



The Constitutional Court of Ukraine, Kyiv, July 2020. Source: Pavelskyi Vladyslav/Shutterstock

Constitutional Crisis in Ukraine: Looking for Solutions

By Mikhail Minakov and William Pomeranz

As the gatekeeper of the Ukrainian Constitution, the Ukrainian Constitutional Court is no stranger to controversy. It often has to balance competing legal and political interests in determining whether legislation complies with the country's highest law. The principle of judicial review, however, comes with an implicit warning, namely not to abuse these sweeping powers and do more harm than good.

Despite this longstanding admonition, the Constitutional Court of Ukraine (CCU) recently plunged the country into one of its deepest crises in its 30-year history. Specifically, on October 27, 2020, the Court declared that the main elements of Ukraine's anti-corruption legislation, adopted between 2014 and 2020,

were unconstitutional.¹ In response, President Zelensky introduced legislation calling for the early termination of all Constitutional Court judges.² Later, in December, he suspended the chairman of the Court for two months.³

The result was widespread chaos in Ukraine's political system. Zelensky's actions were of questionable legality and provoked harsh criticism from all political sides. The ramifications of the Court's decision include the cancellation of over 100 pending corruption investigations, a development that potentially could endanger future EU-Ukraine trade and economic cooperation under the 2014 Association Agreement.⁴ Whether the various players in this drama (particularly President Zelensky; the chief of the presidential office,

Andriy Yermak; the head of the CCU, Oleksandr Tupitskyi; and Rada Speaker Дмитро Разумков) can walk this crisis back and reach some sort of political compromise will largely determine whether Ukraine's on-again, off-again democratic transition continues.

In many ways, this crisis was 30 years in the making. Since its independence, Ukraine has alternated between a presidential system and a parliamentary-presidential system of government, interrupted by two major revolutions (the Orange Revolution of 2004, and the Euromaidan of 2013-14) that have significantly altered the trajectory of Ukrainian politics, with varied results. The current crisis dates back to the Euromaidan revolution of dignity in 2014, when Ukraine – at the insistence of both its population and its Western supporters – introduced new legal institutions to combat Ukraine's endemic corruption. These reforms were necessary largely because Ukraine's major law enforcement bodies – notably the prosecutor's office and the Ministry of Internal Affairs – had never been thoroughly overhauled since the collapse of the Soviet Union.

In particular, two new anti-corruption bodies were created in the aftermath of the Euromaidan. In order to bypass the procuracy, Ukraine established a new criminal investigative agency, the National Anti-Corruption Bureau (NABU), to oversee the investigation and prosecution of corrupt state officials. The post-Euromaidan reforms also included the founding of the National Agency for the Prevention of Corruption (NACP), that was given the task of collecting annual financial disclosures from public officials and managing the e-assets declaration system with open access for the public. NACP also was required to receive reports from

these officials regarding any important acquisitions and expenditures.

The results of these reforms have been mixed, but nevertheless demonstrated the high priority that the Ukrainian government gave to fighting corruption

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and continuing on the European path. This campaign against corruption, however, went after established financial interests and practices, thereby inviting opposition. And it turns out that the best place to overturn these anti-corruption measures was not at the ballot box, but at the Ukrainian Constitutional Court. The Court canceled the provision on illicit enrichment as anti-constitutional on February 26, 2019.⁵ The Court's most recent decision promises to inflict even greater damage on Ukraine's anti-corruption program, with serious political and foreign policy ramifications.

The Ukrainian Constitutional Court originally was designed to be as non-partisan as possible. The appointment of its 18 judges was evenly divided between the president, the Supreme Rada, and the Congress of Judges of Ukraine, which each justice limited to a single nine-year term on the bench. Its jurisdiction was also limited to constitutional

disputes; Ukraine's regular courts handled all other cases. Moreover, in order to further narrow its jurisdiction, individual citizens (up until 2016) did not have direct access to the Court. Instead, it was only Ukraine's other national political institutions – the president and a block of 45 members of the Rada – that were allowed to file appeals to the Court.

Other constitutional courts (notably the French Constitutional Council) historically have included such limitations on the rights of citizens to file a constitutional complaint, although France substantially changed its rules in 2010. In Ukraine, however, the limited number of potential petitioners – plus the absence of a tradition of separation of powers – invariably increased the possibility that the Ukrainian Constitutional Court would be dragged into a political dispute among the other branches of government.

The plaintiffs in the 2020 anti-corruption cases confirmed the political nature of this appeal process.

