

ARTICLE

Special Issue: Informal Judicial Institutions—Invisible Determinants of Democratic Decay

Civil Society as an Informal Institution in Ukraine’s Judicial Reform Process

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Abstract

Since the Revolution of Dignity, civil society has become a major stakeholder in Ukraine’s multiple reform processes. Judicial reform has been particularly salient as it aims to transform the country’s judiciary, long plagued by interrelated problems of political dependence, oligarchic capture, and internal corruption, into an autonomous guarantor of the rule of law. This Article examines how Ukrainian civil society has developed into an informal institution in Ukraine’s judicial reform. Building upon an overview of judicial reform efforts in Ukraine and a general theoretical framework of informality, this contribution studies how Ukrainian civil society influences the reform process, using the example of the country’s Constitutional Court. We argue that civil society has become an influential informal institution which plays an increasingly important role in judicial reform in Ukraine.

Keywords: Judiciary; Ukraine; civil society; reform; Constitutional Court

Introduction

In the wake of Ukraine’s Euromaidan Revolution (2013–14), civil society actors involved in wide-ranging reform initiatives developed a reputation as informed and watchful pro-democracy campaigners,¹ having joined forces to consolidate their impact on Ukraine’s reform trajectory. Russia’s full-scale invasion in 2022 gave civil society actors yet another impetus,² making their role in the country’s political processes even more noticeable despite wartime restrictions.³ Within the judicial sector, the last decade of Ukraine’s reform process has seen the emergence of extensive civil society involvement, a dynamic not often observed in other European democracies. Civil society participation has surpassed any formalized prescriptions as to its role in judicial reform initiatives, and its outsized presence has been normalized—however informally—such that civil society input is expected, heeded, and engaged with, if not always solicited, by domestic and international stakeholders.

¹NATALIA SHAPOVALOVA, OLGA BURLYUK, & RICHARD YOUNGS, CIVIL SOCIETY IN POST-EUROMAIDAN UKRAINE: FROM REVOLUTION TO CONSOLIDATION 328 (Natalia Shapovalova, Olga Burlyuk, & Richard Youngs eds., 2018).

²See Kateryna Zarembo & Eric Martin, *Civil Society and Sense of Community in Ukraine: From Dormancy to Action*, EUR. SOC’YS 1, 17 (2023).

³See Nazar Boyko, *Ukraine: Nations in Transit 2023 Country Report*, FREEDOM HOUSE (2023), <https://freedomhouse.org/country/ukraine/nations-transit/2023>.

This Article contends that civil society monitoring of the Ukrainian judiciary in the last decade since the Euromaidan represents an informal institution. Although “monitoring” is the established term, the practice is more wide-reaching and more proactive than the simple observation of activity that the verb “to monitor” implies. Rather, civil society monitoring involves the production of opinions and analyses by legal experts and activists on just about all major developments concerning the Ukrainian judiciary, and the wide dissemination of their opinions through various media has had the effect of solidifying their standing and influence. The subjects of civil society monitoring are predominantly formal institutions and office-holders—including courts, judges, judicial self-governance institutions, the executive, and legislative representatives—all of whom can confidently expect that their actions would be subject to commentary, insofar as they concern the judiciary or rule-of-law-related issues. It is, moreover, in the interest of these actors to pay heed to civil society opinion, especially as unfavorable commentary may put into question one’s reputation among domestic and international stakeholders. Put bluntly, the credibility and influence of civil society actors are such that if you have a stake in Ukraine’s judicial reform process you would be well advised to care what they think and say—regardless of whether you are a proponent or opponent of reform. To the extent that this notion features as a “fact” of Ukraine’s judicial landscape,⁴ it is significant on account of its informal nature. As a sustained arrangement over the past decade, informal civil society monitoring of the judiciary may plausibly be considered institutionalized. While it does not yet meet the benchmark outlined in the introduction to this issue⁵ of sustainability across generations of actors, our expectation is that this is only a matter of time. The civil society organizations (CSOs) are well-institutionalized, and the European Union conditionality process is likely only to further entrench the practice, as European stakeholders continue to solicit and rely on CSO assessments of judicial reform progress in Ukraine.

First, the Article begins with a brief discussion of Ukraine’s judicial reform processes since the Euromaidan Revolution and the formal mechanisms of civil society engagement in the process. Second, it proceeds to outline relevant conceptual frameworks in the judicial reform literature to contextualize the Article’s discussion of informal acts, practices, and institutions, and outlines the informal mechanisms of civil society involvement in judicial monitoring. Third, it focuses on civil society engagement with developments concerning the Constitutional Court of Ukraine (CCU) to illustrate civil society’s operation as an informal institution. Using the example of the CCU, this Article gives an overview of how Ukraine’s civil society actors operate as judicial reform watchdogs and disseminate their expert opinions on the course of developments in the public sphere. This involves an intricate interplay with other stakeholders — many of whom have more formalized roles in the judicial reform process — as part of an effort to influence the transformation of the Ukrainian judiciary. The CCU can serve as an appropriate case study for these purposes because of its important constitutional role and political significance, as well as due to its ongoing reformation. Some conclusions follow.

A. Ukraine’s Post-Euromaidan Judicial Reform Process

The Revolution of Dignity—better known outside of Ukraine as the Euromaidan Revolution—in 2013–14 provided significant impetus to Ukraine’s rule of law reform and anti-corruption agendas. Ensuring an independent, transparent, and accountable judiciary emerged as a foremost priority, and Ukraine’s newly elected leadership proceeded to initiate a substantial overhaul of the judicial sector through the enactment of a wide range of legislative and institutional changes. Because the judiciary was especially vulnerable to politicization and corruption,⁶ its fundamental

⁴Renate E. Meyer, *A Processual View on Institutions: A Note from a Phenomenological Institutional Perspective*, in INSTITUTIONS AND ORGANIZATIONS: A PROCESS VIEW 33–41 (Trish Reay et al. eds., 2019).

⁵David Kosař, Katarína Šipulová & Marina Urbániková, *Informality and Courts: Uneasy Partnership*, in this Special Issue.

⁶Maria Popova, *Ukraine’s Politicized Courts*, in BEYOND THE EUROMAIDAN: COMPARATIVE PERSPECTIVES FOR ADVANCING REFORM IN UKRAINE 140, 143 (H. E. Hale & Robert W. Orttung, eds., 2016).

reform was an especially tall order. The post-Maidan years marked a whirlwind of legislative change and institutional creation aimed at relaunching the judiciary. The results have been mixed. On the one hand, the Ukrainian judiciary has become an increasingly assertive and autonomous actor, whose decisions often go against the interests of powerful incumbents.⁷ On the other hand, problematic informal practices and institutions that have shaped judicial behavior in Ukraine since 1991 coexist with encouraging signs of independent judicial behavior. Such practices include executive interference in judicial governance, deference among rank-and-file judges to court chairs, and “telephone law,” involving unsolicited calls in which politicians or their representatives pressure judges or their superiors to resolve a given case in a particular way.⁸

The Euromaidan Revolution also marked a watershed moment for Ukraine’s civil society sector, whose capacity to mobilize volunteers, raise funds, and build networks took an unprecedented leap. Civil society was thus positioned to expand its influence over the country’s reform process in the aftermath of the revolution.⁹ The most notable organized civil society group that emerged in the immediate aftermath of the Euromaidan was the Reanimation Package of Reforms (RPR), a civic coalition whose members engaged in wide-ranging reform initiatives, including in such fields as the judiciary, anti-corruption, public administration, the energy sector, and the media. The civic coalition emerged from the “New Citizen” partnership, an informal initiative founded in the lead-up to the 2010 presidential elections, which united fifty-one Ukrainian CSOs to improve civic coordination concerning civil rights and freedoms and to encourage citizen engagement. It was this prior coordination experience that laid the foundation for RPR’s rapid unification around a new reform platform in the post-Euromaidan period.¹⁰

