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The effect of international insulation of judicial appointments on executive-judiciary relations: Insights from Ukraine's judicial reform path

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Abstract

Since gaining independence over 30 years ago, Ukraine has been facing the seemingly Sisyphean challenge to undertake judicial reforms that would strengthen the country's democracy and expedite its European integration process. A rather innovative approach stemming from these judicial reform efforts of recent years can be found in the international insulation of judicial appointment procedures – in other words, the introduction of international experts who can determine whether a candidate for a judicial position is successful or not.

Scholarly literature suggests that time-limited international insulation can lead to bureaucratic institutions that are better protected from political influence and whose employees put the interest of the public and the rule of law above personal interests. Since in the past, relations between executive and judiciary in Ukraine have experienced several challenges that have undermined the country's democratic credentials, the following question seems worth asking: Does international insulation help to bring about executive-judiciary relations as they should ideally be in a representative liberal democracy?

In order to find an answer to this question, this research paper constructs an ideal model of executive-judiciary relations in a democracy based on the concepts of legitimacy, accountability, mutual toleration and institutional forbearance and the sub-concepts of quality and impartiality. This model then serves as a benchmark against which two Ukrainian courts of first instance – one with international insulation in its appointment procedures (the High Anti-Corruption Court) and one without (the District Administrative Court of Kyiv) - and their respective relations with executive actors and organs will be juxtaposed. This comparison will be undertaken through an interpretive content analysis of statements by representatives of the two selected courts, of executive organs and statements by organisations from civil society and the international arena.

The result of this research is that the relations of the executive with the court with international insulation are closer to the constructed ideal model and therefore more democracy-friendly than the relations with the court without international insulation. While more research is required to better understand the impact of international insulation on the judiciary (and on its relations with the executive) overall, this paper suggests that it can prove beneficial in bringing about executive-judiciary relations that are conducive to democracy.

Keywords: Ukraine; judicial reform; international insulation; executive-judiciary relations

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CCJE – Consultative Council of European Judges

CCU – Constitutional Court of Ukraine

DACK – District Administrative Court of Kyiv

ECtHR – European Court of Human Rights

EU – European Union

HACC – High Anti-Corruption Court

HCJ – High Council of Justice of Ukraine

HQCJ – High Qualifications Commission of Judges of Ukraine

NABU – National Anti-Corruption Bureau of Ukraine

NAPC – National Agency for the Prevention of Corruption

OECD – Organisation for Economic Co-operation and Development

PCIE – Public Council of International Experts

SAPO – Special Anti-Corruption Prosecutor's Office

VRY – Vyshcha Rada Yustytsii (predecessor of HCJ)

Introduction

Since gaining independence over 30 years ago, Ukraine has been facing the seemingly Sisyphean challenge of undertaking judicial reforms that would remain stable as governments were changing. After two revolutions which had placed democracy and the rule of law into the centre of attention, Ukraine has shown remarkable ambition for judicial reform, which, however, has too often ended up not being crowned with success.

In more recent times (and particularly prior to the beginning of the full-scale Russian war of aggression against Ukraine in February 2022), judicial reform has again been put in the political limelight in Ukraine. Reform efforts went as far as comments asking whether Ukraine was "about to cut the Gordian knot of judicial reform".[1] The question was specifically asked with regards to the creation of an Ethics Council, the task of which, as set out in the relevant legislation, was to assist in the process of appointing members to Ukraine's High Council of Justice (HCJ). The Ethics Council was to be composed by three active or retired judges appointed by the Council of Judges and three appointed by international organisations, with the latter having the final say on who is ultimately appointed as a member of the HCJ.[2]

Precisely this externalisation of decision-making on judicial appointments, reducing domestic influence over the appointment process, – a concept referred to in this paper as *international insulation* – is the centrepiece of this research project. It appears at first sight that international insulation might be able to ensure that individuals fulfilling high ethical standards and a high degree of integrity are appointed in high-ranking positions without political influence or pressure or personal interests being prioritised over the overall rule of law by some members of the judiciary, thereby increasing public confidence in the judiciary and allowing the judiciary to pursue its work without feeling at risk from illicit interventions from the executive.[3]

The purpose of this paper is to investigate the impact left by international insulation, when initiated by domestic political leaders, on the behaviour of the executive and judiciary towards each other. This is reflected in the following formulation of the primary research question of this study:

[1] John Lough, „Is Ukraine about to cut the Gordian knot of judicial reform?", Altantic Council, 10 May 2021, https://www.atlanticcouncil.org/blogs/ukrainealert/is-ukraine-about-to-cut-the-gordian-knot-of-judicial-reform/.
[2] 'The Ethics Council That Will Reform the HCJ Was Formed Automatically', *DeJure Foundation* (blog), 9 November 2021, http://en.dejure.foundation/tpost/89ia7k5zv1-the-ethics-council-that-will-reform-the.
[3] Elton Skendaj, 'International Insulation from Politics and the Challenge of State Building: Learning from Kosovo', *Global Governance: A Review of Multilateralism and International Organizations* 20, no. 3 (19 August 2014): 462, https://doi.org/10.1163/19426720-02003009.

Q: How does international insulation of judicial appointments affect the relationship between the executive and the judiciary if the latter is viewed through the lens of an ideal model of executive-judiciary relations in a representative liberal democracy?

As suggested above, this paper's hypothesis is the following:

International insulation of judicial appointments will more likely lead to executive-judiciary relations that resemble an ideal form of the relations between the two in a representative liberal democracy.

This paper will start by setting out an overview of the existing literature discussing international insulation and of the research gap this paper seeks to tap into. This will be followed by an outline of the conceptual framework, with a particular focus being on the paper's understanding of executive-judiciary relations in a democracy. The discussion of the concepts of legitimacy, accountability, mutual toleration, and institutional forbearance as well as the sub-concepts of quality and impartiality will culminate in the construction of an ideal model depicting the relationship between executive and judiciary. This will ultimately serve as a benchmark against which the empirically measured relations will be compared and contrasted.

Then, the methodological choices of this paper will be presented. The research presented in this paper will be based on a comparative study of two of Ukrainian first-instance courts, the jurisdiction of both of which follows exceptional rather than territorial principles – the High Anti-Corruption Court (HACC) on one hand and the District Administrative Court of Kyiv (DACK) on the other. An overview of relevant developments regarding judicial reform in Ukraine will be outlined to help justify the selection of Ukraine as a country of study. Then, after a discussion on the operationalisation of the concepts of this research puzzle, an explanation of the choice of the two cases as well as the selected timeframe will be provided. Finally, the primary sources and overall data collection methods for this research project will be overviewed. This paper intends to employ interpretive content analysis to look at statements produced by executive leaders and key judicial representatives with regards to the respective other branch of power while taking into account the context in which these statements were made. This context notably includes assessments by organisations from civil society and the international arena.

This paper's analysis suggests that international insulation indeed helps to develop executive-judiciary relations that are more conducive to democracy. Relations between the District Administrative Court of Kyiv, which has no international insulation in its appointment

procedures, and the executive have been found to be significantly strained, with questionings regarding the legitimacy of the respective other and its actions taking place on several occasions during the timeframe of this research. These took place in a context of legal and legislative uncertainty that was regarded as undermining public confidence in the belief that the rule of law was at the heart of the actions and intentions of both the executive and the DACK. On the other hand, relations between the executive and the High-Anti Corruption Court, which does have international insulation in its judicial appointment procedures, were marked by much more democracy-friendly statements that highlighted the independence of the two branches, the recognition of the respective other as a legitimate holder of power and a sense of cooperative spirit where this appeared to be required to strengthen the rule of law. In the context of the HACC's decision-making that did not bring about such public doubts about its integrity and impartiality, it is concluded that relations of the executive with the HACC were significantly more conducive to democracy than relations with the DACK. The hypothesis of this paper was thus confirmed.

The structure of this paper will be as follows: The first chapter will provide an assessment of the current knowledge in the field of international insulation and its contrasts to the notion of local ownership. The second chapter will discuss the key concepts of this paper that are argued to be relevant for executive-judiciary relations. This will then culminate in the construction of an ideal model of executive-judiciary relations in a democracy which will serve as a benchmark the intended analysis. The third chapter will outline the methodological considerations underlying this paper, including a justification for the selection of Ukraine as the country of study, a discussion on the operationalisation of the concepts, on the two cases to be analysed, on the chosen research timeframe and on the selected data collection methods. The final chapter of this research will provide the analysis of relations of the executive with the High Anti-Corruption Court and the District Administrative Court of Kyiv, which will be summed up in the conclusion part of this paper.

Literature Review

The following section will outline a review of the current knowledge with regards to international insulation. It will discuss understandings of the notion and how it contrasts to the idea of local ownership. The section will close off with a construction of the research puzzle that this paper seeks to address in the form of a research question.

International insulation – understandings and debates

International insulation refers to "the effective control by international actors of the local bureaucracies for a defined period of time", thereby removing potential political or societal influence from these bureaucracies.[4] It can be understood as a sub-concept to the overall notion of 'bureaucratic insulation'. The latter concept is viewed in contrast to the notion of 'patronage', describing the idea that "bureaucrats can be hired, promoted and fired by the political leadership without institutional restrictions".[5] Accordingly, bureaucratic insulation denotes the idea that such restrictions are in place in order to maximise bureaucratic competence. They can include examinations for entry, objective standards for promotion and redundancy procedures, all of which are coordinated by a civil service commission rather than political actors.[6] A typical example of such an insulation in many countries is the central bank, which is kept independent from political influence.

The advantage of bureaucratic insulation overall lies in the fact that it increases opportunities for the bureaucracy to invest in and reward competence instead of fearing a potential fundamental makeover with every change in government. Bureaucratic insulation is also argued to help to reduce possible deviations of elected officials in their policy choices from the policy views of the median voter, as this "creates a kind of compensatory inertia that mutes the significance of variation in the president's policy preferences".[7] Bureaucracies, it is argued, are more likely to increase their performance if they are insulated, as they create disinterested routines and bring about an impartial policy implementation in a system with meritocratic recruitment and professional socialisation.[8] This stands in contrast to a non-insulated bureaucracy which would be under (more) political influence.

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[4] Elton Skendaj et al., 'Local Ownership and International Oversight: Police Reform in Post-Yugoslav States', *Journal of Intervention and Statebuilding* 13, no. 5 (20 October 2019): 597, https://doi.org/10.1080/17502977.2018.1559581.
[5] Hannes Mueller, 'Insulation or Patronage: Political Institutions and Bureaucratic Efficiency', *The B.E. Journal of Economic Analysis & Policy* 15, no. 3 (1 July 2015): 961–96, https://doi.org/10.1515/bejeap-2013-0084.
[6] Mueller.
[7] Matthew C Stephenson, 'Optimal Political Control of the Bureaucracy', *Michigan Law Review* 107, no. 1 (2022): 55.
[8] Skendaj, 'International Insulation from Politics and the Challenge of State Building', 462.

