

CONSTITUTIONAL ORDER AND THE RULE OF LAW IN A TIME OF WAR IN UKRAINE¹

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TRYKHLIB, Kristina. Constitutional Order and the Rule of Law in a Time of War in Ukraine. *International and Comparative Law Review*, 2024, vol. 24, no. 1, pp. 241–255. DOI: 10.2478/iclr-2024-0015

Summary: Today, Ukraine and its constitutional order are facing enormous internal and external challenges. The key challenges for the national legal order of Ukraine at the moment are, *inter alia*, the constitutionality of specially adopted legislation, the effective provision and protection of basic human rights and fundamental freedoms, compliance with the proportionality principle in the case of temporary restrictions on human rights, the preservation of the system of checks and balances under the principle of the separation of powers, ensuring access to an independent and impartial judiciary and recognition of the legal status and jurisdiction of future international courts, *etc.* Undoubtedly, this war in the centre of Europe requires the consolidation of the entire international and European community and the elaboration of effective mechanisms to counteract and stop aggression. Thus, the war in Ukraine is a challenge to the system of international public law and democracy in general.

Keywords: emergency constitutionalism; martial law; margin of appreciation; rule of law; human rights.

1 Introduction

On 24 February 2022, martial law was introduced in Ukraine, and it started the era of so-called military (emergency) constitutionalism or constitutionalism under extreme conditions.

The introduction of martial law under the condition of war, on the one hand, has resulted in significant restrictions on human rights, and, on the other hand, has endowed some state authorities, *prima facie*, the executive and security/military bloc, headed by the President, with additional powers. In this regard, it is necessary to achieve a fair balance and maintain the functioning of the rule of law. At the

1 The publication was funded by the Future Democracy Lab, a flagship project of the POB Society of the Future, under the program “Excellence Initiative – Research University” at the Jagiellonian University in Krakow.

same time, one must also understand that, in wartime, the key principle and duty of the state is to preserve territorial integrity and national security.

The key question and challenge is how to ensure the functioning of the rule of law in such a time of war. The Constitution is not designed to operate in wartime and thus does not explicitly provide a clear answer to this question.

After the full-scale invasion by the Russian aggressor, Ukraine officially announced its derogation from its certain obligations under the European Convention on Human Rights² and the UN International Covenant on Civil and Political Rights.³ Ukraine has been facing unprecedentedly difficult internal and external challenges, which determine the peculiarities of the functioning of all state bodies, ordinary citizens and the Ukrainian legal system as a whole.⁴

The aim of this paper is to summarize and identify key challenges for the constitutional order and the rule of law in a time of war in Ukraine based on methods of comprehensive analysis and synthesis of Ukrainian legislation as well as international and the European law.

2 Internal Challenges

The core internal challenges under martial law in Ukraine are as follows:

1. Prohibiting constitutional amendments being made under martial law;
2. Guaranteeing basic human rights and freedoms under the condition of war and their effective protection;
3. Imposing restrictions on certain human rights, in particular, the confiscation of property for the needs of the army, the introduction of compulsory labour for those who are capable of working, who are not involved in work in the defence sphere and in the sphere of ensuring the livelihood of the population, and who are not reserved for enterprises, institutions and organisations for the period of martial law for the purpose of the performance of work of a defensive nature, as well as the elimination of the consequences of emergency situations that arose during the period of martial law during their involvement in socially useful work.⁵ According to the Decree of the President of Ukraine No. 64/2022 as of 24 February 2022, the constitutional rights and freedoms of individuals and citizens provided for in Articles 30–34, 38, 39,

2 Council of Europe. European Convention on Human Rights of 1950 https://www.echr.coe.int/documents/d/echr/convention_ENG accessed 08 November 2023.

3 United Nations. International Covenant on Civil and Political Rights of 1966. [online]. Available at: <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>> Accessed: 14 February 2024.

4 United Nations. Reference: C.N.65.2022.TREATIES-IV.4 (Depositary Notification). International Covenant on Civil and Political Rights New York, 16 December 1966 Ukraine: Notification under Article 4 (3) 1. [online]. Available at: <<https://treaties.un.org/doc/Publication/CN/2022/CN.65.2022-Eng.pdf>> Accessed: 14 February 2024.