A judicial reform working group was created as a subset of the RPR, and its member organizations were to emerge at the forefront of civil society judicial monitoring efforts in the post-Euromaidan period. The cornerstone of the working group was the Centre of Policy and Legal Reform (CPLR), a nongovernmental think-tank founded in 1996 to support the implementation of institutional reforms in several spheres, including constitutionalism, governance, and public administration, the judiciary, criminal justice, and anti-corruption, and whose members held wide-ranging policy and legal expertise.¹¹ In 2016, members of the RPR judicial reform working group established the DEJURE Foundation, whose mandate contained a sharpened focus on the promotion of the rule of law and reforms in the judicial sector, which was to be implemented by its membership of legal experts and lawyers.¹² The Centre for Democracy and Rule of Law (CEDEM)—established in 2005 as the Media Law Institute and renamed in 2016—became the third member of the working group, and its work focuses on the development of independent media, civil society, and the rule of law in Ukraine.¹³ While CPLR, the DEJURE Foundation, and CEDEM still spearhead separate initiatives in the sphere of

⁷Thomas Barrett, *Oligarchs and Judges: The Political Economy of the Courts in Post-Soviet Unconsolidated Democracies*, 2 J. IDEOLOGY & POL. 260, 270 (2021).

⁸Maria Popova & Daniel J. Beers, *No Revolution of Dignity for Ukraine’s Judges: Judicial Reform After the Euromaidan*, 28 DEMOKRATIZATSIIYA: J. POST-SOVIET DEMOCRATIZATION 113–42 (2020).

⁹Laura Cleary, *Half Measures and Incomplete Reforms: The Breeding Ground for a Hybrid Civil Society in Ukraine*, 16 J. SE. EUR. & BLACK SEA STUDS. 7, 7–23 (2016); Susann Worschech, *New Civic Activism in Ukraine: Building Society from Scratch?*, 3 KYIV-MOHYLA L. & POL. J. 23, 29 (2017).

¹⁰Christina Parandii & Balázs Jarábik, *Civil Society and Ukraine’s Reforms: Mission Exhausted? A Case Study of the Reanimation Package of Reforms*, in CIVIL SOCIETY IN POST-EUROMAIDAN UKRAINE: FROM REVOLUTION TO CONSOLIDATION 183–211 (Natalia Shapovalova & Olga Burlyuk, eds., 2018).

¹¹*About Centre of Policy and Legal Reform*, CTR. OF POL’Y & LEGAL REFORM, <https://pravo.org.ua/en/about/#cplr> (last visited Oct. 16, 2023); *Reanimation Package of Reforms Annual Report 2015*, REANIMATION PACKAGE OF REFORMS (2015), https://rpr.org.ua/wp-content/uploads/2016/03/rpr_zvit2015_ENG.pdf.

¹²*Reanimation Package of Reforms Annual Report 2016*, REANIMATION PACKAGE OF REFORMS (2016), <https://rpr.org.ua/wp-content/uploads/2017/07/rpr-EN-web.pdf>.

¹³*Who We Are*, CTR. FOR DEMOCRACY & RULE OF L., <https://cedem.org.ua/en/who-we-are/> (last visited October 16, 2023).

judicial reform—some of which will be discussed in further detail below—their membership of the judicial reform working group allows a forum for cooperation on shared priorities and embeds their work within a broader network of civil society actors in the RPR framework.¹⁴

While the CSOs involved in judicial monitoring are formally constituted—that is, they are formally registered CSOs, predominately funded by international donors—their involvement in the judicial reform process is not legally mandated. The only formally authorized role civil society actors hold in relation to the judiciary is through their involvement in the Public Integrity Council (PIC), an advisory board of CSO representatives created in 2016 by the Law on the Judiciary and the Status of Judges to assist the High Qualification Commission of Judges (HQCJ) to vet candidates for judicial office—an arrangement intended to increase the transparency and accountability of the judicial cadre renewal process by involving civil society. The PIC is comprised of twenty members who, according to the Law, constitute “representatives of human rights public associations, legal scholars, lawyers, and journalists who are recognized specialists in the field of their professional activity, have a high professional reputation, and meet the criteria in political neutrality and integrity.”¹⁵ While the PIC members are elected by representatives of participating public associations, it is the HQCJ that convenes the meetings of these associations and determines their participation in the PIC election if they adhere to the criteria established by law—specifically, that within the two years preceding the meeting they carried out “activities aimed at fighting corruption, protecting human rights, supporting institutional reforms, including implementing projects in these areas.”¹⁶ The primary tasks of the PIC are to collect information about judges or candidates for the position of a judge, to evaluate the candidate’s compliance with criteria of professional ethics and integrity, and to provide the HQCJ with the conclusion of their evaluations. The HQCJ is not, however, constrained by negative evaluations presented by the PIC, if eleven of the sixteen HQCJ members support the candidate. The PIC was constituted in 2016 and 2018, although the group that was to be elected in 2020 has yet to be formed, due to ongoing delays with reforms to the HQCJ.¹⁷

Civil society actors also hold consultatory roles with foreign stakeholders, and notably the European Commission for Democracy through Law (hereinafter the Venice Commission), which provides legal advice, studies, and reports to countries of the Council of Europe concerning draft legislation or legislation already in force. Civil society’s consultatory role may be considered formalized to the extent that the Venice Commission’s working method for the preparation of its legal opinions involves a visit by a designated working group to the target country for talks with authorities, civil society, and other stakeholders.¹⁸ That Ukrainian CSOs also submit comments in writing about the legislation under consideration by the Venice Commission may be considered informal to the extent that it is not solicited, although the Venice Commission formally engages with the input once received—that is, it reads, considers, and often comments directly on Ukrainian CSO positions, or otherwise incorporates a response to their positions in its own output.¹⁹ Civil society actors have also been at the forefront of advocating for the formalized

¹⁴Other notable CSOs in the judicial monitoring section include: Courts At Your Fingertip (Sud na Doloni), Ukrainian Centre for Public Data, Anti-Corruption Center, All-Ukrainian Association “Avtomaidan”, YouControl, “Access to Truth”, - NGO- “Legal Innovations”, Transparency International Ukraine, Bihus.Info, Center for Political and Legal reforms.

¹⁵Law of Ukraine on the Judiciary and the Status of Judges, Holos Ukrainy [Voice of Ukraine] 2016 Nos 132-133, <https://zakon.rada.gov.ua/go/1402-19>, Art. 87; *Public Integrity Council: How is the Public Control Over Judges Precise?*, REANIMATION PACKAGE OF REFORMS (May 25, 2023), <https://rpr.org.ua/en/news/public-integrity-council-how-is-the-public-control-over-judges-precise/>.

¹⁶Law of Ukraine on the Judiciary and the Status of Judges, *supra* note 15 at art. 87.; *Public Integrity Council*, *supra* note 15.

¹⁷*Public Integrity Council: When Will the Control Over Judges be Restored?*, REANIMATION PACKAGE OF REFORMS (May 25, 2023), <https://rpr.org.ua/en/news/public-integrity-council-when-will-the-control-over-judges-be-restored/>.

