



# UKRAINE

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## I. INTRODUCTION

Russian aggression against Ukraine continued in 2023. The aggressor tried to deny Ukrainian statehood and looked for ways to discriminate against constitutional bodies, in particular by promoting the idea of “external control”. Despite this, the constitutional bodies continue to exercise their powers in the manner prescribed by law. Under Article 64.2 of the Constitution of Ukraine, in martial law conditions, some restrictions of constitutional rights and freedoms could be established with an indication of the period of validity of such restrictions. However, the decree of the President of Ukraine No. 64/2022 from February 24, 2022 (which permanently extended martial law throughout 2023) did not contain any specific restrictions, leaving the relevant authorities with the discretionary powers established by the Law of Ukraine “On the Legal Regime of Martial Law”.<sup>1</sup> Overall, Ukraine continues the European integration vector toward establishing the rule of law; however, severe challenges to the human rights situation because of martial law became more tangible in 2023.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### 1. Russia-Ukraine War and Human Rights Challenges

Any war presents numerous problems for the state and society; unfortunately, Ukraine is no exception in this regard. In its efforts to resist the aggressor, the national government implemented a series of controversial measures in 2022 and continued this trend in 2023 concerning an extraordinary regime of martial law and general mobilization measures. Ukraine continued enforcing numerous human rights restrictions affecting all male Ukrainian citizens aged 18 to 60 (with certain exceptions), including a prohibition on international travel for those subject to mobilization. Sadly, the actual administrative practices toward mobilization and travel bans led to disproportionate human rights limitations, often lacking legal justification in practice. Most of the implemented restrictions suffered from legal uncertainty, which fostered arbitrary discrimination against male citizens by public officials responsible for mobilization measures. Such a situation has caused many corruption-related scandals, drawing criticism from civil society. Following the unsuccessful Ukrainian counter-offensive of 2023, which resulted in high casualties and limited territorial gains, the government presented a new mobilization draft law in Parliament by the end of the year. Nevertheless, the general societal attitude towards all war-related issues and human rights restrictions changed dramatically since 2022. Measures that were perceived in 2022 as necessary and, perhaps, reasonable, in 2023 began to be viewed as obnoxious and discriminatory. The absence of consistent and transparent constitutional policy on martial law and human rights restriction only provokes fear and displeasure among ordinary citizens.

### 2. Martial Law and Parliamentary Elections

Free and competitive elections are one of the leading indicators of any modern democratic government. During the reporting period of 2023, parliamentary and presidential elections were among the primary issues discussed in Ukraine.

Ukraine did not hold regular parliamentary elections in October 2023 because the Constitution and the law prohibit such elections during

martial law. The presidential elections should have been held in March 2024. However, the Constitution remains silent about presidential elections during martial law: the prohibition of presidential elections exists only at the level of law, not the Constitution.

According to the Constitution, the Parliament and the President are elected for five years (Articles 76.1 and 103.1). However, in the event of a proclamation of martial law, the Parliament should continue its work until a new one is elected after the martial law expires (Article 83); there is no equivalent clause for the President of Ukraine. On the other hand, the President of Ukraine performs his or her duties until the newly elected President of Ukraine takes office (Article 108.1), and presidential elections are to be held under the Constitution and the law. If the law prohibits presidential elections during martial law, there definitely will be legal room for such a matter. The Constitutional Court of Ukraine could efficiently resolve these so-called inconsistencies in the text of the Constitution by providing an opinion on the matter. However, no request for such an interpretation of the Constitution was submitted to the Court in 2023.

Except for the legislative disputes mentioned, some other problems would have been faced if elections had been held during the war. The first and the main are the security challenges. From the first view, it seems right to ban elections because any mass crowds of people can be easy targets for missile attacks. On the other hand, despite the apparent security concerns, the Ukrainian government allowed sports events with viewers in the stadiums.

Another possible reason for the election ban is the occupation of Ukraine's territories, which will limit voting rights. It can be a reasonable argument, but the last presidential and parliamentary elections were held after the occupation of Crimea and parts of the Donetsk and Luhansk regions. Despite the increasing number of occupied territories after February 2022, if one analyzes

maps of occupied territories and presumes the migration of people to the territories free from Russian troops, such a reason for the election ban seems questionable.