Raising bureaucratic insulation to the international level, as suggested by Skendaj et al.'s definition from above, can be argued to have particular advantages for the professionalisation of a bureaucracy. While it also removes political influence over the bureaucracy, international insulation can also help to remove clientelism within a bureaucracy. Examples of such clientelism can include the appointment of individuals to positions in a bureaucracy not based on merit or competence, but on implicit or explicit quid-pro-quos between the leaders of a bureaucratic institution and that individual, or on the completion of illicit tasks that serve not the public, but the bureaucrats themselves.[9] Such a situation could arise if, say, a previously politically influenced bureaucracy, in which leadership appointments had been politically motivated, would continue under the leadership of the same politically appointed individuals who might have been socialised into a context of patron-client relations and therefore may continue employing such relations with subordinated bureaucrats in order to serve their own interests.[10] An intervention from the political sphere with the intention of professionalising the bureaucracy by removing such illicit influence from superiors in a bureaucracy could immediately be perceived as political influence over the bureaucracy and could actually be seen as a return to the previous situation with the outlined disadvantages.[11]

International insulation can be argued to break this impasse. By introducing external actors with no affiliation with the ways things were done previously in that bureaucracy, they might be less likely to be part of any kind of patron-client relationships and might therefore help professionalise the bureaucracy by deciding on the merits of an individual for a (high-ranking) bureaucratic position. This, it could be argued, may help a bureaucracy in applying rules in an equal and reasoned rather than an arbitrary manner and thereby acting more professionally and without regard for personal matters or networks.[12]

International interventions in state-building such as international insulation can be considered controversial.[13] In particular, one may find criticism in the expectation that a one-size-fits-all

[9] Derick W. Brinkerhoff and Arthur A. Goldsmith, 'Clientelism, Patrimonialism and Democratic Governance: An Overview and Framework for Assessment and Programming' (US Agency for International Development, December 2002), 19, https://pdf.usaid.gov/pdf_docs/Pnacr426.pdf.
[10] Morten Egeberg, 'Bureaucrats as Public Policy-Makers and Their Self-Interests', *Journal of Theoretical Politics* 7, no. 2 (1 April 1995): 157–67, https://doi.org/10.1177/0951692895007002003.
[11] Mueller, 'Insulation or Patronage'.
[12] Tony Waters and Dagmar Waters, 'Bureaucracy', in *Weber's Rationalism and Modern Society: New Translations on Politics, Bureaucracy, and Social Stratification*, ed. Tony Waters and Dagmar Waters (New York: Palgrave Macmillan US, 2015), 73–127, https://doi.org/10.1057/9781137365866_6.
[13] See, for example, Gerhard Knaus and Felix Martin, 'Travails of the European Raj', *Journal of Democracy* 14, no. 3 (2003): 60–74, https://doi.org/10.1353/jod.2003.0053.

approach without regard for the domestic context will not work well.[14] The degree of international insulation across a bureaucratic system appears to matter as well, as there is a potential risk that, if too much power is vested with international actors indefinitely, local actors may lose interest in seeking to engage in challenging reform processes because they could think that the internationals will take action regardless of what the locals do. This is argued to have happened in Bosnia and Herzegovina, where, following the civil war, the Office of the High Representative was established in the late 1990s with the task of overseeing the implementation of the peace agreement. The High Representative enjoys vast powers, including the ability to adopt of binding decisions when local actors appear unable or unwilling to take action as well as to remove public officials of Bosnia and Herzegovina from office if they violate provisions of the peace agreement. This, arguably, has played a vital role in reducing incentives for local politicians to solve problems themselves – after all, they would know that, in the absence of consensus being found on a political solution, the High Representative would step in and impose a solution.[15] It appears reasonable to believe that this should not be the ultimate goal of international insulation.

Local ownership – an alternative to international insulation?

When faced with an example such as Bosnia and Herzegovina, one might be led to believe that vesting more powers and thereby more responsibility with local actors might therefore seem more appropriate. By definition, the concept of international insulation stands in an evident contrast to the concept of local ownership. Local ownership is defined by Skendaj et al. as "indigenous control and domestic accountability", with the owners being understood as the people of the country concerned, who drive the development process through democratic procedures, thereby controlling their government and holding it accountable for its actions.[16] Under the idea of local ownership, external assistance, where required, should be "responsive to local needs [and] consistent with local capacities and priorities", which will be seen as legitimate beyond the bubble of the international community.[17] This is to be supported, among

[14] Peter Evans, 'Development as Institutional Change: The Pitfalls of Monocropping and the Potentials of Deliberation', *Studies in Comparative International Development* 38, no. 4 (1 December 2004): 30–52, https://doi.org/10.1007/BF02686327.
[15] Eric Gordy, 'Dayton's Annex 4 Constitution at 20: Political Stalemate, Public Dissatisfaction and the Rebirth of Self-Organisation', *Southeast European and Black Sea Studies* 15, no. 4 (2 October 2015): 617, https://doi.org/10.1080/14683857.2015.1134132.
[16] 'Shaping the 21st Century: The Contribution of Development Co-Operation', Best Practices in Development Co-operation, Best Practices in Development Co-Operation (OECD, 30 May 1996), 2, https://doi.org/10.1787/da2d4165-en.
[17] Simon Chesterman, 'Ownership in Theory and in Practice: Transfer of Authority in UN Statebuilding Operations', *Journal of Intervention and Statebuilding* 1, no. 1 (March 2007): 20, https://doi.org/10.1080/17502970601075873.

others, through an open dialogue with civil society.[18] Therefore, it appears intuitive to assume that the legitimacy of a (bureaucratic) administration will be enhanced if there is more influence on the administration from a government commanding a democratically affirmed majority compared to the 'countermajoritarian' insulated administration, which is less responsive to majoritarian interests.[19]

A fundamental aspect behind several arguments in favour of local ownership of local bureaucracies is found in the purported democratic credentials of the concept. Indigenous actors' superior understanding of local conditions allows them to tailor priorities and solutions more effectively than external actors. The involvement of local actors has been found to increase the likelihood of investment and participation of local actors and the local community in reform processes. Another argument in favour of local ownership over international insulation is the democratic accountability resulting from the empowerment of local communities.[20] Politicians, being aware of an electorate holding its leaders to account, would have incentives to undertake necessary reforms. These reforms would then be considered more legitimate.

However, these arguments appear to presuppose the existence of a high level of transparency within a political system, giving citizens the opportunity to hold elected leaders to account for all decisions, including for politically motivated decisions with regard to the local bureaucracy. While supporters of local ownership do not seem to question that an electorate is always able to hold leaders to account, it appears important not to neglect the inevitable existence of informal networks that may be more or less successful at achieving ends without making use of formal channels. For instance, if formal institutions are insufficiently strong, a bureaucracy may become "too politicized through recruitment of well-connected individuals who do not get promoted based upon 'what they know' but 'who they know'",[21] while the public may not even notice that this process is taking place. In other words, an asymmetry of information resulting from a lack of transparency may actually inhibit the capacity of local ownership to ensure accountability.

International insulation can help to counter such instances of intransparency. A view that stands in competition with local ownership advocates stresses that bureaucratic autonomy from

[18] 'Shaping the 21st Century', 14.
[19] Stephenson, 'Optimal Political Control of the Bureaucracy', 54.
[20] Skendaj et al., 'Local Ownership and International Oversight', 596.
[21] Skendaj et al., 597.

political interference allows organisations to become more effective.[22] In some political environments clientelism, i.e. quid-pro-quo relations that involve exchanges of benefits for political support,[23] but also corporatism, understood as the existence of "closed professional groups with privileges without oversight" whose work is "impenetrable" to outsiders and who therefore have the tools to block or stall developments that are not in their self-interest, need to be reckoned with.[24] In such environments bureaucratic autonomy and accountability is arguably achieved more easily if put in the hands of international actors who do not form part of clientelist networks or who would not use the advantage of corporatism to protect their personal interest to the detriment of the interest of the public. Particularly if the local bureaucracy is insulated by international actors from domestic political influence for an explicitly limited period of time, a generation of officials may emerge who were hired and promoted based on merit and who are more likely to follow the professional rules of the organisation, including for the recruitment of new personnel once the period of international insulation has expired.[25]

The latter point suggests that insulation from political influence and local ownership do not have to be mutually exclusive categories. In fact, Skendaj et al. state that OECD member states tend to have both insulation as well as local ownership. International control over this insulation does stand in contrast with local ownership, but if international insulation is given a time limit, it can arguably bring about a bureaucracy that is better insulated against political influence when local ownership becomes more prevalent while also acknowledging the democratic idea that ultimately, local actors, mandated by the local population, should take decisions. Chesterman appears to pin down the essence of this idea by stating that "[local] ownership may well be the end of a transitional [system], but it is often not the means of achieving it … The guiding principle must be a balance of short-term measures [of foreign intervention] to assert the re-establishment of the rule of law and long-term institution building that will last beyond the life of the mission … of international actors".[26]

Therefore, it might be suitable to talk of a continuum between local ownership and international insulation. On one end of this spectrum, international organisations "set the agenda, make the

[22] Max Weber (1954), cited in: Skendaj et al., 597.
[23] Allen Hicken and Noah L. Nathan, 'Clientelism's Red Herrings: Dead Ends and New Directions in the Study of Nonprogrammatic Politics', *Annual Review of Political Science* 23, no. 1 (11 May 2020): 277–94, https://doi.org/10.1146/annurev-polisci-050718-032657.
[24] Martin Shapiro, 'Dishonest Corporatism and Judicial Review', *The Foundation for Law, Justice and Society*, 28 June 2007, https://www.fljs.org/dishonest-corporatism-and-judicial-review.; 'Jurist Zlata Djurdjevic: Corporatism is the main problem of Croatia's judiciary' (N1 Info, 15 June 2021), https://n1info.hr/english/news/jurist-zlata-djurdjevic-corporatism-is-the-main-problem-of-croatias-judiciary/.
[25] Skendaj et al., p. 597.
[26] Chesterman, 'Ownership in Theory and in Practice', 20.

rules for state institutions, and administrate these institutions without the collaboration of key local stakeholders", while on the other end, there is full local ownership, with local authorities leading state institutions according to their own preferences and priorities.[27] One might be able to talk of a degree of international insulation within an entire political system, depending on the quantity of national institutions being internationally insulated and on the specific provisions for said insulation, such as whether international experts get to make decisions on appointments or just to eliminate candidates from the selection process.