¹⁸*The Commission’s Activities*, VENICE COMM’N: COUNCIL OF EUR., https://www.venice.coe.int/WebForms/pages?p=01_activities&lang=EN (last visited Oct. 4, 2023).

¹⁹Venice Comm’n, Follow-up Opinion To the Opinion “On the Draft Law ‘On Amendments to Certain Legislative Acts of Ukraine on Improving the Procedure for the Selection of Candidates for the Position of Judge of the Constitutional Court of Ukraine on a Competitive Basis’”, at 8, CDL-AD(2023)022 (June 10, 2023) [hereinafter Venice Comm’n Follow-up Opinion],

involvement of foreign experts—primarily the EU—in Ukraine’s reform processes, especially in judicial appointment procedures.²⁰

B. The Informal Role of Civil Society in Ukraine’s Judicial Reform Process: A Conceptual Framework

Ukraine offers a useful case study through which to build on conceptual frameworks developed in the literature on judicial reform, and notably emerging conceptualizations that emphasize the normative elements of the judicial reform process. Reformers and scholars had previously placed emphasis on the attainment of concrete legislative and institutional changes,²¹ or outcomes such as independence or efficiency,²² as indicative of a reform agenda’s success. A more recent attempt to conceptualize and define judicial reform contests the presumed linearity and destination-focus of reform initiatives, and instead underscores the phenomenon’s complexity as a multi-dimensional “process of transformation.”²³ Among the three modes of reform outlined in this conceptualization— namely, legislative, institutional, and normative—the former two are perceived as most common and expedient, yet potentially superficial. Normative change, on the other hand, is more prolonged and onerous, yet “consequential and enduring,” given its focus on changing the way judicial actors think, behave, and interact with other branches of government.²⁴ Changes may include attempts to violate existing norms, alter existing norms, or introduce new informal dynamics, and have the potential to prompt significant and systematic effects on formal institutional outcomes.²⁵

Following the categories of informality discussed in this special issue, civil society monitoring of the judiciary in Ukraine is conceptualized as an *external judicial informal institution*, for example, one between external actors, but which affects judicial governance and judicial decision-making. The following three practices exhibited by civil society actors demonstrate their informal involvement in the judicial reform process: 1) Their inclusion in debates on legislation; 2) the dissemination of their expert commentary and active media presence; and 3) their participation as separate actors in judicial reform discussions with international partners. As a result, these civil society actors play a crucial role in shaping public discourse and debates on judicial reform, judicial careers, and sometimes even judicial output.

The CCU judges’ demonstrated engagement in public discourse on judicial reform is conceptualized as an *mixed judicial practice*—between judges and external actors—insofar as the judges have endeavored to respond to commentary disseminated by external actors or to test the public mood on a particular issue. In other words, this practice is an example of the judiciary’s reaction to the activities of civil society actors as an informal institution. There are, however, instances where their engagement in public discourse may be considered as a practice that combines

[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2023\)022-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2023)022-e); Venice Comm’n, Opinion No 1109/2022 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”, at 3, CDL-AD(2022)054 (Dec. 19, 2022) [hereinafter Venice Comm’n Opinion No 1109/2022], [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).

²⁰Andrii Nekoliak, “Shaming” the Court: Ukraine’s Constitutional Court and the Politics of Constitutional Law in the Post-Euromaidan Era, 47 REV. CENT. & E. EUR. L. 298, 305 (2022).

²¹Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 315 (2001); JODI FINKEL, JUDICIAL REFORM AS POLITICAL INSURANCE: ARGENTINA, PERU, AND MEXICO IN THE 1990S (2008); Pedro C. Magalhães, *The Politics of Judicial Reform in Eastern Europe*, 42 COMPAR. POL. 43, 58 (1999).

²²Juan Carlos Botero, Rafael La Porta, Florencio López-de-Silanes, Andrei Shleifer, & Alexander Volokh, *Judicial Reform*, 18 WORLD BANK RSCH. OBSERVER 61, 61 (2003).

²³Popova & Beers, *supra* note 8, at 115.

²⁴*Id.*

²⁵GRETCHEN HELMKE & STEVEN LEVITSKY, INFORMAL INSTITUTIONS AND DEMOCRACY: LESSONS FROM LATIN AMERICA (Gretchen Helmke & Steven Levitsky eds., 2006).

elements that are *informal and internal judicial*—between judges of a single or several courts—specifically in cases where their engagement is prompted by tensions between judges on the CCU.

This informal engagement in public discourse on judicial reform by civil society actors and judges is worthy of attention, as it shapes Ukraine’s reform trajectory and its prospects for European Union integration. This Article illuminates the ways in which informal dynamics may evolve to create or strengthen incentives to comply with formal rules,²⁶ and may be harnessed and channeled by reform actors in directions that reinforce judicial impartiality and forward meaningful judicial reform and democratization. The informal practices under discussion are considered neither positive nor negative *a priori*. On the one hand, civil society monitoring of the judicial reform process may be considered positive insofar as it functions as an accountability mechanism that enhances judicial transparency, through which informed experts express their opinions and demonstrate their commitment to meeting the EU’s conditionality in the pre-accession process. On the other hand, the monitoring is potentially negative, in that it seemingly forces the judges to engage with and respond to pressures from civil society actors. Judges’ engagement in public discourse on judicial reform threatens to undermine the development of a professional norm conception within the judiciary, which emphasizes both independence from extra-judicial pressure and notions of the judiciary’s elevation above the political fray. The fact that judges are forced to engage in public discourse along with civil society actors—and politicians—might serve to perpetuate the judiciary’s politicized image.

In addition, the anti-reform, entrenched judicial elites articulate and weaponize concerns about the informal practice of civil society judicial monitoring and evoke the primacy of judicial independence to insulate themselves from accountability. These elites had operated under the regime of former Ukrainian president Viktor Yanukovich—whose flight from the country marked the end of his presidency and the beginning of the post-Euromaidan era—and were leftovers from an era of executive dominance over judicial governance, where “pro-presidential” judges were appointed to judicial self-governing institutions.²⁷ These actors stall reform as a means of self-preservation, while coming under pressure from largely informal pro-reform actors external to the judiciary. It would seem unsurprising that Ukrainian judges sought to reinforce their defences and put up a resistance to external interference after having endured sweeping judicial lustration efforts in the immediate post-Euromaidan period.²⁸ However, the Ukrainian Constitutional Court Crisis of 2020—which will be discussed in further detail below—demonstrated that although the judiciary may have effectively defended itself from executive interference, Ukraine’s judicial governance institutions had emerged as the main battlegrounds for judicial elites and their oligarchic cronies as they vie for control of the judiciary under the new regime. To the extent that civil society has placed pressure on the Ukrainian judiciary, an outcome of this appears to be a demonstrated inclination among judges to communicate in the public domain, which the Article will also consider as an emerging informal practice.

On the one hand, resistance to reform by entrenched judicial elites, which we observe in Ukraine in the post-Euromaidan period, runs counter to some findings in the judicial politics literature that foresee institutional change instigated by actors from within the judiciary.²⁹ On the other hand, Ukraine’s experience echoes long-standing problems in other post-Communist settings where judicial elites have manipulated the judicial independence maxim to their benefit. Scholars have documented how judges sabotaged and sank attempts by the political branches to increase judicial accountability through reforms by complaining that the reforms hurt their independence.³⁰

²⁶*Id.*

²⁷Popova & Beers, *supra* note 8.