In any case, it is impossible to hold elections before the active phase of the warfare ceased. However, another risk should also be considered: Ukrainian authorities can enact a state of emergency after canceling martial law, which also bans elections. Such a move, of course, can undermine the legitimacy of public authorities in Ukraine.

### 3. A Priori Review of Constitutional Amendment during Martial Law: Venice Commission's Amicus Curiae Brief on Draft Law No. 5133

The Constitution of Ukraine establishes a rare procedure for amending the Constitution, with mandatory preliminary involvement of the Constitutional Court of Ukraine (CCU). The CCU conducts *a priori*, i.e. *ex-ante* or preliminary, judicial review of constitutional amendments before they are adopted by Parliament. As mentioned in the 2021 report,<sup>2</sup> a draft law on constitutional amendment No. 5133, aimed at establishing a new procedure for appointing and dismissing the Director of the National Anti-Corruption Bureau and the Director of the State Bureau of Investigation, was registered in Parliament in February 2021. In March 2021, by Article 159 of the Constitution, the Parliament requested the opinion of the CCU on draft law No. 5133, but the CCU did not respond in time. Since martial law was declared on the entire territory of Ukraine in 2022, and the Constitution of Ukraine explicitly prohibits amending the Constitution during a period of martial law or a state of emergency (Article 157.2), the CCU faced a dilemma with a pending motion on Draft Law No. 5133, as *a priori* judicial review has never been carried out during martial law.

In December 2022, the Acting Head of the CCU requested an *amicus curiae* brief from

the European Commission for Democracy through Law (also known as the Venice Commission) on five specific substantive and procedural issues raised by this pending application. One of the key questions was whether an opinion on the conformity of a constitutional amendment draft law with the requirements of Article 157.2 could be given during the actual period of martial law.

In March 2023, the Venice Commission adopted an *amicus curiae* brief addressing the issues raised. The Commission noted that two alternative interpretations of the constitutional provision prohibiting constitutional amendments in Ukraine during martial law are possible (paras. 21-37, 69-71). According to interpretation #1, the Constitution precludes any possibility for the CCU to issue an opinion on constitutional amendments during martial law, as such an opinion is an integral part of the constitutional amendment process. Under interpretation #2, the Constitution prohibits only the final adoption of constitutional amendments, not the preparatory or intermediate steps in that process, since the actual adoption of constitutional amendments is the responsibility of Parliament, not the CCU. While expressing a slight preference for interpretation #2, the Venice Commission stated that only the CCU itself should reach the official conclusion on the interpretation of Article 157(2).

Despite receiving the Venice Commission's *amicus curiae* brief with a clear response, the CCU remains reluctant to give an opinion on draft law No. 5133.

### 4. Selection of Judges of the Constitutional Court of Ukraine: Another Law on Competitive Process

As mentioned in the 2022 report on Ukraine,<sup>3</sup> the European Commission recommended that Ukraine enact and implement legislation on a selection procedure for CCU judges in line with the Venice Commission's recommendation. Such implementation was not without flaws,<sup>4</sup> but at the end of 2022, *Law No. 2846-IX* on the



revision of the competitive selection procedure for CCU judges entered into force. However, on January 25, the President of the Venice Commission sent a letter to the Chairman of the Ukrainian Parliament stating that while most of the critical recommendations contained in the Venice Commission's previous opinion had been followed, two key recommendations—concerning the powers of the Advisory Group of Experts (AGE), an advisory body to assist the subjects of appointment of the CCU judges in assessing the moral qualities and level of competence in the field of law, and its composition—had not been met in the adopted law. Therefore, the Venice Commission cannot delegate a candidate member to the AGE. Other international organizations, which had been invited to send two experts to the AGE, also followed the Venice Commission's example, bringing the process of establishing the AGE to a dead-end.

There was an urgent need to change the competitive component of the selection of CCU judges and to start the competitive process again. A new draft law to clarify the competitive selection of candidates for CCU judges was registered in Parliament only on May 25. On July 27, Parliament passed the draft law No. 9322 as Law No. 3277-IX, which entered into force on 20 August.

On September 14 and 18, the competitions for vacant judicial seats from respectively the Parliament's and Council of Judges' quotas commenced. A total of 29 candidates submitted their applications for the 3 vacant seats from the Parliament's quota, while 16 candidates applied for the 2 vacant seats from the Congress of Judges' quota.