Nonetheless, while being aware of different degrees of both concepts, one might want to consider the two concepts in a binary perspective as well, especially through the question of "who calls the final shots". Is it the international experts who make a decision on who can and who cannot be appointed to a particular position? Are the local actors the ones who can decide how the resources of an institution are allocated? Who gets to decide how the role of international experts in bureaucratic procedures is changed or re-shaped? Ultimately, each sector in bureaucratic processes, from the appointment of bureaucrats to the final decision that is taken, can be divided in such a binary way. Presumably it is the combination of all these sectors that helps to contribute to the abovementioned idea of a continuum. Given that this study is dealing with the question of international insulation in one particular procedure, namely appointments for judicial positions, and that the presence or absence of international insulation in this procedure produces a binary result (an individual is or is not appointed for a judicial position), a binary understanding of the concept was chosen for the purposes of this paper.

Problem statement and research question

This section has provided an overview of the notion of international insulation. It is argued that international insulation helps to bring in meritocratic recruitment procedures and avoid complete makeovers of the bureaucracy after large-scale political changes. International insulation can also assist in limiting the impact of clientelist/corporatist networks in which personal interests might be given priority over public interest. At the same time, it is important to keep local actors 'on board' in order to avoid a perception that processes and activities are driven entirely by internationals, which could ultimately be seen as undemocratic and therefore alienate the local population and its elite from political processes.

Therefore the challenge is to identify how and where international insulation can be put in place in order to foster meritocracy and professionalism in bureaucratic institutions while avoiding a

[27] Skendaj, 'International Insulation from Politics and the Challenge of State Building', 462.

feeling that external actors are 'wresting control' over domestic bureaucratic procedures. A time limit has been found to be beneficial to finding such a middle ground, as it can help to re-establish the rule of law while setting the foundation for longer-term institution building that will be put into local hands.

The intention of this paper is to investigate how such an approach plays out with regards to judicial institutions in which international insulation is not introduced in a blanket approach, but rather in a more localised form – the appointment procedure for judicial positions – and with a time limit. Under the assumption that international insulation of judicial appointment procedures brings more meritocracy and professionalism to judicial institutions, the key question would thus be how such a form of international insulation affects the perception the other branches of power have of these judicial institutions in a representative liberal democracy and how this affects inter-branch relations overall.

In order to enhance the viability of this paper, the author has decided to focus on relations of the executive with the judiciary. The primary reason for this choice is to be seen in the composition of the key actors of the two branches. While the legislative is composed of legislators elected by the population according to regulations applying in a particular state, the executive is, to varying degrees, often either also directly elected (e.g. in the case of direct elections of a head of state) or elected indirectly by a legislative majority. Therefore one can assume that the composition of a government will likely be roughly equal to the composition of a legislative majority that can pass ordinary laws. It can thus be regarded as rather probable that the positioning of the legislative majority towards questions related to the judiciary will be a reflection of the positioning of the government commanding that majority. Therefore, in addressing matters on the judiciary, the legislative majority's position is likely to form part of the executive's position, while not all of the executive's positions will necessarily be reflected vice versa. As a result, in addition to the fact that an investigation into both powers' relations with the judiciary would arguably exceed the limited scope of this paper, opting for the executive instead of the legislative allows for a wider range of angles.

With this in mind, one arrives at a research question for this paper that is formulated in the following way:

Q: How does international insulation of judicial appointments affect the relationship between the executive and the judiciary if the latter is viewed through the lens of an ideal model of executive-judiciary relations in a representative liberal democracy?

This paper will seek to provide an answer to this question by unpacking relevant developments in this area in post-Euromaidan Ukraine.

Conceptual framework

The following section will discuss the relevant concepts of this paper. First, the concept of international insulation will be briefly recapped. Then, this paper will seek to construct an ideal model of executive-judiciary relations in a democracy to serve as a benchmark for the intended analysis. This will be based on a brief theoretical discussion of democracy as well as several factors that are considered important benchmarks for executive-judiciary relations in a democracy. These are legitimacy, accountability, mutual toleration and institutional forbearance, as well as quality and impartiality. Finally, this section will be closed off with an outline of the constructed model as well as a catalogue showing select criteria on what actions the executive and judiciary would ideally take or refrain from with regards to each other in a representative liberal democracy. The constructed ideal model will then serve as a benchmark for the analysis of the empirical data of this paper.

International insulation of judicial appointments

As described in the literature review section of this paper, *international insulation* (the independent variable of this research paper) is understood by the author as "the effective control by international actors of the local bureaucracies for a defined period of time".[28] Judicial appointments relate to decisions around candidates being considered and subsequently placed on judicial positions, for example as judges.

Executive-judiciary relations in a democracy

For the purposes of this paper, executive-judiciary relations will be understood as the way in which the executive and judiciary behave towards and interact with each other. This entails questions such as what public statements representatives of the two branches of power make towards each other and how they voice criticism towards each other in light of actions and decisions of the respective other. This section will discuss several concepts that are considered relevant in the relations between the executive and judiciary in a democracy. The intention behind this discussion is to provide a basis for the creation of an ideal model of executive-judiciary relations in a representative liberal democracy, which will be used as a benchmark to support this paper's analysis work. The discussion will start with a brief remarks on democracy, which will be followed by a discussion on the following concepts that will form the key pillars in this paper's understanding of executive-judiciary relations: Legitimacy, accountability, mutual toleration and institutional forbearance. The sub-concepts of quality and impartiality,

[28] Skendaj et al., 'Local Ownership and International Oversight', 597.

which support the four 'main' component-elements of the model, will also be looked at. This discussion will finally culminate in the creation of a list of select actions that are ideally taken or refrained from by the two branches of power with respect to each other in a democracy.

A brief discussion of democracy

The formulation of the research question of this paper requires a clarification of what is meant by an "ideal type" and by democracy. An ideal type, according to Max Weber, "is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct."[29] Such an arrangement will take place in this paper in order to construct an ideal relationship between the executive and the judiciary, viewed through the lens of a representative liberal democracy.

The first step in the approximation of such an ideal model is a conceptual clarification on how democracy is understood in this paper. At the core of democracy stands the idea of popular sovereignty, meaning that every member of a territorially delineated demos affected by a certain decision should be given the right to contribute to the decision-making process and be affected by the taken decision with regard taken for due process. For Charles Tilly, a regime can be considered democratic "to the degree that political relations between the state and its citizens feature *broad*, *equal*, *protected* and *mutually binding* consultation."[30] He describes the four dimensions (italicised in the previous quote) as follows:

- *Breadth*: refers to the degree of inclusion of people under the state's jurisdiction.
- *Equality*: Ranges "from great inequality among and within categories of citizens to extensive equality in both regards"
- *Protection*: Ranges "from little to much protection against the state's arbitrary action"
- *Mutually binding consultation*: the extent to which state agents fulfil their obligations towards citizens.

While the first two dimensions deal with crucial aspects of citizenship, the latter two relate more to the relations of citizens towards their state and vice versa. The latter two can also be understood as entailing the principle of the rule of law, which envisages a "mechanism, process,

[29] Max Weber (1963), cited in: Jon Hendricks and C. Breckinridge Peters, 'The Ideal Type and Sociological Theory', *Acta Sociologica* 16, no. 1 (1 January 1973): 32, https://doi.org/10.1177/000169937301600103.

[30] Charles Tilly, *Democracy*, 1st ed. (Cambridge University Press, 2007), 13–14, https://doi.org/10.1017/CBO9780511804922.

institution, practice, or norm that supports the equality of all citizens before the law, secures a nonarbitrary form of government, and more generally prevents the arbitrary use of power."[31] According to Tilly, the four dimensions tend to correlate with each other, as "regimes that offer extensive protection, in general, also establish broad categories of citizenship rather than treating each person or small group of citizens differently".[32]

In addition to this, it is helpful to identify the requirements needed for a democracy to be regarded as consolidated. Consolidation allows for a longer-term self-maintenance of democracy that makes it less likely to revert to authoritarianism. For this, the definition of democracy put forward by Juan Linz and Alfred Stepan appears helpful. They see three conditions for a consolidated democracy: (1) no attempts to create a non-democratic regime or to turn to violence to secede from the state, (2) a strong majority in the public believing democratic procedures are the most appropriate form of government and (3) resolutions of conflict happening within specific laws, procedures and institutions within the democratic framework.[33] They see this democratic framework as consisting of: "sufficient agreement … about political procedures to produce an elected government, [governments coming to power as a] direct result of a free and popular vote … and the executive, legislative and judicial power … not hav[ing] to share power with other bodies".[34]

Legitimacy

Legitimacy lies at the core of executive-judiciary relations. Both are given extensive authority and powers which are exercised on behalf of society. Therefore, "society and the [respective] other powers of the state are entitled to be satisfied that all those given that authority and power … have a legitimate basis on which to exercise it in the name of society as a whole".[35] Such a legitimate basis, in the view of Max Weber, is found in the belief of the ruled in the justified rule by others – "a belief by virtue of which persons exercising authority are lent prestige".[36]

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[31] 'Rule of Law | Definition, Implications, Significance, & Facts', in *Encyclopaedia Britannica*, 4 January 2023, https://www.britannica.com/topic/rule-of-law.
[32] Tilly, *Democracy*, 15.
[33] Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore, US: Johns Hopkins University Press, 1996), 6, http://ebookcentral.proquest.com/lib/gla/detail.action?docID=4531140.
[34] Linz and Stepan, 3.
[35] 'CCJE Opinion No. 18 on "The Position of the Judiciary and Its Relation with the Other Powers of State in a Modern Democracy"' (London: Consultative Council of European Judges (CCJE), 16 October 2015), para. 12, https://rm.coe.int/16807481a1.
[36] Max Weber, cited in Fabienne Peter, 'Political Legitimacy', in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 24.04.2017 (Metaphysics Research Lab, Stanford University, 2017), https://plato.stanford.edu/archives/sum2017/entries/legitimacy/.

For the executive, the basis of legitimacy in a democratic system can be derived with relative ease. The executive exercises authority to uphold and enforce legislation brought forward by a democratically elected legislative branch. Depending on the political system of a country, executive leaders can also be appointed (directly or indirectly) through elected representatives and thereby enjoy 'democratic legitimacy'.[37] Of course, legitimacy is conferred to the executive not only through the means of elections, but also through the inclusion of public participation in the actions of the executive, such as the engagement of interest groups in bills promoted by the executive.