The 47 members of the Rada who signed on to the petition resulting in the CCU's controversial decision came from Victor Medvedchuk's pro-Russian 'Opposition Platform-For Life' party, as well as deputies from other factions linked with oligarch Ihor Kolomoisky. The motives of both groups raised questions, especially since the government has been fighting with Kolomoisky ever since it nationalized his bank in 2016. The petitioners, however, actually raised serious legal concerns. Specifically, they objected to the statute that founded NABU as a criminal investigation agency outside the control of the executive branch, in seeming contradiction to Ukrainian law.

The Court ultimately declared several key components of Ukraine's anti-corruption architecture unconstitutional. Most notably, criminal liability for submitting false declarations was deemed disproportionate to the actual offense committed



Director of the NABU (National Anti-Corruption Bureau of Ukraine) Artem Sytnyk and Specialized Anti-Corruption Prosecutor's Office (SAP) Chief Nazar Kholodnytskyi. Source: Sharomka/shutterstock.com

and was overturned. Moreover, the Court found that the right of the NAPC, an executive body, to review the declarations of public officials – including judges – encroached on the independence of the judiciary and Ukraine’s separation of powers. Finally, the Court struck down the statute establishing NABU. According to the Ukrainian Constitution, such an institution must be part of the executive branch and the lack of such affiliation rendered NABU unconstitutional.

The problems related to NABU’s legal status were raised at its founding in 2014 and were always considered potential grounds for judicial review and reversal. No one expected, however, that the Court would so brazenly throw out the essential elements of Ukraine’s anti-corruption program. Therefore, President Zelensky issued an urgent appeal to the Venice Commission, the Council of Europe’s (CoE) advisory body on constitutional matters, to assess the overall legality of the Court’s decision.⁶ This is a usual practice for the CoE member states, especially for the “young democracies,” as the Venice Commission measures draft legislation against basic CoE norms, values, and agreements.

On December 9, 2020, the Commission released a highly critical assessment of the Court’s procedure and actions, highlighting several deficiencies.⁷ First, the CCU’s decision was adopted with unusual speed and without a public hearing.⁸ Second, several CCU judges possessed a major conflict of interest, since the NACP had detected irregularities in members of the CCU’s financial declarations and had transmitted these cases to NABU for further investigation.⁹ The Commission also questioned the unilateral nature of the CCU’s actions. The Commission noted, for example, that “it is a requirement of the separation of powers that a

constitutional court should not usurp the role of the legislature. Even when, formally, a constitutional court has the power to declare unconstitutional a provision of the criminal code, this power should be exercised with due regard to the role played by Parliament in a system of checks and balances.”¹⁰ The CCU essentially ignored this requirement, thereby discontinuing proceedings already in progress and allowing for potential violations to go unpunished.¹¹ The Commission further found that, unlike previous decisions, the CCU did not give the legislature time to correct these problems.¹²

Finally, the Commission rejected the CCU’s reasoning that NAPC’s oversight powers of all public officials, including judges, somehow represented a fundamental encroachment by the executive branch on the judiciary’s independence.¹³ Instead, in its sweeping critique, the Commission concluded the CCU’s decision lacked “clear reasoning” and had no “firm basis in international law.”¹⁴

In sum, the Commission concluded the Constitutional Court of Ukraine had exhibited no judicial restraint or deference to the legislature. More importantly, the decision showed that the Court did not possess the mechanisms that other high courts possess to try to diffuse a highly political case. For example, the United States recognizes the principle of “severability,” whereby a part of an act can be declared unconstitutional without declaring the whole act unconstitutional (i.e., a scalpel rather than a bulldozer). Moreover, the U.S. Supreme Court has formulated a “political question doctrine” that allows the Court to defer to another branch of government if it finds that the U.S. Constitution assigns a particular issue to the jurisdiction of that branch.¹⁵

Of course, the U.S. Supreme Court’s track record

in high-profile controversial cases (especially in civil rights cases) has alternated from regressive (“separate but equal” in 1896) to socially transformative (the de-segregation of public schools in 1954). The U.S. Supreme Court also has hid behind the political question doctrine in numerous instances, most notably, in cases surrounding the constitutionality of the Vietnam War. Legal scholars have questioned whether certain cases are beyond judicial review. Nevertheless, the political question doctrine represents an important tool in the U.S. Supreme Court’s toolkit for defusing highly-charged political cases and deferring to another branch of government.