In October 2023, the Venice Commission endorsed the urgent follow-up opinion on Law No. 3277-IX. The Commission noted with satisfaction that the main recommendations it had formulated had been followed in Law No. 3277-IX and announced that it could proceed with the election of a member and a substitute member of the AGE.

The purpose of the AGE remained the same: to assist in assessing the moral qualities and level of competence in the law of candidates for CCU judges. Within six years from the date of the entry into force of Law No. 3277-IX, the composition of the AGE of six persons shall be formed as follows: (1) the President of Ukraine, the Parliament and the Council of Judges shall each appoint one member; (2) the Cabinet of Ministers shall appoint three members on the proposal of the Venice Commission (one person) and other international/foreign organizations provided Ukraine with international technical assistance in the areas of constitutional reform, the rule of law, the protection of human rights and the prevention and combating of corruption over the past five years (two persons). In addition, each member of the AGE has a deputy appointed by the same body as the member.

The AGE held its first official meeting on 12 November 2023 to elect its Chairman and Secretary and adopt its Statute. On 4 December 2023, the AGE adopted the methodology for assessing the moral qualities and level of competence in the field of law of CCU judge candidates. By the end of 2023, the AGE had received all the documents of CCU judge candidates and started to conduct their background checks.

In conclusion, Ukraine has made progress in implementing the European Commission's recommendation on the legislative framework for the selection procedure of CCU judges. However, the actual results of the competitive selection process, which started in 2023, will not be visible until 2024.

### III. CONSTITUTIONAL CASES

In 2023, the CCU delivered a total of 12 decisions. The Grand Chamber adopted only one decision, the First Senate adopted two decisions, and the Second Senate had nine decisions. As mentioned above, no opinions on the constitutional amendment draft law have been delivered during the reporting period.

## 1. CCU Decisions No. 5-r(II)/2023 and No. 9-r(II)/2023 (Second Senate), No. 6-r(I)/2023 (First Senate) on Administrative Responsibility

These decisions are related to the constitutionality of prescriptions, which establishes administrative responsibility. The CCU has checked the disputed norms for their compliance with the principles of individualization of punishment and proportionality. Thus, the provisions of Articles 481, 483 of the Customs Code of Ukraine (further – the Code) and Article 44 of the Law of Ukraine “On State Market Supervision and Control of Non-Food Products”<sup>5</sup> (further – Law No. 2735) had no alternative sanctions for relevant offenses.

In *Decision No. 5-r(II)/2023*, the CCU has stated that prescriptions of Article 483.1 of the Code have a criminal-legal nature. It follows from the content of the sanction of Article 483.1 of the Code, that the legislator defined the measure of administrative responsibility (100 percent of the value of the goods fine), which is not fair and corresponds to a legitimate goal, which could be achieved by court discretion. The impossibility of choosing the type and size of the administrative sanction taking into account the circumstance of the case makes it impossible for the court to reasonably consider the case. Such legislative regulation contradicts the principles of a democratic society based on the rule of law.

Unlike the previous case, in *Decision No. 6-r(I)/2023*, the CCU has recognized the prescriptions of Article 481.6.2 of the Code as constitutional. The sanction of this norm establishes the imposition of a fine in the amount of ten thousand tax-free minimum incomes of citizens or confiscation of a vehicle. The possibility of applying a property sanction should make it economically unprofitable to violate customs rules compared to their compliance and, accordingly, contribute to the achievement of the goal of administrative responsibility. The establishment of the contested provision of the



Code of alternative types of basic administrative fines enables the individualization of administrative fines by the court, taking into account the entire set of circumstances of the case within the limits of the legally defined sanction and, as a result, the implementation of the principle of individualization of legal responsibility.

In *Decision No. 9-r(II)/2023*, the CCU stated that measures to prevent violations of legislation on the quality and safety of goods, products, and all types of work and services should be deterrents. The existing strict system of determining the sanction for the violator of the legislation on the safety of non-food goods and products did not provide the subject of imposing an administrative penalty, the implementation of which would make it possible to individualize the legal responsibility of the violator and apply to him a presumptive measure of legal obligation. The contested provision of Law No. 2735 (a fine in the amount of three thousand tax-free minimum incomes of citizens) did not create conditions for achieving a fair balance during law enforcement between the requirements of the public interest in ensuring a high level of protection of consumer rights and the protection of a person's property rights since the contested provision of Law No. 2735 imposes an individual and excessive burden on a person, and therefore they are grounds for excessive state interference in the property rights guaranteed by Article 41 of the Constitution of Ukraine.