As far as the question of legitimacy of judicial power is concerned, due to a lack of direct democratic legitimation, one needs to dig deeper. Firstly, one can derive legitimacy for the powers of the judiciary from a constitution, which provides the legitimate foundation for a democratic state. Such constitutions "recognise and create … the role of a judiciary which is there to uphold the rule of law and to decide cases by applying the law in accordance with legislation and case law".[38] This constitutionally derived type of legitimacy applies not only to the judiciary, but also to individual judges appointed in accordance with the constitution.

In addition, the Consultative Council of European Judges (CCJE) denotes a "functional legitimacy" of individual judges. The legitimacy of the judiciary cannot rest solely on constitutional provisions but must also be achieved by earning and maintaining public confidence in and respect for the judiciary, as this guarantees an effective judicial system.[39] This is done best by ensuring highest possible quality and respect of high ethical standards. According to the CCJE, this can be done, among others, through various means, e.g. ensuring a fair trial within a reasonable time,[40] effective application of international (and, if applicable, European) law,[41] the quality of judicial decisions[42] and the effective enforcement of judicial decisions.[43] Individual judges can also maintain their functional legitimacy by fulfilling their

[37] 'CCJE Opinion No. 18', para. 12.
[38] 'CCJE Opinion No. 18', para. 13.
[39] 'CCJE Opinion No. 3 on the Principles and Rules Governing Judges' Professional Conduct' (Strasbourg: Consultative Council of European Judges (CCJE), 19 November 2002), para. 22, https://rm.coe.int/168070098d.
[40] 'CCJE Opinion No. 6 on Fair Trial within a Reasonable Time and Judge's Role in Trials Taking into Account Alternative Means of Dispute Settlement' (Strasbourg: Consultative Council of European Judges (CCJE), 24 November 2004), https://rm.coe.int/168074752d.
[41] 'CCJE Opinion No. 9 on the Role of National Judges in Ensuring an Effective Application of International and European Law' (Strasbourg: Consultative Council of European Judges (CCJE), 10 November 2006), https://rm.coe.int/16807476ad.
[42] 'CCJE Opinion No. 11 on the Quality of Judicial Decisions' (Strasbourg: Consultative Council of European Judges (CCJE), 18 December 2008), https://rm.coe.int/16807482bf.
[43] 'CCJE Opinion No. 10 on the Role of Judges in the Enforcement of Judicial Decisions' (Strasbourg: Consultative Council of European Judges (CCJE), 19 November 2010), https://rm.coe.int/168074820e.

duties stemming from disciplinary and procedural rules (e.g. recusal due to an actual or perceived conflict of interest).

Accountability

In democratic societies, there has been acknowledgement of the need for public services to "provide a fuller explanation of their work for the public they serve".[44] This understanding lies at the core of the concept of accountability, together with the assumption of responsibility for actions taken by a public body. Accountability underlines the fact that all public bodies and branches of power are ultimately there to serve the public.[45]

For the executive, it appears intuitive to believe that accountability is achieved relatively easily again through the holding of elections. Executive leaders who, in the eyes of the public they purport to represent and serve, are perceived to perform well, will be rewarded, whereas those who do not, will face the consequence of being voted out of office. However, some problems can be argued to arise if the discussion ends with elections, as this does not take account of possible misuse of public office and decision-making authority bestowed upon leaders by the electorate, not least due to the informational asymmetries that public office offers to policy-makers compared to the public.[46] Therefore another necessary requirement to ensure the executive remains accountable to society beyond elections are appropriate checks and balances as part of a separation of powers. The key, according to Persson et al., to making separation of powers work in favour of society is "that no policy can be implemented unilaterally, i.e. without the consent of [more than one body]."[47] This, so it is argued, helps to ensure branches of power are encouraged to provide explanations of their actions to the public and to the other branches of power.

Once again, in the context of the judiciary, a more complex situation is observed with regards to accountability, as the principles of judicial independence and accountability could be argued to be irreconcilable opposites, as accountability could be understood to mean that the judiciary would have to justify its actions and have to fear consequences from other branches of power if they are insufficiently satisfied with these justifications. However, the CCJE stresses that "'accountable' does not mean that the judiciary is responsible to or subordinate to another

[44] 'CCJE Opinion No. 18', para. 20.
[45] See 'CCJE Opinion No. 7 on Justice and Society' (Consultative Council of European Judges (CCJE), 2005), https://rm.coe.int/1680747698; 'CCJE Opinion No. 10 on the Role of Judges in the Enforcement of Judicial Decisions'.
[46] T. Persson, G. Roland, and G. Tabellini, 'Separation of Powers and Political Accountability', *The Quarterly Journal of Economics* 112, no. 4 (1 November 1997): 1166, https://doi.org/10.1162/003355300555457.
[47] Persson, Roland, and Tabellini, 1166.

power of the state". Instead it should be seen as "being required to give an account, that is: to give reasons and to explain decisions and conduct in relation to cases that the judges must decide".[48] The judiciary is faced with the task of showing to the other branches of power as well as society how its power, authority and independence have been used, as the legislature is entitled to know how the laws it enacted are interpreted and applied by the judiciary.[49]

The CCJE sees various types of accountability. Beyond the straightforward concept of judicial accountability, which is understood as the existence of appeal processes for individual judges' decisions, there is also an "explanatory" and a "punitive" accountability of judges.

Explanatory accountability is understood as the need for courts to make their actions public and to provide explanations for them. This includes requirements for open hearings and reasoned judgements which are generally made publicly available. Open hearings that help the public to understand judicial processes better also help to ensure adherence to human rights standards, such as Articles 7 and 10 of the Universal Declaration of Human Rights, outlining everyone's right to equality before the law and to a fair trial respectively.[50] This also means that judicial decisions must be readily comprehensible, in order to enable litigants and the public to understand and, if deemed necessary and applicable, to challenge the reasoning of judges by appealing against the decision.

Punitive accountability refers to the need for adherence to principles of professional conduct and established disciplinary procedures. Ethics and integrity lie at the heart of the public's confidence in the judiciary. This means if the behaviour of individual judges oversteps accepted norms, responsibility must be taken, including at the level of liability. In cases of gross misbehaviour by judges (e.g. judicial corruption), there must also be some means of removing them from office.[51]

It is worth pointing out that the concepts of legitimacy and accountability outlined above are closely linked. By being accountable to the public and to the other branches of power by explaining the actions of its courts and other institutions, the judiciary will be more able to maintain public confidence and thereby enjoy more functional legitimacy. The same applies to

[48] 'CCJE Opinion No. 18', para. 20.
[49] 'Independence and Accountability of the Judiciary' (Rome: European Network of Councils for the Judiciary (ENCJ), 13 June 2014), https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_independence_accountability_adopted_version_sept_2014.pdf.
[50] United Nations, 'Universal Declaration of Human Rights', United Nations (United Nations), accessed 27 November 2022, https://www.un.org/en/about-us/universal-declaration-of-human-rights.
[51] 'CCJE Opinion No. 18', para. 37.

the actions of the executive: Allowing for public participation in the way politics is made (also with regards to the judiciary) and providing reasonable explanations for its actions, the executive is more likely to enjoy public confidence. Recognising each other as legitimate and providing each other with sufficient room for action and capacities, the two branches of power can actually help each other in ensuring they can give an account of their actions. Therefore, it is imperative to note that "the full recognition of the basic safeguards of judicial independence, such as security of tenure, no change of function of location without a judge's consent, appointment and promotion free from political influence …, is a prerequisite for any satisfactory discussions between the three powers of state".[52]

Mutual toleration

In addition to the need for the executive and judiciary to continuous strive towards being recognised as legitimate by and accountable to society, it is also important for them to recognise each other as legitimate holders of power. The following understanding of "mutual toleration", as conceptualised by Levitsky and Ziblatt, originally referred to relations between a governing party and a party in opposition and has been moderately adapted for the purposes of this discussion:

> *Mutual toleration refers to the idea that as long as [the branches of power other than our own] play by constitutional rules, we accept that they have an equal right to exist [and to exercise their constitutionally derived power]... We may disagree with, and even strongly dislike, [the other powers], but we nevertheless accept them as legitimate. This means recognizing that [the other powers] are [formed of] decent, patriotic, law-abiding citizens—that they love our country and respect the Constitution just as we do. It means that … we do not view them as an existential threat.*[53]

To Levitsky and Ziblatt, mutual toleration is "a remarkable and sophisticated invention" that dismantled the view that opposition to those in power was an act of treason. Although mutual toleration might appear as commonsensical in a political system built on the separation of powers, it should not be viewed as inherent to all democracies.[54]

In the context of executive-judiciary relations, this can be understood as meaning that the executive and the judiciary acknowledge each other's legitimate role as a power holder in a democratic society. Discussions, or even criticism, of the actions of the other should therefore

[52] 'CCJE Opinion No. 18', para. 35.
[53] Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York, NY: Crown, 2018), 125.
[54] Levitsky and Ziblatt, 126–27.

take place in a climate of mutual respect for the legitimate use by one branch of power of its competences to make certain decisions. Of course, this implies that one branch trusts that the other will act in the same way.

Institutional forbearance

The second helpful concept put forward by Levitsky and Ziblatt is that of institutional forbearance. Forbearance is defined as patient self-control, restraint and tolerance; or 'the action of restraining from exercising a legal right'. The authors thus define institutional forbearance for their purposes as "avoiding actions that, while respecting the letter of the law, obviously violate its spirit".[55] Institutional prerogatives, even if permitted by the letter of the law, can still imperil a democratic system, making institutional forbearance a necessity. Often, it is exercised in less formalised ways, such as habits and conventions (the authors name the conscious decision of US presidents to not pack the Supreme Court, that is, to add judges to the court in addition to the conventional nine members, despite no law preventing such a move).[56] The authors note that all three branches of power need to engage in self-restraint, as self-restraint is more likely to bring about a climate of mutual respect if there is trust that neither of the other two branches will "play constitutional hardball" and make use of its powers to the fullest, thereby potentially limiting the scope of action for the other branches.

This also applies to the executive and judiciary. For example, from a legal point of view, there would little to prevent an executive from making use of its constitutionally derived right to propose legislation that changes the composition and functioning of a court for multiple times within a short timeframe. However, instead of showing benefits, such an approach could sow confusion and undermine public trust in the judiciary and the political system overall. Equally, courts benefit from continuing a climate of mutual respect between the branches of power by maintaining restraint even if their standing would allow them to rule in a way that could be seen as compromised by an outsider. This is particularly crucial with regards to courts of last instance, who shape the legal situation in their country with the knowledge that there is no further remedy on national level against their decision. Acting with restraint allows them to make sure the other branches of power will be less likely to feel the need to retaliate.