The Ukrainian Constitutional Court evidently has no such doctrine, and instead plowed right into the controversy. In the process, it set off a chain reaction that now threatens Ukraine’s anti-corruption agenda, its relationship with the

EU, and the integrity of Ukraine’s entire political system. President Zelensky quickly responded to the Court’s decision. While ignoring the guarantee of independence and inviolability of Constitutional Court justices under the constitution, he suspended the Chairman of the Court Oleksandr Tupitskiy for two months and issued a decree suspending all of the judges who participated in the October 27, 2020 decision. The Security Council further decided to restore the activities of NAPC and the requirement that all public officials submit their asset declarations as required under the original law.¹⁶ It also ordered that criminal penalties be reinstated for violation of the anti-corruption law.

The growing crisis has provoked disparate responses from Ukraine’s friends abroad. A group of deputies within the European parliament called on Ukraine to re-establish the NAPC despite the Constitutional Court’s ruling. By contrast, the



Ukrainian President Volodymyr Zelenskiy attends the Constitutional Court session in Kiev, Ukraine. June 11, 2019. Source: home for heroes /shutterstock.com

International Commission of Jurists insisted that Zelensky abandon his draft law dismissing all of the judges of the Constitutional Court.¹⁷ Indeed, as we see it, President Zelensky's proposed actions raise serious constitutional questions and only deepens Ukraine's political crisis. Moreover, several Rada opposition members are considering commencing impeachment proceedings against Zelensky, despite the fact that the impeachment procedures introduced last year are widely seen as unworkable.¹⁸

How can Ukraine extricate itself from this downward political spiral? Taking into account the growing tensions and polarization in Kyiv, Ukraine should consider appointing some sort of a neutral all-Ukrainian body (something like a National Round Table or Constitutional Assembly that have already proved helpful in the past to restore dialogue between conflicting parties) to address this constitutional crisis. Ideally, such a body would include representatives from all levels of government (national, regional, local), the legislature, the judiciary, the Security Council, and the Constitutional Court, as well as prominent legal scholars. The intended result would be to lower the political temperature and to restore a degree of trust and cooperation among Ukraine's leading politicians and legal institutions.

The natural candidate to head such a council would be the chairman (or member) of the Constitutional Court, but since the Court is an interested party (indeed the catalyst of this crisis), an alternative arrangement will have to be found.

The Venice Commission outlined a possible road-map to deal with the major legal controversies resulting from the Court's decision. Such reforms would include changing the relevant statute under

Criminal Code so as to provide greater clarity about the different degrees of culpability for submitting false declarations. The duties of the NACP could also be restored while providing greater protections for judges who come under investigation.

Other potential solutions circulating around Kyiv include formally making NABU a part of the executive branch, thereby bringing it in full compliance with the Ukrainian constitution and removing future legal objections to its existence. A responsible national advisory body further could ensure that the other legal and administrative impediments to Ukraine's anti-corruption program are removed.

But the window on compromise is rapidly closing. As noted above, President Zelensky has now taken several provocative steps, including proposing legislation that voids the Constitutional Court's anti-corruption rulings and begins the process of dismissing and replacing those justices who supported that decision. None of these actions are supported under present-day Ukrainian law.¹⁹ The rhetoric between the president and the Constitutional Court is also escalating, with Constitutional Court Chairman Tupitskyi warning that the president's actions threaten the territorial integrity of Ukraine.²⁰ Calls for impeachment proceedings are being raised in the Rada, and Zelensky yet again escalated the crisis on February 3, 2021 by blocking pro-Russian TV channels controlled by Victor Medvedchuk.²¹ The legality of the latter action was even questioned by the EU, who told Zelensky that while Ukraine possessed the right to protect itself from disinformation, it still had to comply with international standards and "fundamental rights and freedoms."²²

The pressure on Zelensky is growing as he tries

to navigate the fine line of obeying the law as written while simultaneously claiming that the very integrity of the country is at stake. And Zelensky's problems are only mounting, with the Cabinet of Ministers recently calling for the dismissal of the head of NABU and the IMF delaying the next tranche of financial support, in part because of Ukraine's failure to implement a comprehensive anti-corruption program.²³ One must add that Zelensky has to address this urgent situation in the face of sharply declining poll numbers, increased rumblings from Russia, and an international pandemic. To paraphrase Zelensky's famous retort to former President Poroshenko in their 2019 presidential debate, this is his "sentence." The fate of his presidency, and indeed Ukraine's survival as a democracy, now depends on him finding an answer.

The opinions expressed in this article are those solely of the author.



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