²⁸Yuliya Zabyelina, *Lustration Beyond Decommunization: Responding to the Crimes of the Powerful in Post-Euromaidan Ukraine*, 6 STATE CRIME J. 55, 72–73 (2017).

²⁹LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* (2007).

³⁰DAVID KOSAŘ, *PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES* (2016); Maria Popova, *Be Careful What You Wish For: A Cautionary Tale of Post-Communist Judicial Empowerment*, 18 DEMOKRATIZATSIIYA: J. POST-SOVIET DEMOCRATIZATION 56, 69 (2010).

It is necessary to distinguish between the abovementioned civil society actors—and notably the RPR associates who advocated and lobbied for changes to the institutional structure of the judiciary with the aim of increasing its independence—from others who “blurred the line between civil activism and vigilantism.”³¹ In the immediate post-Euromaidan period (2014–15), judges were subjected to increasing pressure and interference by civil society activists, some engaging in “trashcan lustration” actions,³² in which activists physically attacked and forced into trashcans judges who were seen as stooges of the regime of former President Yanukovich, or those who activists believed had violated citizens’ civil and human rights during the Euromaidan. Such public humiliation brought about the resignation of several judges.³³ Elections for court chairs were also occasionally disrupted when activists attempted to advocate forcefully for a particular candidate.³⁴ These violent and disruptive tactics were problematic and, had they become informally institutionalized as a tool of extra-judicial pressure on the courts, could have gravely undermined the long-term goal of solidifying the rule of law by interfering with judges’ ability to freely decide cases in line with their *bona fide* interpretation of the law.³⁵ Fortunately, as the work of the temporary commission investigating judicial misconduct during Euromaidan wound down, trashcan lustration actions also stopped.

The last several years have also witnessed a significant increase in the dissemination of local and international expert analysis on judicial reform, including through online media and television programs run by civil society groups. A notable television series, “Chest’ i NeChest’” [“Honour and Dishonour”], aired in 2018 on Kanal 24,³⁶ which was initially formatted as a panel discussion with three rotating hosts—investigative journalist, Oleksa Shalayskiy; the Co-Coordinator of the Public Integrity Council (2016–18), Halyna Chyzyk; and the co-founder and Chair of the Board of the DEJURE Foundation, Mykhailo Zhernakov. Guests included CCU Chairman Stanislav Shevchuk, government officials, representatives from judicial governance bodies, and civil society activists, thus offering a public forum in which various actors involved in the judicial reform process convened to exchange views on recent developments. In June 2020, the show revealed a new host — Iryna Shyba, then Executive Director of the DEJURE Foundation — and a new format adapted from a multimedia project of the DEJURE Foundation that published weekly evaluations of the performance and professional integrity of selected judges.³⁷ The producers also welcomed nominations from legal experts as to which judges were seen to warrant attention and either negative or positive evaluations. Each episode discussed details related to a selection of prominent court cases, offered evaluations of the judges’ conduct and substance of their decisions in the given cases, and accordingly awarded a prize for the most “honorable” and “dishonorable” judges.

The restoration of public trust in the judiciary was a driving aim of the evaluations, which sought to highlight positive developments in the judicial reform process, explain the scope of systemic issues that remained to be tackled, and offer their proposals on the best way forward.³⁸ The public nature of the evaluations was also intended to influence judicial behavior, where positive evaluations were meant to serve as a form of recognition and encouragement, and negative evaluations as a form of public shaming and deterrence against further unscrupulous action. It is striking that a show that initially seemed to engage and give voice to judges and a broad

³¹Maria Popova, *Putin-Style “Rule of Law” & the Prospects for Change*, 146 DAEDALUS 63, 73 (2017).

³²Roman David, *Lustration in Ukraine and Democracy Capable of Defending Itself*, in TRANSITIONAL JUSTICE AND THE FORMER SOVIET UNION 135, 138 (Cynthia M. Horne & Lavinia Stan eds., 1st ed. 2018).

³³Popova & Beers, *supra* note 8.

³⁴Popova, *supra* note 6.

³⁵Popova & Beers, *supra* note 8.

³⁶*Chest’ i NeChest’*, KANAL 24, https://24tv.ua/chest-nechest_tag6063/.

³⁷Iryna Shyba, *Chest i NeChest Tyzhnia z Irynoyu Shyboyu* [“Honor and Dishonor of the Week”], DEJURE FOUND., <https://dejure.foundation/special#!/tab/188857767-1>.

³⁸*Dlia choho my obyraiemo CHEST’ i NE.CHEST’ Tyzhnia?* [Why do we select an HONOR and DISHONOR of the week?], DEJURE FOUND. (Mar. 13, 2020), <https://dejure.foundation/tpost/az71591hul-dlya-chogo-mi-obiramo-chest-nechest-tizh>.

range of actors in the judicial reform process gradually shifted its approach and format—from pointed interviews and discussions to the explicit casting of “judgment” on judicial personnel, which can be construed as undue external pressure. That civil society actors disseminated their analyses and content on various media platforms and in several formats—the content of the updated version of the show was, for example, publicized as a television series, written articles, and social media posts—also signals an effort to engage a broad audience beyond just the stakeholders in the judicial reform process.

The initiative encapsulates how civil society experts essentially filled a vacuum of information and trust on judicial issues in the public sphere in the post-Euromaidan period—indeed, low public trust in Ukraine’s judiciary could be said to have had an empowering and motivating effect on the informal role of civil society experts in the judicial reform process. That civil society experts were positioned to help fill this vacuum was at least nominally acknowledged by actors within the judiciary, although the position was not conceived as one to be wholly formalized. For example, in a meeting held in 2018 between CCU judges and civil society members—initiated by the latter—the judges acknowledged that it was crucial to restore public trust in the judiciary, and claimed that the dissemination of expert commentary about the Court’s activities reinforced its work and was important in ensuring judicial transparency and public understanding of the Court’s activities.³⁹ As the subsequent discussions will demonstrate, the public sphere—far from figuring as a vacuum of information—would soon emerge as a major battleground for civil society experts, judges, and politicians involved in the judicial reform process.

C. Ukraine’s Civil Society and the Constitutional Court

Having presented a brief theoretical framework on informality and shortly outlined the important position of Ukraine’s civil society in the judicial reform process which has been taking place in the country since the Euromaidan, this Article proceeds to illustrate the informal role of the CSOs using the example of the Constitutional Court of Ukraine.⁴⁰ More precisely, this contribution looks into how Ukrainian civil society reacted to a series of controversies that have happened around the CCU since 2019, when President Zelenskyy⁴¹ came to power after a landslide victory.⁴² The Article isolates a certain portion of the Ukrainian judiciary reform and examines the CSOs’ activity to draw some conclusions that could potentially be extrapolated to the whole process of judicial reform, albeit with some limitations and reservations. Below, this section discusses the controversies chronologically to shed light on how Ukraine’s CSOs were influencing the developments surrounding the CCU. After that, this Article offers some observations about the position of the CSOs, building on the theoretical framework developed in the previous sections and applying it to the factual developments discussed herein.

The CCU has been a focal point of civil society’s attention in Ukraine. The reason for that is the political sensitivity and far-reaching impact of its decisions. Created in the unique circumstances

³⁹*U Konstytutsynomu Sudi Ukraïny vidbulasya zustrich z predstavnykamy ekspertnoï hromads’kosti* [The Constitutional Court of Ukraine Met with Representatives of the Expert Public], CONSTITUTIONAL COURT OF UKRAINE (Mar. 28, 2018), <https://ccu.gov.ua/novyna/u-konstytucynomu-sudi-ukrayiny-vidbulasya-zustrich-z-predstavnykamy-ekspertnoyi-gromadskosti>.