Like legitimacy and accountability, mutual toleration and forbearance are also closely related to each other. Political leaders are more likely to act with restraint when they accept one another as legitimate holders of power, and if they do not see them as subversive, they will be less

[55] Levitsky and Ziblatt, 130.
[56] Levitsky and Ziblatt, 133.

tempted to break norms to reduce their power.[57] However, the opposite can also happen. Perceived pressure of the electorate on the executive may result in the executive choosing to abandon forbearance in order to double down on reform efforts. This, in turn, can lead to further acts of constitutional hardball by both the judiciary and executive, further undermining mutual toleration.

Considerations on quality and impartiality

In the context of executive-judiciary relations, there are further factors which help to enhance legitimacy, accountability, mutual toleration and institutional forbearance. Two such sub-factors will be pointed out here: quality and impartiality.

It appears obvious, but equally important, to state that high-quality judicial decisions are an essential element for the judiciary to benefit from a functional legitimacy by continuing to earn public confidence in the work of judges. In particular, "to be of high quality, a judicial decision must be perceived by the parties and by society in general as being the result of a correct application of legal rules, of a fair proceeding and a proper factual evaluation, as well as being effectively enforceable."[58] To that end, a decision must be drafted in clear and simple language. Proper reasoning that is consistent, clear and unambiguous is another prerequisite for a high-quality decision. This not only helps litigants to understand the decision, but avoids the appearance of arbritrariness, as the decision outlines how the litigating parties' submissions were considered and thereby shows to society how the judicial system works.

Of course, the quality of a judicial decision is dependent on more than endogenous intra-judicial factors. A key role is also played by the legislation to be applied in a particular judicial decision both with regards to the relevant case as well as to procedural frameworks. Quality decisions are more likely to take place "within a legislative and procedural framework that permits [judges] to decide freely on and to dispose effectively of (for example) the time resources needed to deal properly with the case."[59] Over-frequent changes in legislation, poor drafting or other types of deficiencies that may significantly influence the type and volume of cases brought before courts should be avoided.

Furthermore, impartiality is a key factor in ensuring that the judiciary and individual judges are seen as legitimate in their functions and as accountable. Impartiality denotes the absence of bias and prejudgement, both actual and perceived. In other words, "justice must not only be done,

[57] Levitsky and Ziblatt, 137.
[58] 'CCJE Opinion No. 11 on the Quality of Judicial Decisions', para. 31.
[59] 'CCJE Opinion No. 11 on the Quality of Judicial Decisions', para. 13.

but manifestly be seen to have been done".[60] The test for impartiality is whether "an informed person, viewing the matter realistically and practically – and having thought the matter through – would apprehend a lack of impartiality in the decision maker". Therefore judges should avoid conduct that could reasonably give rise to a perception of an absence of impartiality. This includes the obligation of recusal from a particular case if a conflict of interest could be perceived to exist. It also includes the idea that judges should refrain from (publicly) engaging in political activity, particularly in policy areas that do not concern the independence and fundamental organisational or operational aspects of the judiciary, as this "puts at risk public confidence in the impartiality and the independence of the judiciary", especially if further down the line, the same judge who had engaged in political activity had to adjudicate on the matter at question.[61]

Ideal model of executive-judiciary relations

The overall purpose of this section is to find an approximation of ideal relations between the judiciary and executive branches as well as the aspects pertaining to such ideal relations. The intention of this ideal model is to address the following questions:

- What does the ideal relationship between executive and judiciary in a representative liberal democracy look like?
- What actions does the judiciary take or refrain from with regards to the executive?
- What actions does the executive take or refrain from with regards to the judiciary?

It should be admitted that a full exclusion of subjectivity in this matter seems neither possible nor reasonable. Perspectives on democracy and on the relationship between the judiciary and executive are variegated and the constructed ideal model that I will propose in the subsequent section of this paper cannot be fully objective. Instead, my goal was to come up with a model that could get close to an understanding of the ideal relationship between the executive and judiciary in a democracy based on understandings of democracy and related concepts. As such the espoused model should not be understood as objective, but rather as an argument based on the discussion from the sections above, the primary purpose of which is to provide a benchmark against which the empirically measured executive-judiciary relations can be compared and contrasted.

[60] Canadian Judicial Council, 'Ethical Principles for Judges', 2004, 31, https://cjc-ccm.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf.
[61] Canadian Judicial Council, 35.

The table at the end of this chapter outlines the results of this discussion and provides answers to the three questions mentioned above. The discussion was based on the factors that are argued to play a role in the relations between the executive and the judiciary. Democracy by itself provides the basis for these factors, particularly Tilly's notions of equality (before the law), protection (from the state's arbitrary actions) and mutually binding consultation (ensuring the state fulfils its obligations towards citizens)[62] as well as Linz and Stepan's criterion on the resolution of conflict taking place within the prescribed laws and procedures that provide for a separation of powers into executive, legislative and judiciary.[63] The legitimacy of the executive and the judiciary within the territorially defined demos is intrinsically linked to their functional performance, as this improves public confidence in them. This is reflected, for example, in the quality and certainty of legislation put forward and endorsed by the executive (see point B1 in the table), as well as the degree of consultation with the judiciary on legislation affecting it (point B4). It is also seen in the quality of judicial work, including the maintenance of ethical standards, impartiality and recusals in case of potential conflicts of interests that allow to maintain a perception of independence of the court (point A3). Accountability, which also builds on the separation of powers, requires that the judiciary give reasons for their decisions that an informed person, viewing the matter realistically and practically, would be able to understand as being the correct application of the law (point A2). If, for instance, a perception emerges that a court (or one of its members) was inappropriately involved in a particular matter, relevant disciplinary measures or recusals should follow in order to restore public confidence. The notion of mutual toleration requires the two branches to recognise each other as legitimate and to refrain from actions that could be seen as indicating otherwise. Points of criticism between the two branches of power are raised in a climate of mutual respect without the legitimacy of the constitutionally derived power of the other branch being put under question (points A4, B2). Institutional forbearance requires restraint from exercising a legal right that might follow the letter of the law, but not its spirit. This can mean, for instance, that courts employ particular restraint and care when it comes to actions and decisions that affect high-level political decisions, in order to ensure that there is no perception of undue influence (point A1). At the same time, executive actors take care to not be perceived as exerting pressure on judicial institutions to make certain decisions (point B3).

The table with the relevant benchmarks can be found below. It is worth mentioning that the outlined elements are not completely independent from each other, but rather well interlinked.

[62] Tilly, *Democracy*, *pp. 13-14*.
[63] Linz und Stepan, *Problems of Democratic Transition and Consolidation*, *p. 3*.

For example, particular restraint with decisions that affect political organs (A1) will help a court be perceived as impartial (A3), in the same way that constructively raised criticism would (A4). Close consultations with the judiciary on changes to the judicial system (B4) will help to promote legal certainty (B1) as well as reduce perceptions that the executive seeks to put pressure on the judiciary (B3). It should also be pointed out that this table makes no claim to completeness. Without a doubt, more elements that could be argued to be relevant for executive-judiciary relations could be added to the table, for example the provision of sufficient resources (e.g. finances, personnel, premises) for the judiciary by the executive,[64] or the promotion of legal certainty by the judiciary.[65] However, an addition of more detailed aspects to the table would exceed the scope of this paper and therefore inhibit the provision of an overall perspective on executive-judiciary relations.

A) In an ideal relationship between the executive and judiciary in a liberal democracy, the judiciary branch undertakes these actions:
A1) The judiciary employs restraint with regards to actions and decisions that affect other judicial organs or political organs and government policy.
A2) The judiciary ensures that judicial decisions are perceived as reasonable and as resulting from the correct application of the law.
A3) The judiciary is (perceived as) impartial and independent.
A4) The judiciary raises points of criticism towards the executive in a climate of mutual respect.

Table 1: Ideal actions of the judiciary with regards to the executive in a democracy.

B) In an ideal relationship between the executive and judiciary in a liberal democracy, the executive branch undertakes these actions:
B1) The executive promotes legal/legislative certainty in its judicial policies.
B2) The executive raises points of criticism towards the judiciary in a climate of mutual respect.
B3) The executive employs restraint with regards to actions that are perceived as exerting pressure on judicial institutions to make specific decisions.
B4) The executive engages in consultations with the judiciary regarding (legislative) changes to the judiciary system.

Table 2: Ideal Actions of the executive with regards to the judiciary in a democracy.

[64] 'CCJE Opinion No. 18', para. 43.
[65] Examples of problems regarding legal certainty resulting from judicial decisions in Ukraine can be found in the section on Ukraine's Constitutional Court on pages 35-37.

Research Design and Methodology

The purpose of this study is to investigate the effect of the insulation of judicial appointments through external actors on relations between the executive and the judiciary in Ukraine. To that end, the paper will take a look at two Ukrainian courts with two fundamentally different appointment procedures: In one, international experts have a veto over judicial appointments, while in the other, they do not.

The main research question of this paper is the following:

Q: How does international insulation of judicial appointments affect the relationship between the executive and the judiciary if the latter is viewed through the lens of an ideal model of executive-judiciary relations in a representative liberal democracy?

To answer the research question, this paper will compare those two courts by making use of John Stuart Mill's method of difference, also known as the most similar systems design (MSSD). This implies the comparison of "instances in which the phenomenon [to be studied] does occur with instances in other respects similar in which it does not".[66] The prerequisite for this is to find cases that are sufficiently similar in as many instances as possible other than the phenomenon studied. In the latter they should differ. This should strengthen the assumption that the studied phenomenon or phenomena are causally linked. While tracking the operational links over the timeframe of this study, the research seeks to focus on exploring whether international insulation is a pivotal factor in executive-judiciary relations. In order to achieve such an exploration, the study will look at two courts whose pivotal difference is argued to be the existence (or non-existence) of international insulation in their respective judicial appointment procedures. Specifically, it will look into aspects pertaining to these courts that are argued to play a role in executive-judiciary relations. These will then be compared and contrasted to the benchmark elements that were constructed in the ideal model in order to ascertain the distance between the empirically derived relations of the executive with the respective courts and the ideal relations. The smaller the distance between relations in reality and ideal relations is, the more democracy-friendly the relations in reality are argued to be.

It is imperative to note that for the purposes of this paper, executive-judiciary relations will be looked at through an ideal lens based on democracy in order to provide arguably essential limitations to the scope in which executive-judiciary relations are understood here. This was

[66] John S. Mill 1843, taken from: John S. Odell, 'Case Study Methods in International Political Economy', *International Studies Perspectives* 2, no. 2 (May 2001): 167, https://doi.org/10.1111/1528-3577.00047.

necessary in order to be able to exclude regimes that are evidently non-democratic and do not appear to aspire towards democracy (e.g. totalitarian and authoritarian regimes), as these tend not to provide the required fundamentals (such as judicial independence) allowing one to speak of relations between two separate branches of power that are not viewed as being in a horizontal power relationship. These considerations are reflected in the choice of understandings of democracy from Tilly and Linz and Stepan quoted in the Conceptual framework section of this paper.