5 PRYTYKA, Yuriy, IZAROVA, Iryna, MALIARCHUK, Liubov, and TEREKH, Olena. Legal Challenges for Ukraine under Martial Law: Protection of Civil, Property and Labour Rights, Right to a Fair Trial, and Enforcement of Decisions. *Access to Justice in Eastern Europe*, 2022, vol. 3 no. 15, p. 236 – 237. DOI: <https://doi.org/10.33327/AJEE-18-5.2-n000329>

41–44 and 53 of the Constitution of Ukraine may be temporarily restricted during martial law (in particular, concerning the inviolability of the home, the secrecy of correspondence, non-interference in private and family life, freedom of movement, freedom of thought and speech and the right to own, use and dispose of one's property, *etc.*⁶);

4. Observing the principle of the rule of law in constitutional law, in particular, balancing the provision and protection of fundamental human rights and the restriction of individual human rights under martial law;
5. Tackling the challenges that exist for law-enforcement agencies, such as maintaining law and order and legality, promptly responding to threats, investigating diversified groups, the organisation and functioning of checkpoints and checking documents and all vehicles that move around the city (e.g., during the first few months of the war, individuals in Kharkiv were forbidden to travel by private transport without a special permit, which was issued by the head of the regional state administration);
6. Providing legislative regulations and housing and financial support for internally displaced persons (IDPs);
7. Balancing the effective provision of the right to information and freedom of expression with the aim of protecting national security;
8. Maintaining constant contact with society through the implementation of a unified information policy in order to guarantee the right to information, especially in the first months of the war (the Ukrainian United News Marathon⁷);
9. Carrying out explanatory and educational work in all possible ways, for instance, regarding how to behave if captured or under occupation and how to provide first aid to victims. Nowadays, the relevant topics are 'What should be done in the event of a nuclear explosion?' and 'What should be done in case of strong mental agitation?';
10. Fighting against the dissemination of Russian disinformation, propaganda and fake news on different platforms (informational hybrid war and maintenance of cybersecurity);
11. Providing medical care and other services, in particular, operations in extreme conditions (organising various training courses and workshops for medical workers and other social groups, including civilians);
12. Providing the right to education through online education and other platforms;

6 President of Ukraine. Decree No. 64/2022 'About introduction of a state of emergency in separate regions of Ukraine' of 24 February 2022. [online]. Available at: <<https://rm.coe.int/1680a5b03f>> Accessed: 14 February 2024.

7 President of Ukraine. Decree No.152/2022 'On the decision of the National Security and Defense Council of Ukraine regarding the implementation of a unified information policy under martial law' of 19 March 2022. [online]. Available at: <<https://zakon.rada.gov.ua/laws/show/n0004525-22#Text>> Accessed: 14 February 2024.

13. Making ongoing progress in online governance, banking and digitalisation (e.g., the development of the mobile application Diia) in order to obtain legal documents and other necessary services for Ukrainian citizens, both in Ukraine and abroad;
14. Observing the proportionality principle and the margin of appreciation in the case of temporary restrictions on human rights and freedoms, the search for the golden mean between arbitrariness and objective necessity for legitimate human rights restrictions under martial law, as well as the proper justification of such limitations;
15. Observing the constitutional principle of the separation of powers – the system of checks and balances – along with the necessary expansion and concentration of powers by the President as the head of foreign and defence policy, as well as delegating some extra powers to the government (executive authority) in order to quickly respond to and effectively resolve urgent tasks. Thus, the Law of Ukraine ‘On the Legal Regime of Martial Law’⁸ provides for the creation of local military administrations, the introduction of curfews (restrictions on movement at certain times) and the creation of local territorial defence units, *etc.*;
16. Ensuring access to an independent and impartial judiciary, particularly to the Constitutional Court of Ukraine, regarding the possibility of filing and considering constitutional complaints. According to Article 64 of the Constitution of Ukraine, the right to judicial protection is not subject to limitations.⁹ Thus, there is a legal opportunity for the adjudication of some cases in video conference mode; for this, the participants in the case must declare their participation in the court session via video conferencing. During the period of martial law, it is necessary to regulate the remote format of justice at the legislative level, and
17. Reintegration and reconciliation processes.