⁴⁰For an early overview of Ukraine’s law on the CCU, see Bohdan A. Futey, *Comments on the Law on the Constitutional Court of Ukraine*, 6 E. EUR. CONST. REV. 56 (1997).

⁴¹This Article spells the President’s surname as Zelenskyy, although there might be other variations, see Peter Dickinson, *Zelensky, Zelenskiy, Zelenskyy: Spelling Confusion Doesn’t Help Ukraine*, ATLANTIC COUNCIL (June 9, 2019), <https://www.atlanticcouncil.org/blogs/ukrainealert/zelensky-zelenskiy-zelenskyy-spelling-confusion-doesn-t-help-ukraine/>.

⁴²Shaun Walker, *Comedian Wins Landslide Victory in Ukrainian Presidential Election*, THE GUARDIAN (Apr. 22, 2019), <https://www.theguardian.com/world/2019/apr/21/zelenskiy-wins-second-round-of-ukraines-presidential-election-exit-poll>.

after the demise of the Soviet Union⁴³ and following the continental tradition,⁴⁴ the CCU⁴⁵ is primarily responsible for checking whether the country's laws are compatible with the Constitution.⁴⁶ The Court can make decisions with profound impact on the country's policies and laws. At the same time, the Court has not enjoyed a healthy level of public trust due to long-standing perceptions of political dependence and frequent corruption allegations.⁴⁷ As argued by a prominent representative of Ukraine's civil society, the CCU never was independent.⁴⁸ Due to this combination of opportunities for external interference and political impact, the CCU is of particular interest to Ukraine's CSOs, who took on the role of the rule-of-law reform watchdogs. Also, reforming the CCU is considered essential to the country's ambition to join the EU.⁴⁹ In light of the geopolitical context and Ukraine's domestic political demand,⁵⁰ acceding to the EU is widely acknowledged as one of the country's top priorities, and, consequently, the CCU inevitably comes into the spotlight. Although there are, of course, many other courts in Ukraine that can serve as good material for studying the role of the Ukrainian civil society in the judicial reform process, the considerations listed above are some of the primary reasons for choosing the CCU as the case study for this Article.

1. The CCU's 2019 Decision on Judicial Reform

In 2019, Volodymyr Zelenskyy became Ukraine's President, defeating the incumbent president, Poroshenko, in large part due to the perception that Poroshenko's administration had failed to deliver on its promises to curb corruption and build the rule of law.⁵¹ Zelenskyy started his tenure rhetorically determined to deliver a "new era"⁵² of what was summarized by others as "renewed reform and a real fight against corruption."⁵³ The strong reform mandate received by Zelenskyy from the people of Ukraine and the profound scale of the challenges he faced cannot be

⁴³Trevor L. Brown & Charles R. Wise, *Constitutional Courts and Legislative-Executive Relations: The Case of Ukraine*, 119 *POL. SCI. Q.* 143, 153–54 (2004).

⁴⁴Futey, *supra* note 40, at 56. See generally Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 *INT'L J. CONST. LAW* 44, 45 (2007).

⁴⁵It remains unclear whether the CCU is actually a court *stricto sensu*. While it is formally a part of the judiciary and its judges enjoy the same status as their colleagues working in the courts of general jurisdiction, the nature of the role that the CCU plays allows some commentators to conclude decisively that the CCU "does not belong to the judicial system of Ukraine." Ivan Pankevych & Iryna Sofinska, *The Constitutional Court of Ukraine as the Main Actor in Safeguarding of the Constitution*, 9 *JURID. TRIB.* 77, 82 (2019). For a detailed account of the debate on the judicial status of the CCU, see Hryhorii Berchenko, Andriy Maryniv & Serhii Fedchyshyn, *Some Issues of Constitutional Justice in Ukraine*, 4 *ACCESS TO JUST. E. EUR.* 128, 128 (2021). The purpose of this Article is to explore the role of Ukraine's civil society as an informal institution, so the exact status of the CCU is largely outside of the scope of this contribution.

⁴⁶CONSTITUTION OF UKRAINE [CONSTITUTION], Holos Ukraine [Voice of Ukraine] 1996 No 128, <https://zakon.rada.gov.ua/go/254%D0%BA/96-%D0%B2%D1%80>, art. 147 (Ukr.); Law of Ukraine on the Constitutional Court of Ukraine, Holos Ukraine [Voice of Ukraine] 2017 No 141, <https://zakon.rada.gov.ua/go/2136-19>, art. 7(1), 7(2).

⁴⁷Andrii Nekoliak, *A Damaged Court Causing a Constitutional Crisis*, *VERFASSUNGSBLOG* (Dec. 5, 2020), <https://verfassungsblog.de/a-damaged-court-causing-a-constitutional-crisis/>.

⁴⁸"Дійте на Ростов!": українці закликали суддів КСУ йти у відставку, *DEJURE FOUND.* (Oct. 30, 2020), <https://dejure.foundation/tpost/fi1zljbyv1-dte-na-rostov-ukrants-zaklikali-suddv-ks>.

⁴⁹*European Commission Opinion on Ukraine's Application for Membership of the European Union*, at 5, COM (2022) 407 final (June 16, 2022).

⁵⁰The goal of acceding to the EU and joining the NATO has been set out in the preamble to the country's Constitution and called "irreversible." See *CONST. (UKR.)*.

⁵¹Cristina Gherasimov & Iryna Solonenko, *Rule of Law Reform after Zelenskyy's First Year: A Return to Business as Usual in Ukraine*, 4 *DGAP ANALYSIS* 9, 9–10 (2020).

⁵²Volodymyr Zelenskyy, Newly Elected President of Ukraine, Volodymyr Zelenskyy's Inaugural Address, (May 20, 2019), in *OFFICIAL WEBSITE OF THE PRESIDENT OF UKRAINE*, <https://www.president.gov.ua/en/news/inavguracijna-promova-prezidenta-ukrayini-volodimira-zelensk-55489>.

⁵³Steven Pifer, *Ukraine's Zelenskyy Ran on a Reform Platform—Is He Delivering?*, *THE BROOKINGS INST.* (July 22, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/07/22/ukraines-zelenskyy-ran-on-a-reform-platform-is-he-delivering/>.

overestimated. Expectedly, one of the first steps taken by the President was the renewal of judicial reform by means of Bill 193-IX amending, among other laws, the Law on the Judiciary and the Status of Judges which provides the basis for the institutional setup of the country's courts.⁵⁴ The CCU, however, declared the bill unconstitutional and effectively stopped the reform. From the beginning of Zelenskyy's term, the CCU clashed with the President on judicial reform.

The CCU's decision was met with a great deal of criticism by civil society. Although some of the bill's provisions had been criticized by Ukraine's international partners before, Ukraine's CSOs took a stance and spoke against the CCU's judgment, which they saw as the ultimate hurdle in what could have been a successful reform. Specifically, the CSOs argued that "[t]he judicial corporation inside the CCU (. . .) is protecting the status quo in the judiciary by all means."⁵⁵ CSOs went beyond criticism of the CCU's actions. They also offered a list of alternative solutions, urging the President and his party to carry on with judicial reform efforts despite the resistance from the CCU.⁵⁶ Five Ukrainian CSOs joined forces and produced a detailed roadmap for reforming the Ukrainian courts.⁵⁷ The civil society representatives essentially offered an elaborate and comprehensive judicial reform plan, based on their intricate knowledge of Ukraine's legal system.⁵⁸ The fact that many parts of the plan were later incorporated in the advice of Ukraine's international partners and were also pursued by the country's leadership is a testament to the growing informal power of the CSOs and their increasing political influence.