This section will be structured as follows: First, an overview of developments in the judicial system of post-Maidan Ukraine will take place and help to justify the suitability of Ukraine as a country of study for this research paper. Then the operationalisation of the main concepts of this paper will be looked into. Finally, an explanation of the case selection, the timeframe and the data collection for this paper will take place.

Overview of developments in the judicial system of post-Maidan Ukraine

This section seeks to provide an overview of the judicial system in Ukraine after the Revolution of Dignity and to thereby help justify the selection of Ukraine as the country of study in this paper.

Before the Euromaidan: the rollercoaster of judicial reform in Ukraine

Before the Revolution of Dignity, Ukraine has been faced with a plethora of events and challenges in the area of judicial reform. These include the following: the period after independence, which was marked with high macroeconomic instability and political uncertainty and in which judicial reform "had to compete for resources and government attention with the overwhelming need to create new political and economic systems";[67] the passing of a new constitution for Ukraine in 1996; the minimal steps and missed opportunities (especially after the Orange Revolution in 2004) for judicial reform of the 2000s;[68] and the judicial reform in 2010 under the Yanukovych presidency, which was prepared and enacted within a timespan of only five months, ignoring comments from the parliamentary opposition and representatives of the judiciary branch and leaving insufficient time for the Venice Commission to comment on the draft law. After the adoption of the bill, the Venice Commission expressed concern regarding the disempowerment of the Supreme Court of Ukraine and the political influence

[67] James Anderson, David Bernstein, and Cheryl Gray, *Judicial Systems in Transition Economies: Assessing the Past, Looking to the Future* (The World Bank, 2005), 11, https://doi.org/10.1596/978-0-8213-6189-4.
[68] Oksana Khotynska-Nor, 'The Influence of the "Small Judicial Reform" on the Development of the Judicial System of Ukraine: Organisational aspects', *Court Appeal* 1, no. 42 (2016): 6–15; Gregory Feifer, 'Unloved But Unbowed, Ukraine's Viktor Yushchenko Leaves Office', *Radio Free Europe/Radio Liberty*, 27 August 2018, https://www.rferl.org/a/Unloved_But_Unbowed_Ukraines_Viktor_Yushchenko_Leaves_Office/1967436.html.

over the judiciary that the reform de facto allowed for.[69] As a result, there could be little confidence in the independence of a judiciary that would work in the interest of the rule of law.

The renewed push for judicial reform after the Revolution of Dignity

The Revolution of Dignity and the consequent abrupt end of the presidency of Viktor Yanukovych have provided an opportunity for a renewed impetus for Ukraine's European integration process as well as for the judicial reform process in the country. This included, for instance, the ratification of the Association Agreement with the EU in June 2014.[70] This section seeks to outline some noteworthy examples of (attempted) judicial reforms since then.

High Anti-Corruption Court

2018 saw the beginning of the setting up of specialised courts, most notably the High Anti-Corruption Court (HACC). The competition for vacant positions in the Court and its appeal chamber was announced in August 2018. The HACC was set up as an equivalent of a court composing of a first-instance Trial Chamber and a completely separate second-instance Appellate Chamber handling primarily high-profile cases investigated by the National Anti-Corruption Bureau (NABU) and procedurally guided by the Specialised Anti-Corruption Prosecutor's Office (SAPO), both of which were established in 2015. Since the HACC will be used as one of the cases of this paper, its functioning is described in more detail in the section of this paper outlining the justification of case selection.

Reform attempts around the HQCJ and HCJ

Since the Revolution of Dignity, a significant part of the judicial reform effort addressed the High Qualification Commission of Judges (HQCJ) and the High Council of Justice (HCJ). The HCJ, according to Article 131 of the Constitution of Ukraine, is responsible, among other things, for submitting requests for the appointment of a judicial candidate and for disciplinary proceedings against judges.[71] It consists of a total of 21 members; ten are chosen by the Council of Judges of Ukraine from a pool of retired judges, two are appointed each by the President, the Verkhovna Rada, the Council of Lawyers of Ukraine, the All-Ukrainian Conference of Prosecutors and from academic representatives. The 21st spot is occupied by the President of

[69] 'Draft Joint Opinion on the Law on the Judicial System and the Status of Judges of Ukraine', Opinion (Strasbourg: European Commission for Democracy Through Law (Venice Commission), 18 October 2010), 7, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)026-e.
[70] 'Association Agreement between the European Union and Ukraine' (Cabinet of Ministers of Ukraine), accessed 3 December 2022, https://www.kmu.gov.ua/en/yevropejska-integraciya/ugoda-pro-asociacyu.
[71] „The Constitution of Ukraine", accessed 6 December 2022, https://zakon.rada.gov.ua/go/254%D0%BA/96-%D0%B2%D1%80, Article 131.

the Supreme Court.[72] The HQCJ is responsible for the qualification assessments of judicial candidates and for submitting recommendations on judicial appointments to the HCJ. The HQCJ has 16 members, which are nominated by similar institutions as the HCJ: eight are chosen by the Council of Judges of Ukraine and two each from the Council of Lawyers of Ukraine, from academic representatives, the Human Rights Representative of the Verkhovna Rada and the Head of the Judicial Administration of Ukraine.[73]

In both the HCJ and the HQCJ, the majority for decision-making is composed by members of the judiciary. This stands in contrast to the predecessor of the HCJ from pre-Euromaidan times, the *Vyshcha Rada Yustytsii* (henceforth VRY; inconveniently translated into English also as 'High Council of Justice'[74]), the majority of which was not formed by judges elected by judges themselves. The 2010 Yanukovych reforms led to an undermined independence of this body, as they reduced the quorum required for decisions in order to allow the VRY to make decisions even if no judges were present at a meeting. The VRY's competences were widened to allow for requests for insights into documents on ongoing judicial matters and cases and for the dismissal of judges based on the vague grounds of 'oath-breaking'. This made judges fully dependent on the VRY, which, in turn, was dependent on the executive.[75] According to the Venice Commission, this increased risk in politicisation of the VRY and did not correspond to European standards.[76] This was changed after the Revolution of Dignity. The VRY was replaced by the HCJ, which was designed in the abovementioned way in order to ensure a higher degree of independence. While these did not address questions regarding moral and ethical standards of the HCJ members, they did strengthen their independence from executive influence.

Under the presidency of Volodymyr Zelensky, efforts to reform the HCJ and HQCJ have encountered criticism from various sides. The first attempted reform, adopted by the Verkhovna Rada in October 2019, provided for the dismissal of all members of the HQCJ and its new formation, putting all its qualification assessment activities, particularly for first and second instance judge positions, on ice. The introduction of mixed commissions, composed of national

[72] 'Law of Ukraine on the High Council of Justice', 1798-VIII § (2016), https://zakon.rada.gov.ua/go/1798-19.
[73] 'Law of Ukraine on the Judiciary and the Status of Judges', 1402-VIII §, art. 93, accessed 3 December 2022, https://zakon.rada.gov.ua/go/1402-19.
[74] The post-Euromaidan Ukrainian name of the institution is *Vyshcha Rada Pravosuddya*.
[75] 'Judicial Reform in Ukraine: Current Results and Near-Term Perspectives' (Kyiv: Razumkov Centre, April 2013), 31–33, https://razumkov.org.ua/upload/Sudova_reforma_2013.pdf.
[76] 'Draft Joint Opinion on the Law Ameding Certain Legislative Acts of Ukraine in Relation Ot the Prevention of Abuse of the Right of Appeal' (European Commission for Democracy Through Law (Venice Commission), 7 October 2010), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2010)098-e.

and international nominees by half each, supervising the behaviour of both the HCJ and the HQCJ was seen as a positive step for building public trust. However, according to the Venice Commission, the timing of the reform was not right, as all assessment activities were interrupted without any transitional provisions in place, leaving over 2000 unfilled vacancies.[77] The Venice Commission also pointed out that large parts of the abovementioned law were subsequently declared unconstitutional by the Constitutional Court of Ukraine.[78] As a result, following the dismissal of the previous HQCJ and the annulment of the provisions of the adopted bill for its recomposition, the HQCJ de facto ceased to exist, bringing all appointment procedures to a halt.

Only in July 2021 were the reforms of the HQCJ and the HCJ passed again, this time with significantly less criticism voiced by the Venice Commission.[79] These laws foresaw the creation of an Ethics Council designed to undertake a one-off vetting of all existing HCJ members and of incoming HCJ members in the six years after the adoption of the law. Half its members are nominated by the Council of Judges of Ukraine, i.e. a national body, while its other half is appointed by the international community. A similar process was envisaged for the HQCJ, which would allow it to start filling the many vacancies in the judicial system in Ukraine. As with any judicial reform, the results remain to be seen: There are several procedural hurdles still to be overcome: the nomination of Ukrainian members to the Ethics Council took several weeks, stalling the start of its work, and it is not certain that the reform would withstand, for instance, a review by the Constitutional Court. Still, after it was finally formed, the Ethics Council began its interviews with HCJ candidates in February 2022, upon which 10 HCJ members resigned voluntarily.[80] In November 2022, the Ethics Council issued a list of recommended candidates for appointment to the HCJ. An election of eight of these candidates would allow the HCJ to have the required quorum of 15 members to be able to undertake its

[77] European Commission for Democracy through Law (Venice Commission) and Directorate-General of Human Rights and Rule of Law, 'Joint Opinion on Draft Amendments to the Law on the Judiciary and the Status of Judges and Certain Laws on the Activities of the Supreme Court and Judicial Authorities (Draft Law No. 3711)' (Council of Europe, 9 October 2020), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)022-e.

[78] Decision of the Constitutional Court of Ukraine No. 2-r/2020, accessed 6 December 2022; Decision of the Constitutional Court of Ukraine No. 4-r/2020, accessed 6 December 2022.

[79] European Commission for Democracy through Law (Venice Commission), 'Urgent Joint Opinion on the Draft Law on Amendments to Certain Legislative Acts Concerning the Procedure for Electing (Appointing) Members of the High Council of Justice (HCJ) and the Activities of Disciplinary Inspectors of the HCJ (Draft Law No. 5068)' (Strasbourg: Council of Europe, 5 May 2021), 14, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2021)004-e.