3 External Challenges

In terms of external challenges, we highlight these as follows:

1. The collection of evidence of international crimes carried out by Russian troops in the territory of Ukraine (a lack of human resources and specific means in order to guarantee proper investigations, as well as data analysis and examinations). Therefore, the President of the European Commission announced the establishment of the International Centre for the Prosecution of the Crime of Aggression Against Ukraine (ICPA) at the 24th EU – Ukraine Summit on 02 February 2023. It is a unique judicial centre within Eurojust

8 Verkhovna Rada of Ukraine. Law of Ukraine ‘On the legal regime of martial law’ of 2015. [online]. Available at: <<https://zakon.rada.gov.ua/laws/show/389-19#Text>> Accessed: 14 February 2024.

9 Verkhovna Rada of Ukraine. Constitution of Ukraine of 1996. [online]. Available at: <<https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>> Accessed: 14 February 2024.

designed to support national investigations into crimes of aggression related to the war in Ukraine.¹⁰

2. The development of European legislation on temporary protection status and refugee law.¹¹
3. Justice *in absentia* (a criminal court proceeding in which the person who is subject to it is not physically present at those proceedings). According to Ukrainian legislation, it is possible to conduct trials and adjudicate cases *in absentia*.¹² However, at the International Criminal Court (ICC) in the Hague, adjudication *in absentia* is not envisaged.¹³
4. The creation of the Special International Tribunal for the Crime of Aggression will adjudicate a crime of aggression. In turn, the ICC will consider *ad hoc* international crimes against humanity, war crimes and the crime of genocide of the Ukrainian people and will deal primarily with the international criminal liability of the top leadership and those who directly gave the criminal orders, as well as regular soldiers. Thus, the delegation of prosecutors from the ICC visited Ukraine and contributed to the collection and fixation of evidence of war crimes in Ukraine. At the moment, we are exploring the experience of foreign states, such as Yugoslavia, for example, and the functioning of 'truth commissions' and we are discussing the most optimal composition of a possible tribunal, taking into account the need to ensure its independence and impartiality, which will undoubtedly affect the international recognition and legitimacy of its verdicts.
5. The issue of the recognition of the legal status and jurisdiction of future international courts that will consider cases of war crimes committed by Russians may become essential for constitutional justice.
6. Transitional justice (truth tribunals). Transitional justice processes include the search for truth, prosecution initiatives, different types of reparations and a wide range of measures to prevent the recurrence of further violations, including constitutional, legal and institutional reforms, strengthening civil society and memorialisation efforts.¹⁴

10 International Centre for the Prosecution of the Crime of Aggression against Ukraine. Official website. [online]. Available at: <<https://www.eurojust.europa.eu/international-centre-for-the-prosecution-of-the-crime-of-aggression-against-ukraine>> Accessed: 14 February 2024.

11 European Commission. Temporary protection. An official site of the European Union. [online]. Available at: <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en> Accessed: 14 February 2024.

12 Verkhovna Rada of Ukraine. Criminal Procedure Code of Ukraine of 2013. [online]. Available at: <<https://zakon.rada.gov.ua/laws/show/4651-17#Text>> Accessed: 14 February 2024.

13 Rome Statute of the International Criminal Court of 1998. [online]. Available at: <<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>> Accessed: 14 February 2024.

14 United Nations. 2023. 'About transitional justice and human rights. OHCHR and transitional justice'. [online]. Available at: <<https://www.ohchr.org/en/transitional-justice/about-transitional-justice-and-human-rights>> Accessed: 14 February 2024.

Possible options for international accountability may, in particular, include the following:

1. An international or hybrid tribunal under the joint auspices of Ukraine and the United Nations General Assembly (this would solve the issue of state immunity).¹⁵
2. Domestic prosecutions in the courts of Ukraine.¹⁶

Ukrainian law specifically criminalises the crime of aggression. Article 437 of the Criminal Code of Ukraine ('Planning, preparing and waging an aggressive war') defines the crime of aggression as a particularly serious crime against Ukraine, which is punishable under the Criminal Code of Ukraine, even if it is committed outside the country by a foreigner (however, the maximum term of imprisonment is 15 years, which is highly criticised in Ukraine as well).¹⁷

In 2019, a Ukrainian court found the former President of Ukraine, Viktor Yanukovich, guilty of high treason and complicity in the crime of aggression. The trial took place *in absentia*, since he did not appear. Viktor Yanukovich was sentenced to 13 years in prison.¹⁸