## 2. CCU Decisions No. 1-r(II)/2023 and No. 8-r(II)/2023 (Second Senate) on Legal Status of Prosecutors

Among the decisions, those concerning the legal status of prosecutors in Ukraine (Second Senate) should be singled out since in the 2016 version of the Constitution of Ukraine, Chapter VII "Prosecution" became invalid, and the Prosecutor's institution was transferred to the justice system (Article 131-1).

*Decision No. 1-r(II)/2023* concerned the prescription of Clause 6 of Section II "Final

and Transitional Provisions" of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Regarding Priority Measures for the Reform of Prosecutor's Organs"<sup>6</sup> (further – Law No. 113), according to which: "from the date of entry into force of this Law, all prosecutors (...) are considered to have been personally warned in due order about a possible future dismissal from their position on the basis of paragraph 9 of the first part of article 51 of the Law of Ukraine 'On the Prosecutor's Office'", which was recognized as unconstitutional.

In this case, the CCU has concluded that the state's provision of adequate guarantees against the illegal dismissal of a prosecutor whose activities are related to the functioning of the justice system is not only an element of the prosecutor's status but also one of the prerequisites for the realization of the constitutional right to judicial protection. Therefore, the dismissal of any prosecutor is possible only in the manner and on the grounds determined by the law, the norms of which must meet the requirements of the rule of law, must be aimed at achieving a legitimate goal, and the means used during the dismissal must be reasonable (proportional). In addition, the prosecutors, who were subject to the disputed provision of Law No. 113, did not have the opportunity to clearly understand the content, foresee the legal consequences of its application and plan their further actions.

*Decision No. 8-r(II)/2023* had as its subject the third paragraph of Clause 3 of Section II "Final and Transitional Provisions" of Law No. 113: "by prosecutors and heads of regional, local and military prosecutor's offices, prosecutors and heads of structural subdivisions of the General Prosecutor's Office of Ukraine the corresponding legal status that they had before the entry into force of this Law is preserved, when performing the functions of the prosecutor's office until the day of their release or transfer to the Office of the General Prosecutor, the regional prosecutor's office, the district

prosecutor's office. For the specified period, the remuneration of employees of the General Prosecutor's Office of Ukraine, regional prosecutor's offices, local prosecutor's offices, and military prosecutor's offices is carried out in accordance with the resolution of the Cabinet of Ministers of Ukraine, which establishes the remuneration of employees of prosecutor's offices", which was recognized as unconstitutional.

The CCU believes that granting the Cabinet of Ministers of Ukraine the authority to regulate the issue of remuneration of prosecutors cannot be recognized as meeting the constitutional requirement for state authorities to exercise their powers within the limits established by the Constitution of Ukraine and in accordance with the laws of Ukraine. One of the final prerequisites for the independent activity of the prosecutor's office, impartial, unprejudiced, effective executions of powers by prosecutors, is the appropriate level of their material and social support, which must be guaranteed in such a way as to make it impossible to influence prosecutors when they make decisions. The above provides grounds for the conclusion that the remuneration of prosecutors – a guarantee of their independence, which is an inseparable element of their legal status, and therefore a component of the organization and procedure of the prosecutor's office within the meaning of Article 131-1 of the Constitution of Ukraine – should be determined only by law.

## 3. Ruling of Grand Chamber of Supreme Court: Oleksandr Tupytskyi Case, № 9901/96/21

On October 19, 2023, the Ukrainian Supreme Court decided in the case of the presidential decree suspending the two judges of the CCU from office (one of them was former CCU Head Oleksandr Tupytskyi).

In March 2021, President Zelenskyy signed a decree,<sup>7</sup> which cancelled the decrees of former President Yanukovich by which the two CCU judges were appointed and, as a result,

dismissed them from office. The legality of such action was discussed among expert society because there were no legal reasons for cancelling the former President's decree and, as a result, dismissing judges. After all, only the CCU has such powers.

In April 2021, 49 MPs applied to the CCU regarding the constitutionality of such decrees. Unfortunately, the CCU has not decided on this case yet. On the other hand, the Court showed its position when it refused to swear in two new judges appointed by the President as replacements for the two dismissed.