[80] 'Judicial Reform in Action: Most Members of the High Council of Justice Have Resigned' (DeJure Foundation, 22 February 2022), http://en.dejure.foundation/tpost/m2ec3xumi1-judicial-reform-in-action-most-members-o.

tasks.[81] Whether the reformed HCJ will prove helpful in restoring public confidence in the judiciary remains to be seen.

Reforms of the Constitutional Court

The Constitutional Court of Ukraine also underwent reforms since the Revolution of Dignity. This has arguably been the most challenging reform to undertake, as there is "a weak tradition of constitutionalism among both society and dominant political parties and elites" that undermines the independence of the Court and by extension of the entire judiciary.[82] This is observed very well, for example, in the CCU 2010 decision to annul constitutional amendments from 2004 (which reduced the powers held by the president) for procedural reasons that, in a previous ruling in 2008 on the same matter, were ruled as being inadmissible. What was identified by the Venice Commission as "a certain inconsistency in the case-law of the CCU"[83] appears to have been done to give Yanukovych more power as president.[84]

Already in early 2014, the Verkhovna Rada reinstated the Constitution with its amendments enacted in 2004 and dismissed its share of appointees to the Court. Further reforms took place in 2016-17, which aimed at strengthening the independence of the Constitutional Court. They improved the Court's accessibility for citizens by opening the possibility for requests to be filed to the Court by individuals, rather than just the President or members of the Verkhovna Rada. Appointment and dismissal procedures for members of the Constitutional Court were also reformed, in order to reduce the political influence on the CCU.[85] Competitive processes for appointments were made obligatory and are organised and carried out by the organ nominating the members of the Court. However, the transparency and the value of competitive processes are undermined by the fact that the nominating organs themselves decide on the procedure, as there was no regulation of the procedure in the reform law itself.[86] Crucially, the independence

[81] 'The Ethics Council Recommended 16 Candidates for the HCJ' (DeJure Foundation, 1 November 2022), http://en.dejure.foundation/tpost/91fdvghey1-the-ethics-council-recommended-16-candid.
[82] Julia Kyrychenko, 'Ukraine's More Accessible and Independent Constitutional Court' (ConstitutionNet), accessed 6 December 2022, https://constitutionnet.org/news/ukraines-more-accessible-and-independent-constitutional-court.
[83] 'Opinion on the Constitutional Situation in Ukraine', Opinion (Strasbourg: European Commission for Democracy Through Law (Venice Commission), 20 December 2010), paras 33–35, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)044-e.
[84] 'Ukraine Court Boosts Powers of President Yanukovych', *BBC News*, 1 October 2010, https://www.bbc.com/news/world-europe-11451447.
[85] European Commission for Democracy through Law (Venice Commission), 'Opinion on the Draft Law on the Constitutional Court', Opinion (Strasbourg: Council of Europe, 12 December 2016), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)034-e.
[86] European Commission for Democracy through Law (Venice Commission), 'Opinion on the Draft Law on Constitutional Procedure (Draft Law No. 4533)' (Council of Europe, 2021), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)006-e.

of the CCU was strengthened in the area of dismissal of judges. If previously the nominating bodies were able to dismiss judges on the ill-defined ground of 'breach of the oath' (the Verkhovna Rada and the president previously made use of this provision), now the only way to dismiss a judge from the Court is by approval from at least two thirds of all other Constitutional Court judges. In simple words, the Constitutional Court can now choose more independently whether to dismiss one of its judges.[87]

However, the strengthening of the independence of the CCU has not necessarily been accompanied with a strengthening in the quality of CCU decisions and in moral-ethical standards of CCU members. This becomes particularly apparent in the Opinion of the Venice Commission dealing with the Constitutional Court's decision which invalidated large parts of Ukraine's anti-corruption legislation.[88] Four Constitutional Court judges were deemed potentially directly affected by the legislation for their failure to make due declarations of their financial situation, but they did not withdraw from adjudicating on the case. Among other, the decision precluded anti-corruption authorities from checking asset declarations and identifying potential conflicts of interest. While noting that CCU decisions are final and binding and must therefore be implemented, the Venice Commission described the decision as "handed down in a hasty way", "incomplete" and "not persuasive" and suggested that this warrants a reform of the Constitutional Court, particularly of procedural matters like the appointment of judges and disciplinary proceedings. A suggestion by the Venice Commission includes the recourse to international assistance in these matters, e.g. by means of mechanisms used for the appointment of members of other bodies, such as the HCJ, the HQCJ or by means of amicus curiae briefs by the Commission to the Constitutional Court.

The CCU decision appears to stand in stark contrast to the ideas of explanatory accountability, impartiality, and institutional forbearance. While (or precisely because) the decision was final and binding, it could be regarded even more as undermining public confidence in the judiciary and confidence by the executive that the judiciary will exercise its powers in an accountable way that stands in the interest of the rule of law. The latter point can also be recognised in the subsequent attempt by President Zelensky to dismissing two sitting CCU judges.[89] This, of

[87] Kyrychenko, 'Ukraine's More Accessible and Independent Constitutional Court'.
[88] Decision of the Constitutional Court of Ukraine No. 13-r/2020, accessed 6 December 2022; European Commission for Democracy through Law (Venice Commission), 'Urgent Opinion on the Reform of the Constitutional Court' (Strasbourg: Council of Europe, 2020), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)019-e.
[89] 'Ukrainian President Dismisses Head of Constitutional Court', *Reuters*, 27 March 2021, https://www.reuters.com/article/us-ukraine-court-idUSKBN2BJ08Z.

course, is not admissible in any democracy with a functioning separation of powers and represents an infringement on the idea of mutual toleration. This episode serves to show that the actions by one branch of powers can have repercussions in the actions of another branch.

It is possibly for that reason that Ukraine has sought to introduce a form of international insulation for the nomination of CCU judges as well. The relevant legislation was passed in December 2022 and foresees the introduction of a so-called 'Advisory Group of Experts' that would assist the selection procedure. However, the enacted bill does not foresee veto powers for the international experts, but rather solely an advisory role. The bill has also been criticised for allowing too much political influence over the advisory group.[90] Whether this will suffice to strengthen public confidence in the Constitutional Court remains to be seen.

Summary

Overall, it can be stated that since gaining independence in 1991, Ukraine has experienced significant developments with regards to the functioning of its judiciary. Fundamental reforms often stalled due to insufficient political agreement or were even reversed, while some developments have arguably led to an exacerbation in public confidence in the judiciary (notably the decisions annulling the 2004 constitutional amendments and invalidating a significant portion of anti-corruption legislation). In such a context it appears difficult to assume that (a) the executive can intervene to reform the judiciary without encroaching on its independence and that (b) the judiciary will implement legislation on the functioning of the judicial system not only by the letter, but also by the spirit of the law. The inclusion of international experts could, as is argued in this paper, provide a possibility to end this impasse.

This chapter has provided an overview of developments in Ukraine's judicial sector in recent years. While some evident improvements in the separation of powers and the independence of the judiciary were achieved, there were also challenges to the relations between executive and judiciary, both due to questionable decisions by judicial organs and seemingly erratic legislative changes that resulted in further complications instead of the resolution of problems.

Possibly for these reasons, international insulation appears to have become a trend in Ukraine's most recent judicial reform efforts. The developments in Ukraine also provide an opportunity to learn more about the possible role of international actors, most notably the European Union,

[90] European Commission for Democracy through Law (Venice Commission), 'Opinion on the Draft Law "on Amending Some Legislative Acts of Ukraine Regarding Improving Procedure for Selecting Candidate Judges of the Constitutional Court of Ukranie on a Competitive Basis"', Opinion (Strasbourg: Council of Europe, 19 December 2022), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2022)054-e.

in judicial reform efforts in other countries. This is of particular relevance not least because of the importance attributed to the rule of law in the EU's Global Strategy from 2016.[91] An important question will arguably be to what extent international insulation can help to avoid developments of the past (in particular with regards to the HCJ, the HQCJ and the CCU) that have undermined executive-judiciary relations in a way that was not conducive to democracy. This paper seeks to contribute to the finding of an answer to that question.

Operationalisation

Before proceeding with considerations around the comparative nature of this paper, a discussion of the operationalisation of the variables at hand is imperative.

International insulation of judicial appointments

As far as the operationalisation of the concept of international insulation is concerned, a straightforward binary approach will be employed: either there is international insulation, or there is none.

Executive-judiciary relations

Tables 1 and 2 portraying the ideal model of executive-judiciary relations in a liberal representative democracy will provide the basis for the operationalisation of executive-judiciary relations. Specifically, the collected data (details on the collection of data will ensue further below) will be juxtaposed to the ideal model, which will serve as a benchmark for the analysis of the data. The collected data will be compared to the elements of the ideal model, with the intention of investigating whether and to what extent the data corresponds to an item on the list of requirements to be met by the executive or judiciary. The more pieces of data are found to correspond with the benchmark elements the ideal model, the more the relations between the executive and the investigated court will be considered as resembling the ideal executive-judiciary relations in a democracy. Accordingly, the more pieces of data are found to not correspond with the benchmark elements in the tables, the less the relations between the executive and the investigated case will be considered as resembling ideal executive-judiciary relations in a democracy.

Timeframe

The timeframe for this research will be between mid-2016 and February 2022. The timeframe of this study has been selected to take account of the aftermath of the large-scale judicial reform

[91] European External Action Service, 'Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign And Security Policy', June 2016, https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf.

passed in June 2016 that gave more independence to the judiciary overall and thereby changed the power dynamics between the executive and judiciary.[92] The chosen timeframe also allows to take account of the increased overall international involvement in judicial reform efforts in Ukraine, most notably symbolised by the EU-Ukraine Association Agreement, the negotiation and ratification of which provided a significant impetus with regards to judicial reform efforts in Ukraine. It was decided that the timeframe be limited to February 2022 due to the beginning of the full-scale invasion of the Russian Federation in Ukraine and the fundamental shift in the entire political system of Ukraine caused by it.

Justification of case selection and timeframe

The following section will provide the justification for the chosen cases and timeframe of this study.

Cases

The two cases selected for this study are the High Anti-Corruption Court (HACC) on one hand and the District Administrative Court of Kyiv (DACK) on the other. Both the HACC and the DACK are courts of first instance.[93] Unlike most courts of first instance in Ukraine, which are responsible for cases based on territorial jurisdiction (meaning the provision that a legal case is heard based on the location of the court and the legal matter arising), the HACC and the DACK have cases assigned to them based on special jurisdiction (which means that only certain types of cases, covering specified topics, fall under the responsibility of that court). The crucial difference between the two cases is that the HACC has international insulation in its judicial appointment procedures, while the DACK does not. The similarities and the key difference are outlined in the table below. Subsequently, a detailed description of the two cases will ensue.