Moreover, the CSOs took a position that did not fully match the opinions of any other stakeholder. This fact demonstrates the independence and empowerment of Ukraine's civil society and its resolve to advocate for its own agenda. Offering analysis, voicing their critique, and actively stimulating the political branches to carry on with the reform, the CSOs acted as an autonomous institution that exerted substantial influence.

II. The CCU's 2020 Decision on Anticorruption Reform

Despite the considerable public backlash and the CSOs' criticism following the Court stopping the judicial reform bill, the CCU went on and, later in October 2020, declared unconstitutional the country's anticorruption legal framework.⁵⁹ In its judgment, the Court struck down key legal norms designed to combat corruption, particularly the rules on asset declaration, and deprived the National Agency for Prevention of Corruption of its powers.⁶⁰ Having wide-ranging destructive effects⁶¹ and condemned by the Venice Commission,⁶² the decision was handed

⁵⁴Nekoliak, *supra* note 20, at 307.

⁵⁵*Experts Question Future of Ukrainian Judiciary as Court Cancels Judicial Reform*, DEJURE FOUND. (Mar. 19, 2020), <http://en.dejure.foundation/column/experts-question-future-of-ukrainian-judiciary-as-court-cancels-reform>.

⁵⁶*Id.*

⁵⁷*Громадські організації пропонують владі план дій у судовій реформі [Public Organizations Offer the Authorities an Action Plan in Judicial Reform]*, DEJURE FOUND. (May 26, 2020), <https://dejure.foundation/tpost/tmui9gs8nc-gromadsk-organizats-proponuyut-vlad-plan>.

⁵⁸*What Is Needed for Establishing a Truly Independent Judiciary of High Integrity in Ukraine?*, DEJURE FOUND. (2020), <http://en.dejure.foundation/judicial-reform-map-eng> (last visited Oct. 4, 2023).

⁵⁹For an overview of the decision see Roman Kuibida, *Constitutional Court Strikes the Anti-Corruption System in Ukraine*, 4 ACCESS TO JUST. E. EUR. 283, 284 (2020).

⁶⁰Venice Commission, *Decision of the Constitutional Court of Ukraine*, Opinion No. 1012/2020, Case 13-r/2020, 6 (Oct. 27, 2020) Visnyk Konstytutsiinoho Sudu Ukrainy [Bulletin of the Constitutional Court of Ukraine] 25 (2020).

⁶¹Oleg Sukhov, *Constitutional Court Destroys Crucial Pillar of Ukraine's Anti-Graft Infrastructure*, KYIV POST (Oct. 29, 2020), <https://www.kyivpost.com/ukraine-politics/constitutional-court-destroys-crucial-pillar-of-ukraines-anti-graft-infrastructure.html>.

⁶²Urgent Joint Opinion No. 1012/2020 of the Venice Commission and the Directorate General of Human Rights and Rule of Law (Dgi) Of the Council of Europe on the Legislative Situation Regarding Anti-corruption Mechanisms Following Decision No. 13-R/2020 of the Constitutional Court of Ukraine CDL-PI(2020)018, 73 (2020).

down by the CCU judges in the situation of a potential conflict of interest.⁶³ Moreover, the judgment threatened to undermine Ukraine's partnership with Western governments and international organizations, which had supported Ukraine's post-Euromaidan anticorruption efforts.⁶⁴

The Ukrainian CSOs were quick to supply the much-needed expert analysis of the CCU's judgment.⁶⁵ While the President and his team focused on rectifying the immediate damage caused by the decision, civil society representatives emphasized the need to reform the appointment procedure in order to avoid such incidents in the future.⁶⁶ In the situation of urgency and shock, the CSOs offered an evaluation and put forward ways out of the predicament. They provided legal arguments about the wrongfulness of the Court's decisions and offered detailed solutions to the problem.⁶⁷ Importantly, the reaction of the CSOs was not limited to expert analysis, but also included public activism and protest. Several activists, among them Vitaliy Shabunin of the Anti-Corruption Action Center and Iryna Shyba of the DEJURE Foundation, organized a demonstration in front of the CCU building, and called the Court justices traitors of the Ukrainian nation and urged them to depart for Rostov-on-Don, a Russian city near the border with Ukraine. The call was an allusion to former president Yanukovich's flight from Ukraine in 2014 when he initially went to Rostov-on-Don.⁶⁸ The demonstration was organized by four CSOs who saw it as an essential step in safeguarding the rule of law in Ukraine.⁶⁹

The President's reaction to the CCU's decision was even harsher. Zelenskyy decried the decision and criticized the Court, but he did not stop there. His next step was to try to invalidate the Court's decision and dismiss its judges.⁷⁰ The ability of the President to review the CCU's judgments might be seen as an effective and reasonable control over the Court, stemming from his status as the guarantor of the Constitution⁷¹ but this course of action was also a court-curbing step, which could undermine the rule of law by punishing the Court for delivering an unpopular substantive decision. The President had faced a lose-lose political choice—he could either accept the dismantling of the anticorruption institutions crucial for tackling one of Ukraine's top governance hurdles in the name of building judicial independence or punish the justices responsible for undermining anticorruption but sacrifice the CCU's nascent independence. He opted for the latter.

⁶³Oleg Sukhov, *Agency Says Constitutional Court has Conflicts of Interest in Ruling on Big Cases*, KYIV POST (Oct. 10, 2020), <https://archive.kyivpost.com/ukraine-politics/agency-says-constitutional-court-has-conflicts-of-interest-in-ruling-on-big-cases.html>.

⁶⁴Daryna Antoniuk, *Dangerous Constitutional Court Ruling Threatens Visa-Free Travel with Europe*, KYIV POST (Oct. 29, 2020), <https://www.kyivpost.com/ukraine-politics/dangerous-constitutional-court-ruling-threatens-visa-free-travel-with-europe.html>; Mattia Nelles, *Ukraine Caught Between Constitutional Crisis and Counter-Revolution*, ATLANTIC COUNCIL (Nov. 5, 2020), <https://www.atlanticcouncil.org/blogs/ukrainealert/ukraine-caught-between-constitutional-crisis-and-counter-revolution/>.

⁶⁵*The Constitutional Court Destroyed the Asset Declaration System: Analysis of the Decision*, DEJURE FOUND. (Oct. 29, 2020), <https://en.dejure.foundation/tpost/infmmp741-the-constitutional-court-destroyed-the-a>.

⁶⁶*Парламент продовжує імітувати вирішення конституційної кризи [Parliament Continues to Simulate Constitutional Crisis]*, DEJURE FOUNDATION (Jan. 28, 2021), <https://dejure.foundation/tpost/8vefxs62v1-parlament-prodovzhu-mtuvati-virshennya-k>.

⁶⁷*Id.*

⁶⁸“Проведемо суддів-зрадників до Ростова”: активісти принесуть суддям Конституційного суду валізи та квитки в Росію, DEJURE FOUNDATION (Oct. 29, 2020), <https://dejure.foundation/tpost/khjuo2u1r1-provedemo-suddv-zradnikov-do-rostova-akti>.