Nevertheless, there are concerns that states may not be entitled to exercise universal jurisdiction over the crime of aggression. Consequently, domestic courts may face significant legal difficulties due to head-of-state immunity and other immunities for high-ranking Russian officials. Perhaps, this immunity should be revised and quashed in exceptional situations under international law.¹⁹
3. An international tribunal through the UN General Assembly for crimes of aggression without a formal agreement between the UN and Ukraine. Russian aggression is not simply an offence against Ukraine, but is an affront to the entire international legal order and to the violation of the prohibition on the use of force²⁰ contained in Article 2(4) of the UN Charter, and it fundamentally threatens international peace and security.²¹ However, some have expressed concern that the creation of an independent *ad hoc* tribunal could exceed the powers of the General Assembly, especially without the participation of the target state.²²

15 KOMAROV, Alexander, HATHWAY, Oona A. Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression. Published on April 4, 2022 at *Just Security*. [online]. Available at: <<https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/>> Accessed: 14 February 2024.

16 Id.

17 Verkhovna Rada of Ukraine. Criminal Code of Ukraine of 2001. [online]. Available at: <<https://zakon.rada.gov.ua/laws/show/2341-14#Text>> Accessed: 14 February 2024.

18 KOMAROV, Alexander, 2022.

19 Id.

20 Id.

21 United Nations. UN Charter of 1945. [online]. Available at: <<https://www.un.org/en/about-us/un-charter>> Accessed: 14 February 2024.

22 KOMAROV, Alexander, 2022.

4. A special tribunal: Nuremberg-2.
This model has been criticised for lacking sufficient legitimacy for its verdicts, since a tribunal established by several states would not have the same legitimacy or international recognition as a tribunal established under the auspices of an international organisation.²³
5. A hybrid tribunal under the auspices of the Council of Europe.
This tribunal is supposed to be established under the Treaty 'On Extraordinary Ukrainian Chamber for Aggression', which will be a part of the judicial system of Ukraine, which, however, could be quite problematic under the Constitution of Ukraine.²⁴
6. The amendment of the Rome Statute to allow the ICC to exercise its jurisdiction over non-state parties for the crime of aggression. In this case, however, the process is likely to take years, face significant political obstacles and is likely to issue few court verdicts.²⁵

4 Common (Internal and External) Challenges

Some challenges to the constitutional order reflect their simultaneous double effect on the national legal system of Ukraine and on the system of international law as a whole. These are the challenges:

1. The development of a system of real practical guarantees for the national security of Ukraine at the international level and also the reformation of the system of global international security, which will preclude unjustified aggression and military conflicts in the future (first of all, the need for reform of the UN and its Statute in order to effectively ensure the maintenance of peace and sustainable development in the world).
2. The elaboration of an effective mechanism for compulsory compensation for damages not only in the field of public international law, but also at the level of private international law and the national legislation of separate countries, *inter alia*, the confiscation of property of Russian citizens, the ban on issuing visas and work permits, the exclusion of Russian athletes from international competitions and the transfer of frozen assets for the restoration of Ukraine to the budget of Ukraine, *etc.* At the same time, it is important that sanctions should not only apply to the economic sphere, but also to the sphere of culture, sports and scientific cooperation, at all possible levels and across all platforms. In addition, it is advisable for international and national sanctions to be synchronised and complement each other.
Sanctions should also be imposed against countries that support the aggressor and participate in the circumvention of EU sanctions (Iran, Belarus, China, North Korea, and partly, India and Brazil, *etc.*).

23 Id.

24 Id.

25 Id.

Moreover, the list and scope of sanctions imposed by the EU must be constantly updated, taking into account the real situation on the ground. It is important that security forces and law-enforcement agencies of, at the very least, every EU member state must legally respond to violations of sanctions committed within their domestic jurisdiction by private individuals and legal entities.

3. The continuation of the process of European and Euro-Atlantic integration, the adaptation of national legislation to align with the norms and standards of EU law and the start of negotiations on accession to the EU, at least by the end of 2023.