On July 14, 2021, the Administrative Court of Cassation of the Supreme Court upheld<sup>8</sup> the claim of the former Head of the CCU, Oleksandr Tupytskyi, to the President of Ukraine, finding the decree illegal and annulling it. The Administrative Court noticed that such a President's actions violated the guarantees of independence and inviolability of a CCU judge.

In 2023, the Grand Chamber of the Supreme Court ended this case, noting<sup>9</sup> that the President of Ukraine, exercising the powers granted to him regarding the formation of the composition of the CCU, can only decide on appointing judges to the CCU. The cancellation of the decree on the appointment of a judge of the CCU is not a way to exercise the constitutional powers of the President of Ukraine. The Grand Chamber decided that the presidential decree was issued outside the president's powers. Therefore, the decree does not meet the criteria defined in Ukrainian legislation and violates the rights and interests of the former head of the CCU in legal relations regarding his public service, in connection with which the president's decree should be canceled.

#### IV. LOOKING AHEAD

Unlike in 2022, during this year, constitutional bodies have found an understanding of the procedure for exercising powers under martial law. The following year will be a test for

the fight for democracy and the legitimization of the powers of the President of Ukraine and the Parliament. There is an impression that the Ukrainian people have an understanding that the only source of power belongs to them and a consciousness of the main goals that should be implemented during the war – directing efforts to victory and unity of civil society, business and the state.

#### V. FURTHER READING

English Summaries of the Constitutional Court of Ukraine Decisions in 2023, <https://ccu.gov.ua/en/docs/5910>, accessed 14 April 2024.

Sergiy Panasyuk, *Maymulakhin and Markiv v Ukraine: Perspectives on Same-Sex Relations in Ukraine in Light of the European Court of Human Rights' Decision*, The Oxford Human Rights Hub Blog, August 24, 2023, at: <https://ohrh.law.ox.ac.uk/maymulakhin-and-markiv-v-ukraine-perspectives-on-same-sex-relations-in-ukraine-in-light-of-the-european-court-of-human-rights-decision/>

Sergiy Panasyuk, *The Separation of Powers and Ukrainian Public Policy in Wartime*, IACL-AIDC Blog (19 March 2024), at: <https://blog-iacl-aidc.org/2024-posts/2024/3/19/the-separation-of-powers-and-ukrainian-public-policy-in-wartime>

Venice Commission, *Amicus curiae* Brief relating to the procedure for appointing to office and dismissing the Director of the National Anti-Corruption Bureau and the Director of the State Bureau of Investigation, adopted by the Venice Commission at its 134th Plenary Session (Venice, 10-11 March 2023), CDL-AD(2023)004, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2023\)004-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2023)004-e)

Venice Commission, Opinion on the Law on national minorities (communities), adopted by the Venice Commission at its 135th Plenary Session (Venice, 9-10 June 2023), CDL-AD(2023)021, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2023\)021-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2023)021-e)

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Venice Commission, Urgent follow-up opinion to the opinions on the Law “On Amendments to certain legislative acts of Ukraine to clarify the provisions on the competitive selection of candidates for the position of judge of the Constitutional Court of Ukraine”, issued on 25 September 2023 pursuant to Article 14a of the Venice Commission's Rules of Procedure, endorsed by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023), CDL-AD(2023)042, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2023\)042-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2023)042-e)

1 Law No. 389-VIII of May 12, 2015.

2 2021 Global Review of Constitutional Law, pp. 363-364.

3 2022 Global Review of Constitutional Law, pp. 360-361.

4 Sergiy Panasyuk, ‘Why the Selection Process for Judges of Ukraine's Constitutional Court May Become a Stumbling Block for EU Membership’, IACL-AIDC Blog (23 February 2023) <https://blog-iacl-aidc.org/2023-posts/2023/2/23/why-the-selection-process-for-judges-of-ukraines-constitutional-court-may-become-a-stumbling-block-for-eu-membership>.

5 Law No. 2735-VI of December 2, 2010.

6 Law No. 113-IX of September 19, 2019.

7 The Ukraine President Decree No 124/2021 (Mar. 27, 2021), available at <https://www.president.gov.ua/documents/1242021-37701>. See also, 2021 Global Review of Constitutional Law, p. 362-363.

8 The Administrative Court of Cassation of the Supreme Court decision, Case No. 9901/96/21 (July 14, 2021).

9 The Grand Chamber of the Supreme Court Decision, Case No 9901/96/21 (October 19, 2023)