory, the Constitutional Court took a negative view on the trend toward increasing input from the international donor community in the course of the reform processes. Being at the apex of the legal profession themselves, constitutional justices relied on the narrative of separation of powers to hollow out or reject the main provisions of the reforms outright. In turn, the intentional and wide-ranging shaming of this institution of constitutional review by pro-reform civil society actors contributed to the recent practice of placing political pressure on the Court. In the post-Euromaidan setting, the Constitutional Court itself came under reformist and political pressures to the point of deadlock.

The anti-reformist stance of the Constitutional Court is indicative of the pattern of political process observed around the reformist endeavors in Ukraine and in the region more broadly. This pattern is found in the interaction between the classes of political reformers that enjoy popular mandates to reform their countries and the efforts to undermine these reformist endeavors. Legal (judicial) elites play a crucial role in either supporting the political and legal change led by the domestic reformers or facilitating state capture and bureaucratic survival of the previous elites. This article drew an initial comparison of developments in Ukraine with those in Moldova and Georgia, providing evidence of the same ‘troubled’ pattern of political process around reformist endeavors. Time will tell whether these dynamics will prevail in the case of Ukraine. As the country faces Russian aggression, the pattern of political process might persist, or things might look completely different in a postwar context.

Developments in Ukraine foreshadow the need for more comparative knowledge on the causes and consequences of domestic backlashes against the politics of reformers. For future research gathering insights from other country cases or another region with similar conditions may prove valuable (i.e. a country or set of countries belonging to a region that have been subject to similar reformist pressure with a clear component of international involvement in the past). In this paper, the illustrative comparison drawn between Ukraine and the cases of Moldova and Georgia is a good departure point for a truly comparative research design with more explicit theoretical and conceptual frames.