On 06 June 2022, the European Commission published an opinion in which it recommended granting Ukraine candidate status for the EU,²⁶ and on 23 June, the European Council finally approved this decision.²⁷

However, the EU set a number of conditions; if not met, Ukraine could lose this status.²⁸ These requirements, in particular, include the need for Constitutional Court reform and judicial reform, continuing the fight against corruption (the appointment of a new head of the Specialised Anti-Corruption Prosecutor's Office, and launching and completing the selection process for and appointment of a new director of the National Anti-Corruption Bureau of Ukraine), anti-money laundering and law-enforcement sector reforms, improving anti-oligarch legislation²⁹ (taking into account the opinion of the Venice Commission on the relevant legislation), adopting media market legislation and amending the legislation on national minorities (according to the Venice Commission's recommendations).³⁰

The first two necessary conditions (requirements) concern judicial reform. Thus, the reform of the Constitutional Court is the number one priority for the EU. It presupposes the elaboration and implementation of a transparent competition procedure for the appointment of judges to the Constitutional Court of Ukraine, and integrity and professional-level checks of candidates

26 European Commission. Opinion on the EU membership application by Ukraine of 2022. [online]. Available at: <https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_3802> Accessed: 14 February 2024.

27 Council of the European Union. Outcome of proceedings. Draft Council Conclusions on Enlargement and Stabilisation and Association Process of 2022. [online]. Available at: <<https://www.consilium.europa.eu/media/60797/st15935-en22.pdf>> Accessed: 14 February 2024.

28 MOVCHAN, Veronika. Ukraine: Preparation for the EU Accession Process. *Stockholm Centre For Eastern European Studies*, SCEEUS Report Series on Ukrainian Domestic Affairs, No. 6. Published on April 25, 2023. [online]. Available at: <<https://sceeus.se/en/publications/ukraine-preparation-for-the-eu-accession-process/>> Accessed: 14 February 2024.

29 Verkhovna Rada of Ukraine. Law of Ukraine No.1780-IX 'On the prevention of threats to national security associated with the excessive influence of persons who have significant economic and political weight in public life (oligarchs)' of 2021. [online]. Available at: <<https://zakon.rada.gov.ua/laws/show/1780-20#Text>> Accessed: 14 February 2024.

30 European Commission, Commission Opinion on Ukraine's application for membership of the European Union of 17 June 2022.

with the involvement of foreign experts who have been active over the last five years in the fields of constitutional reform, the rule of law and human rights protection.³¹

The Law 'On the Constitutional Court of Ukraine' adopted by Parliament and signed by the President of Ukraine on 20 December 2022 provides that the appointment of candidates to the Constitutional Court should be carried out with the participation of an Advisory Group of Experts consisting of six members, three of whom are to be appointed by the President, the Parliament and the Congress of Judges. The other three members should be chosen by the National Academy of Legal Sciences, the congress of representatives of law schools and research institutes, and representatives of public associations. However, during the first six years (the transition period), these last three members are to be elected from the ranks of international law experts.³²

In November 2022, the Venice Commission issued an urgent opinion in support of this version of the law; however, with two new recommendations.³³

The first recommendation was that the Advisory Group add a seventh member appointed by the international legal community to reduce political influence regarding the selection of judges. The second recommendation was that Parliament add a provision to the law stating that candidates rejected by the Advisory Group may not be accepted as candidates for the position of judge in the Constitutional Court of Ukraine.³⁴

However, Parliament approved the law without following these recommendations. Nevertheless, according to the latest amendments made to the Law 'On the Constitutional Court of Ukraine' at the end of July 2023, during the transitional period of selection, the Advisory Group of Experts will make decisions with at least four votes from its members, of which at least two must be proposed by international organisations or the Venice Commission. The votes of three members of the Advisory Group of Experts, at least two of whom are proposed by international organisations or the Venice Commission, are decisive.³⁵

31 Id.

32 Verkhovna Rada of Ukraine. Law of Ukraine 'On the Constitutional Court of Ukraine' of 2017. [online]. Available at: <<https://zakon.rada.gov.ua/laws/show/2136-19#Text>> Accessed: 14 February 2024.

33 Council of Europe, Venice Commission. Ukraine – Opinion on the draft law 'On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis' of 2022. [online]. Available at: <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2022\)054-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)054-e)> Accessed: 14 February 2024.

34 MINAKOV, Mykhailo. The Constitutional Process in Wartime Ukraine. Focus Ukraine. *A Blog of the Kennan Institute. Wilson Center*. Published on March 14, 2023. [online]. Available at: <<https://www.wilsoncenter.org/blog-post/constitutional-process-wartime-ukraine>> Accessed: 14 February 2024.