⁶⁹“Їдьте на Ростов!”: українці закликали суддів КСУ йти у відставку, *supra* note 48.

⁷⁰Anna Myroniuk, *Experts Split Over Zelensky's Solution to Constitutional Court's Sabotage of Anti-Graft Reform*, KYIV POST (Oct. 30, 2020), <https://www.kyivpost.com/ukraine-politics/experts-split-over-zelenskys-solution-to-constitutional-courts-sabotage-of-anti-graft-reform.html>.

⁷¹For example, the decisions of the constitutional courts in Turkmenistan and Mongolia can be reviewed. See Shannon Ishiyama Smithey & John Ishiyama, *Judicious Choices: Designing Courts in Post-Communist Politics*, 33 COMMUNIST & POST-COMMUNIST STUDS. 163, 167 (2000).

Civil society's reaction to President Zelenskyy's response to the Court's sabotage was mixed. Some actors, such as Vitaliy Shabunin, approved of this course of action because they put the emphasis on restoring the country's anticorruption architecture.⁷² By endorsing Zelenskyy's move, this part of civil society sought to prioritize the corruption fight over entrenching the independence of a Court with sitting justices who seemed opposed to further reforms. Other CSOs were concerned that punishing the justices carried too high a price in terms of the sanctioning of legally questionable steps by the President. In this case, the steps were necessary to tackle a real problem, but the precedent could be dangerous in the long term. So some criticized Zelenskyy's bill as "unconstitutional"⁷³ and suggested workarounds that could restore the anticorruption framework in a manner consistent with the CCU's decision. Nevertheless, even those civil society representatives who did not offer Zelenskyy their express support also called upon the CCU's judges to resign,⁷⁴ therefore implicitly supporting the President's intent to purge Ukraine's constitutional jurisdiction. In other words, the CSOs showed solidarity with the President, although the legal particularities of the means to achieve the desired outcome were debated.

Apart from Zelenskyy, other political actors also suggested their solutions to the problem created by the CCU. The Speaker of Parliament introduced a bill with wide partisan support from the reformist party factions. An alternative bill was also drafted by a group of reformist, pro-Western members of parliament. The bills were slightly different in their detail, but each bill sponsor argued that their bill provided a quick, temporary fix out of the crisis. Ukraine's CSOs paid close attention to those proposals and offered their analysis, which underscores that the CSOs carved out a wide role for themselves as interpreters of steps taken in the broad area of judicial reform. Civil society representatives largely rejected those suggestions and sought to justify their positions through reliance on legal analysis.⁷⁵ To a great extent, this negative feedback from civil society contributed to the abandonment of those proposals. Had the CSOs praised the proposed solutions, they might have given momentum to them and boosted public or international partner support for them. Instead, the failure of the proposals demonstrated how influential Ukraine's civil society was. In a nutshell, getting legislative amendments informally approved by the CSOs is a prerequisite for the formal adoption of those amendments.

D. The Institutional Position of Ukraine's Civil Society

In the series of controversies connected to Ukraine's CCU that took place in 2019–20, the role of Ukrainian civil society was particularly visible and allows some conclusions to be drawn on its position as an influential informal institution. The power of the CSOs comes from their informal mode of actions and relies heavily on their reputation and public trust.

As briefly sketched out above, numerous Ukrainian CSOs were actively involved in the matters surrounding the CCU. They actively monitored the situation, frequently commented on the developments, steadily provided legal analysis, steered public opinion, explained the nuts and bolts of the sometimes convoluted Ukrainian constitutional law for the citizens, and, most importantly, actively influenced the events through their extensive communication with the political branches of power, Ukraine's international experts, and other stakeholders. The extent to which Ukraine's CSOs were engaged with the developments demonstrates their steadfast resolve

⁷²Nekliak, *supra* note 20, at 312.

⁷³*Possible Ways of Solving the Constitutional Crisis*, DEJURE FOUND. (Nov. 2, 2020), <https://en.dejure.foundation/library/possible-ways-of-solving-the-constitutional-crisis>.

⁷⁴*Constitutional Court Judges Must Resign*, DEJURE FOUND. (Nov. 4, 2020), <https://en.dejure.foundation/tpost/2vlzt7yv91-constitutional-court-judges-must-resign>.

⁷⁵*The Solution to Restoring the Ant-Corruption Infrastructure from Dmytro Razumkov. Why it Will Not Work*, DEJURE FOUND. (Nov. 3, 2020), <https://en.dejure.foundation/tpost/1yk809htt1-the-solution-to-restoring-the-anticorrupt>; "Quick Fix" for the Constitutional Crisis: What is Wrong with the MP's Initiative, DEJURE FOUND. (Nov. 4 2020), <https://en.dejure.foundation/tpost/ka1mrd63a1-quick-fix-for-the-constitutional-crisis>.

to push the judicial reform agenda. In short, there is no significant event at the CCU or around it that can go unnoticed by the CSOs. Their omnipresence in political discussions and public debate has become expected, valued, and ultimately institutionalized.

In addition, the opinion of Ukraine's CSOs is of crucial importance not only to stakeholders inside Ukraine but also to its international partners, such as the Venice Commission. In the course of the country's efforts to reform the CCU's appointment procedure, the position of Ukraine's civil society was taken into account by the Commission and had an impact on its opinion.⁷⁶ The country's international partners seek the CSOs' advice, counting on their expertise concerning local peculiarities and legal rules. Also, the Ukrainian CSOs are regarded as reliable partners in many ways because of their roots in the time after the Revolution of Dignity and the principled position they took in that critical time.

The interaction between the CSOs and Ukraine's international partners is, however, not a one-way street. International partners not only seek the opinion of the CSOs and take them into account, but civil society representatives also monitor and check the advice offered by the international partners. For example, the official opinions of the Venice Commission in the aftermath of the infamous 2020 -CCU- decision were attentively analyzed by the CSOs.⁷⁷ Although it was done in the form of media commentary, the practice effectively constituted an informal approval procedure that the Venice Commission's opinions were subject to. Essentially, the controlling role of civil society also covered the input received from outside of Ukraine.

The post-Euromaidan period also saw a rise in efforts among the judiciary to solicit public support, which may be seen as a reaction to civil society activity and public engagement. In response to the CSOs' extensive commenting on the CCU's business, the Court launched an active Facebook page where it set out to communicate its work to the public with more clarity.⁷⁸ Furthermore, some of the Court's judges have been inclined to engage with the public discourse around the CCU, and notably in the immediate aftermath of the CCU's controversial decision at the end of October 2020, when the Court was at the center of much public criticism, vocalized by CSO representatives in particular. For example, in the first week of November 2020, Serhii Sas, a CCU judge, published the draft of the Court's opinion on the constitutionality of the large-scale land law reform in one of the country's most influential political weeklies, *Dzerkalo Tyzhdnia* [Weekly Mirror].⁷⁹ The publication included a passionate foreword authored by Sas personally where, reflecting on the crisis that had erupted in the wake of the CCU decision, Sas spoke of "unprecedented hysteria" around the Court and "pressure" exercised by the President and the country's Parliament. The unusual move looked like an apparent attempt to see whether the public approved of the Court's upcoming judgment. The publication of the draft also provided an opportunity to receive some feedback from CSOs and to check whether they approved of the decision. Shortly after the draft was published, the CCU announced that it needed more time to decide, apparently after receiving the initial feedback on the draft.⁸⁰ This is quite remarkable, as it shows an inclination to receive the approval of civil society as a

⁷⁶Venice Comm'n Opinion No 1109/2022, *supra* note 19, at 3; Venice Comm'n Follow-up Opinion, *supra* note 19, at 8.

⁷⁷"Should Not Usurp the Role of the Legislature,"—Venice Commission on the Decision of the Constitutional Court on E-Declaration, DEJURE FOUND. (Dec. 10, 2020), <https://en.dejure.foundation/tpost/zejpymbeb1-should-not-usurp-the-role-of-the-legisla>; *The Venice Commission on the Constitutional Court of Ukraine: Serious Reform is Needed, Judges Should be Selected by International Experts and the Public*, DEJURE FOUND. (Dec. 15, 2020), <https://en.dejure.foundation/tpost/amro5oav31-the-venice-commission-on-the-constitutio>.

⁷⁸Конституційний Суд України [Constitutional Court of Ukraine], FACEBOOK, <https://www.facebook.com/ConstitutionalCourtOfUkraine/>.

⁷⁹Yuliia Moskalenko, *Суддя КСУ через zn.ua звернувся до українців та показав проект рішення щодо тлумачення земельних статей Конституції*, ZN,UA ДЗЕРКАЛО ТИЖНЯ (Nov. 4, 2020), <https://zn.ua/ukr/UKRAINE/zemelna-reforma-suddja-ksu-zvernuvsja-do-ukrajinsiv-ta-pokazav-proekt-rishennja-shchodo-tlumachennja-statej-konstitutsiji.html>.

⁸⁰*Продовжать розгляд. В КСУ заявили, що ще не ухвалили рішення щодо земельної реформи*, NEW VOICE (Nov. 4, 2020), <https://nv.ua/ukr/ukraine/politics/zemelna-reforma-konstituciyniy-sud-zayaviv-shcho-shche-ne-uhvaliv-rishennya-novini-ukrajini-50122047.html>.

prerequisite to adopting a judgment. In some ways, civil society actors in Ukraine became participants in judicial decision-making.

The judge rapporteur in the controversial 2020 decision of the CCU, Ihor Slidenko, also made several media appearances in its immediate aftermath. As civil society experts, politicians, and international observers responded to the decision with alarm, and a wave of negativity was directed towards Slidenko's persona—including allegations of a conflict of interest in the case—Slidenko was inclined to respond with his own explanations to shape the narrative. Notably, he chose to make public for the first time the fact that he had submitted his resignation from the CCU a few weeks before the judgment was due to be published, on account of what he alleged was pressure coming from the President and his aides, and that his resignation had not been accepted.⁸¹ When pressed by media interviewers on why he had withheld publicizing the allegations of pressure from the presidential administration and his resignation until after the CCU decision was released, he claimed he had not immediately deemed it necessary, but was finally compelled to comment on account of what he stated were lies circulated about him in the media.⁸² It is notable that Slidenko had enjoyed a decent reputation before the 2020 crisis, and even received accolades from civil society actors involved in the abovementioned “Honor and Dishonor” initiative.⁸³ Slidenko evidently felt he had no option to remain aloof and “above the fray,” and was instead inclined to defend his reputation in the public sphere, seeing an opportune moment to air his allegations of pressure from the Presidential administration and the CCU's supposed mishandling of his resignation.

Lastly, the forms of the CSO's influence on the course of Ukraine's judicial reform and the transformation of the CCU are quite diverse. The most frequently used one is perhaps public commentary in writing, but also sometimes orally. Civil society representatives offer their legal analysis and expert opinion, steering the public discourse and directing the work of the political branches of power. Other forms are less traditional and demonstrate a great deal of creativity. For example, in 2021, three prominent civil society representatives, namely Vitaliy Shabunin, Kateryna Butko, and Mykhailo Zhernakov, presented as part of a protest action a newly designed badge meant to be worn by Ukrainian judges.⁸⁴ The whole judiciary of Ukraine was labeled a “mafia” and the badge design included luxury cars, spacious mansions, and piles of money as the symbols of the permeating corruption of Ukraine's judges.⁸⁵ While the act was part of a symbolic protest action and campaign initiated by CSOs, it sent a powerful message to all stakeholders and ultimately stimulated the reform process.

E. Conclusions

This Article has focused on the evolving position occupied by civil society representatives in the process of reforming Ukraine's judiciary, using the example of the country's most influential court, the Constitutional Court of Ukraine. The scale and continuity of the influence civil society actors exercise in the process of judicial reform give sufficient grounds to conclude that civil society is an informal institution in Ukraine. Civil society actors complement and enhance the

⁸¹Oleksiy Sorokin, *Constitutional Court Accuses Zelensky of Pressure, Judge Resigns*, KYIV POST (Oct. 30, 2020), <https://www.kyivpost.com/ukraine-politics/constitutional-court-accuses-zelensky-of-pressure-judge-resigns.html>.

⁸²*Суддя Конституційного суду Ігор Сліденко / Мокрик По Живому* [Judge of the Constitutional Court Ihor Slidenko], YOUTUBE (Oct. 30, 2020), <https://www.youtube.com/watch?v=2xY-nb13KrU>; *Ігор Сліденко: Несподівано відверта розмова в кабінеті судді Конституційного Суду* [Ihor Slidenko: An Unexpectedly Frank Conversation in the Office of a Judge of the Constitutional Court], YOUTUBE (Nov. 11, 2020), <https://www.youtube.com/watch?v=ZyzXgLAoB7A>.

⁸³*Суддя, який поставив на місце нардепа ОПЗЖ та не підтримав Вовка: хто такий Ігор Сліденко*, 24 CHANNEL (July 31, 2020), https://24tv.ua/suddya-yakiy-postaviv-mistse-nardepa-opzzh-ne-pidtrimav-ovvka_n1388194.

⁸⁴АНОНС—Громадськість презентує альтернативний нагрудний знак “Суддя України”, DEJURE FOUND. (Oct. 7, 2021), <https://dejure.foundation/tpost/sibgvymz31-anons-gromadskst-prezentu-alternativnii>.

⁸⁵*Id.*

influence exerted by Ukraine's international partners, as they are more aware of the peculiarities of Ukraine's laws and environment and are located much closer to the political decision-makers in the country, both physically and metaphorically.⁸⁶ The opinion of Ukraine's various CSOs plays a significant role in the judicial reform process and, even if not always followed, is taken seriously by the political branches of power, as well as the judiciary.

The potential impact of this informal practice on the judicial reform process and the prospects of rule-of-law improvement is not *a priori* positive or negative. On the one hand, given that the CSOs emerged out of the Euromaidan—which was driven by a desire to build Ukraine into a democratic state with a strong rule of law—CSOs intended the practice to constitute a form of monitoring that is constructive and moderate. On the other hand, this could potentially stunt the development of a professional norm conception within the judicial corps that centers on independence.⁸⁷ If judges expect their activity to be constantly monitored by an extra-judicial actor, they might not develop the confidence to be assertive but will continue seeking outside input and guidance. In addition, given that the Ukrainian judiciary has a history of a dominant professional norm conception that emphasizes deference and reluctance to take the initiative,⁸⁸ we can expect continued, even entrenching, resistance by the judiciary to the emerging informal institution of active civil society involvement.

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⁸⁶Michael Martin Richter, *The Diversity of Actors in Reform Backsliding and Its Containment in the Ukrainian Hybrid Regime*, 11 *POL & GOVERNANCE* 5, 7 (2023).

⁸⁷John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 *S. CAL. L. REV.* 353 (1998).

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