35 Verkhovna Rada of Ukraine, Law of Ukraine 'On the Constitutional Court of Ukraine' of 2017.

The decision of the Advisory Group in the process of the competitive selection of candidates can be challenged in court. Also, with regard to all candidates admitted to competitive selection, a special check is carried out in accordance with the procedure provided for in the Law of Ukraine 'On the Prevention of Corruption'.³⁶

Thus, according to the Law, the Advisory Group of Experts is formed with the aim of assisting those who appoint judges for the Constitutional Court to evaluate the candidates' moral qualities and level of competence in the field of law.

It consists of six members who are appointed for a term of three years and who participate in its work *pro bono*. A person cannot serve as a member of the Advisory Group for more than two consecutive terms.³⁷

The Law also envisages specific requirements for members of the Advisory Group, which are as follows:

1. Reaching the age of 45 on the date of appointment;
2. Having a higher legal education with a master's degree obtained in Ukraine and/or abroad;
3. Having experience of professional activity in the field of law for at least 20 years;
4. Having high moral qualities;
5. Being a lawyer with a recognised level of competence, and
6. Being politically neutral.

A member of the Advisory Group cannot be a person who:

1. is a member or holds a position in a political party and participates in political activities;
2. is elected to an elected position in a state authority or a local self-government body and has a representative mandate;
3. is recognised as incapable or whose civil capacity is limited by a court decision; or
4. is a judge, prosecutor, investigator, civil servant or holds any political office, *etc.*³⁸

The Advisory Group of Experts is considered formed, provided that at least four of its members are appointed. Meetings of the Advisory Group are held openly, except for cases provided for by the Law.³⁹

The body that provides organisational support for the activities of the

36 Verkhovna Rada of Ukraine. Law of Ukraine 'On Prevention of Corruption' of 2014. [online]. Available at: <<https://zakon.rada.gov.ua/laws/show/1700-18#Text>> Accessed: 14 February 2024.

37 Verkhovna Rada of Ukraine, Law of Ukraine 'On the Constitutional Court of Ukraine' of 2017.

38 Id.

39 Id.

Constitutional Court ensures the broadcasting of the meetings of the Advisory Group in real time on the Court's official website.⁴⁰

The Advisory Group makes a decision with at least four votes, except for cases provided for by the Law.⁴¹

In assessing 'high moral qualities', the Advisory Group is guided by the following criteria:

1. The integrity of the applicant;
2. The absence of reasonable doubts regarding the legality of the sources of origin of the property;
3. Compliance with the standard of living of the candidate or his family members and the declared income, and
4. Compliance with the candidate's lifestyle and his or her status.⁴²

In turn, compliance with the recognised level of competence in the field of law requires the candidate to possess the necessary knowledge to exercise the powers of a judge of the Constitutional Court.

Based on the evaluation results, the Advisory Group undertakes rating voting and forms a ranking list of candidates. The results of the ranking vote of each member of the Advisory Group are open, recorded by name and published on the official website of the Constitutional Court.⁴³

After receiving the list of evaluated candidates for the position of judge of the Constitutional Court from the Advisory Group, the Competition Commission, the relevant Committee of Parliament and the Council of Judges of Ukraine interview the candidates included in the list of evaluated candidates, and based on the results, they make a decision on the recommendation for appointment to the position of judge of the Constitutional Court.⁴⁴

Decisions of the Advisory Group can be appealed in the Supreme Court as a court of first instance and in the Grand Chamber of the Supreme Court as an appellate court in administrative proceedings.⁴⁵

The procedure for forming this body is currently underway. Therefore, it is too early to evaluate its effectiveness.

According to the recommendations of our American partners, for successful European integration, Ukraine needs to carry out the following reforms: strengthen the independence and expand the powers of the Special Anti-Corruption Prosecutor's Office, the National Anti-Corruption Bureau, the High Council of Justice and the National Agency for the Prevention of Corruption; conduct integrity checks of current judges, deepen the reform, increase the number of

40 Id.

41 Id.

42 Id.

43 Id.

44 Id.

45 Id.

judges in the High Anti-Corruption Court and create a High Administrative Court; and restart the judicial system (elaborate transparent and competitive selection and evaluation procedures for judges), reform the Constitutional Court of Ukraine and introduce changes to how applicants compete for the role of head of the Asset Recovery and Management Agency. The United States also proposed reforming the Ministry of Defence to NATO standards and strengthening the Accounting Chamber and the State Audit Service, completing the reform of the Prosecutor General's Office with the re-certification of employees and reforming Customs and the State Border Guard Service. It is also important to have transparent selection procedures for the National Police of Ukraine and to limit the powers of the Security Service of Ukraine.⁴⁶

On 08 November 2023, the European Commission recommended that the Council begin accession negotiations for Ukraine.⁴⁷ According to the assessment of the implementation of the seven steps of the European Commission's Opinion delivered on 08 November 2023 in the Ukraine Report of 2023 (2023 Communication on EU Enlargement Policy), four out of seven conditions were recognised as fulfilled (completed) by Ukraine.⁴⁸ In particular, this applies to the first two key conditions regarding the enactment and implementation of legislation on the selection procedure for judges of the Constitutional Court of Ukraine, including a pre-selection process based on an evaluation of their integrity and professional skills, in line with the Venice Commission's recommendations, as well as the finalisation of integrity vetting for candidates for the High Council of Justice members by the Ethics Council and the selection of candidates to establish the High Qualification Commission of Judges of Ukraine.⁴⁹

5 Conclusion

Currently, we observe changes in the paradigm of Ukrainian constitutionalism. In particular, the question arises about the constitutionality of the specially adopted legislation that is in effect during martial law. However, these issues have not yet been challenged in court. Thus, it should be noted that changes are taking place in the system regarding the functioning of public authorities, namely, the transformation of the constitutionally defined system of local executive bodies into military state administrations, strengthening centralisation in the system

46 U. S. Embassy in Ukraine. Statement on Proposed List of Priority Reforms of 2023. Published on 25 September 2023. [online]. Available at: <<https://ua.usembassy.gov/statement-on-proposed-list-of-priority-reforms/>> Accessed: 14 February 2024.

47 European Commission. Ukraine Report 2023. 2023 Communication on EU Enlargement policy. Published on 8 November 2023. [online]. Available at: <https://neighbourhood-enlargement.ec.europa.eu/ukraine-report-2023_en> Accessed: 14 February 2024.

48 PAUL, Amanda, TARAN, Svitlana. Ukraine's accession talks need bold action in Kyiv and Brussels. *European Policy Centre*. Published on March 24, 2023. [online]. Available at: <<https://www.epc.eu/en/publications/Ukraines-accession-talks-need-bold-action-in-Kyiv-and-Brussels~4f3f1c>> Accessed: 14 February 2024.

49 European Commission, Ukraine Report 2023.

of executive power and the need to combine centralisation and decentralisation under martial law. Additional powers are being acquired and the algorithm for performing the functions of local self-government bodies is being changed, taking into account the priority of national security and defence. Herewith, there is a fear that these powers may be difficult to rescind post-war.

There are also concerns about restrictions on constitutional human rights and freedoms (changes in working conditions, the prohibition of peaceful assemblies, elections, restrictions on movement, *etc.*). Under any circumstances, such restrictions must be proportionate, legal and legitimate. According to Ukrainian legislation, it is not permissible to limit, *inter alia*, such rights as the right to a fair trial, the prohibition of torture and inhuman or degrading treatment or punishment. At the same time, it can already be stated that society is quite sympathetic to restrictions on human rights in wartime, and at the moment, there is not enough judicial practice for legal assessment. There was a similar situation following such restrictions during COVID pandemic and how we are now seeing some legal assessments.

One of the key focuses during the activities of the Constitutional Court of Ukraine is strengthening guarantees for the realisation and protection of social rights and the provision of material and legal assistance, especially for IDPs and other socially vulnerable groups.

In the jurisprudence of the Constitutional Court of Ukraine, one can observe the growth of the ideological component of the constitutional sense of justice – increasing the importance of national identity, sovereignty, territorial integrity and the Ukrainian language and culture.

On 8 November 2023, in light of the positive assessment of results achieved by Ukraine, the European Commission recommended that the Council begin accession negotiations with Ukraine. In addition, the Commission recommended that the Council approve the framework for negotiations once Ukraine has taken certain key measures that are to be reported to the Council by March 2024.

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