[92] 'Judicial Reform in Ukraine: A Short Overview' (DeJure Foundation), accessed 15 January 2023, http://en.dejure.foundation/library/judicial-reform-in-ukraine-what-has-changed-for-the-last-three-years.
[93] It should be noted that appeals to decisions made by the HACC can be appealed at the Appeal Chamber of the High-Anti Corruption Court. While its name confusingly suggests that the Appeal Chamber is part of the HACC, it is in fact a separate institution and independent from the first-instance HACC. In order to enhance the comparability of the two selected cases, this research paper will thus set its focus on the first-instance HACC. See also: 'Closed vertical. What is the High Anti-Corruption Court and why are politicians afraid of its creation?', *Ukrainska Pravda*, 7 June 2018, https://www.pravda.com.ua/articles/2018/06/7/7182654/.

	Case 1	Case 2
Court of 1st instance	High Anti-Corruption Court (HACC)	District Administrative Court of Kyiv (DACK)
Jurisdiction	Special	Special
International insulation for judicial appointments?	Yes	No

Table 3: Main similarities and differences between selected cases.

One particular difference between the courts in question should be addressed, namely the different lengths of existence of the courts forming part of the two selected cases. The HACC was officially launched in September 2019, while the DACK existed for a significantly longer period, having been formed in 2004. The methodological limitation arising from this difference has been mitigated insofar as the process of the creation of the HACC and statements made in that period will be considered as well. Of course, this means that until that point, only the actions of one branch of power can be looked into – those of the executive. However, it could be argued that within this limitation also lies an opportunity: If a difference in positioning by the executive towards the HACC project can be identified before and after the establishment of the HACC, this could provide further insights with regards to the hypothesis of this paper.

High Anti-Corruption Court (HACC)

The High-Anti Corruption Court (henceforth HACC) is a Ukrainian court, composed of a first-instance and a (completely separate) second-instance chamber (which will not form part of this paper's analysis), that was established in April 2019. Its jurisdiction extends to cases brought by the National Anti-Corruption Bureau of Ukraine (NABU) and the Specialised Anti-corruption Prosecutor's Office (SAPO) against high-level officials (such as ministers, members of parliament and judges) for corruption-related crimes.[94]

The formation of the HACC was largely driven by demand from the public, civil society and the international community and contributed to the wide selection of new post-Euromaidan anti-corruption institutions such as NABU, SAPO and the National Agency for Prevention of Corruption (NAPC). The success of these institutions was more limited than was initially

[94] Ivanna Y. Kuz and Matthew C. Stephenson, 'Ukraine's High Anti-Corruption Court' (Chr. Michelsen Institute (CMI), 17 March 2020), 3, https://www.u4.no/publications/ukraines-high-anti-corruption-court.

hoped. While on the side of the prosecution, much had changed in the area of anti-corruption activities, cases were brought to Ukraine's regular courts, which remained largely unreformed. These courts were thus likely to be as susceptible to corruption and political pressure as during the presidency of Viktor Yanukovych. Judges acting with good faith, on the other hand, could struggle with the overall burden of the workload at such a court, leaving highly limited capacities for an expeditious processing of corruption cases.[95]

Despite the rather obvious need for a judicial institution which could competently process prosecutorial cases on corruption, discussions on the possible establishment of a specialised court dealing with corruption were initiated by civil society rather than government representatives. Since the first codification of the HACC in Ukrainian law in June 2016, it took another two years for legislative bills ensuring the actual establishment of the court to be presented in the Verkhovna Rada. Following pressure from civil society and opposition parties as well as encouragement from and conditionalities set by international actors, notably the EU, IMF and the Venice Commission, President Poroshenko finally supported the adoption of the law establishing the HACC, which happened in June 2018.

A pivotal role can be attributed to the abovementioned international actors, who made further financial support (IMF) and visa liberalisation (EU) conditional on mechanisms ensuring an insulation of the appointment procedures for HACC judges from influence from the executive, but also from the Ukrainian judiciary, which has also been tainted by numerous allegations of corruption, lack of adherence to the rule of law, and consequently by a dip in public confidence.[96] Finally the following was agreed: A Public Council of International Experts (PCIE) was to be established in the Law on the HACC. The six members of the PCIE are selected by the HQCJ from a pool of nominees put forward by "international organisations, with which Ukraine cooperates in the area of preventing and countering corruption in line with international agreements concluded by Ukraine".[97] In the duration of its activity (limited to six years from the adoption of the law), the PCIE can, following a request from at least half of its members, ask for a joint meeting of the PCIE with 16 members of the HQCJ to discuss the appropriateness of a particular candidate with regards to their fulfilment of moral and ethical standards required for a position as a judge. If at this joint meeting, the candidate in question

[95] Kuz and Stephenson, 1.
[96] David Vaughn and Olha Nikolaieva, 'Launching an Effective Anti-Corruption Court: Lessons from Ukraine', 1 (Chr. Michelsen Institute (CMI)), 9, accessed 1 November 2022, https://www.u4.no/publications/launching-an-effective-anti-corruption-court#1-building-the-infrastructure-to-combat-corruption.
[97] 'Law of Ukraine on the High Anti-Corruption Court', 2447-VIII § (2018), https://zakon.rada.gov.ua/go/2447-19.

does not receive at least 3 PCIE votes and nine HQCJ votes, they cannot proceed in the selection procedure.[98] Put simply, any candidate for a position on the HACC needs the blessing of foreign experts. While it can be criticised that the PCIE can only "weed out the worst candidates … rather than selecting the best", the power given to international experts is still argued to be pivotal factor in raising the level of integrity and moral standards among judges of the HACC.[99]

District Administrative Court of Kyiv (DACK)

The District Administrative Court of Kyiv (DACK) is a court of first instance. Between its establishment in 2004 and its liquidation in late 2022, it considered cases brought by private entities (e.g. persons or companies) appealing against decisions of state authorities. Particularly, it considered all cases concerning the Central Electoral Commission, the Cabinet of Ministers, all ministries, the National Bank and other central executive organs.[100]

The DACK, and particularly its head judge, Pavlo Vovk, gained notoriety among observers of judicial developments in Ukraine and the Ukrainian population as a result of several controversial rulings and corruption investigations being led against some of its members. DACK judges were responsible for decisions banning peaceful protests on Maidan Square in November-December 2013 and for ordering special police forces Berkut to clear Maidan from protesters.[101]

The DACK was also subject to investigations and corruption charges, which were pursued and brought forward by NABU and the Prosecutor General's Office. In 2019, head judge Vovk and other judges of the DACK were charged with obstruction of judicial authorities, notably the HQCJ, interference with judicial activities and deliberately unjust decisions. Worthy of particular attention are audio recordings of conversations between DACK judges published by NABU, in which the judges are alleged to have discussed and coordinated ways of influencing the HCJ, the HQCJ, the Constitutional Court and of interfering with the work of the NAPC.

Appointments to judicial positions in the DACK functioned in the same way they do for all courts that do not have international insulation: After an application to a vacancy announcement by the High Qualification Commission of Judges (HQCJ), tests need to be passed and

[98] Law of Ukraine on the High Anti-Corruption Court.
[99] Ivanna Y. Kuz, Can the High Anti-Corruption Court Fix Ukraine's Corruption Problem? Q&A with REECA Grad Ivanna Kuz, Harvard University Ukrainian Research Institute, accessed 2 November 2022, https://huri.harvard.edu/high-anti-corruption-court-ivanna-kuz.
[100] „Codex of Administrative Jurisdiction of Ukraine", Article 27, accessed 2 November 2022, https://zakon.rada.gov.ua/go/2747-15.
[101] Yevhen Ablov, Decision No. 35971677 (on the Maidan protesters) (District Administrative Court of Kyiv 9 December 2013).

background checks conducted as envisaged by relevant legal norms. After passing all required tests, a candidate for a judicial position is placed on a reserve list until they are selected by the High Council of Justice (HCJ) for a recommendation for appointment, which is forwarded to the President, who signs the relevant appointment decree.[102] As can be seen from this description, no international expertise is drawn upon at any point during the recruitment and appointment procedure.

Despite the notoriety and the high degree of power enjoyed by the DACK, prior to its liquidation it faced few, if any genuine reforms. Like across a wide part of the judiciary, reform attempts of the past have not brought about a change in personnel at the court. Subsequent reform announcements included ideas such as a substantive transfer of jurisdictional responsibilities from the DACK to the reformed Supreme Court.

Primary sources and data collection

This research project will rely on research methods stemming from interpretive content analysis. Basic content analysis is described as "a research technique for the objective, systematic and quantitative description of manifest content of communication".[103] Interpretive content analysis, in turn, is seen as "a research technique for making replicable and valid inferences from texts (or other meaningful matter) to the contexts of their use. Compared to strictly quantitative content analysis, which is centred on the "objective, systematic and quantitative description of manifest content of communication", a more qualitative approach such as interpretive content analysis has the advantage of being able to account for more latent meanings rather than just manifest content.[104] The contextualised inferences that can be made from the antecedents and the consequences of communication can help to "make judgements about intentions, needs, and potential actions".[105] In other words, it appears that choosing qualitative content analysis offers the best of both worlds for this specific research project, allowing both a an analysis of the manifest meaning of texts and other documents while remaining aware of the context in which judicial reforms and political developments overall in Ukraine took place.

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[102] 'How to Become a Judge, Explained by the Vinnytsia Appellate Administrative Court', *Zakon i Biznes*, 8 August 2018, https://zib.com.ua/ua/134030.html.
[103] Bernard Berelson, *Content Analysis in Communication Research*, Content Analysis in Communication Research (New York, NY, US: Free Press, 1952).
[104] James W. Drisko and Tina Maschi, 'Qualitative Content Analysis', in *Content Analysis*, ed. James Drisko and Tina Maschi (Oxford University Press, 2015), 84, https://doi.org/10.1093/acprof:oso/9780190215491.003.0004.
[105] James W. Drisko and Tina Maschi, 'Interpretive Content Analysis', in *Content Analysis*, ed. James Drisko and Tina Maschi (Oxford University Press, 2015), 66, https://doi.org/10.1093/acprof:oso/9780190215491.003.0003.

The data to be analysed for the purposes of this paper stems primarily from public statements and text from documents produced by members of the executive (notably members of the Office of the President of Ukraine or of the government of Ukraine) about the HACC and the DACK as well as statements by these two courts and their representatives with regards to executive actors. This will be supported by assessments made by international organisations and civil society organisations. The empirical data will be collected the following types of primary sources: interviews with representatives of executive organs/of the two courts, press releases or other types of online publications from these actors, as well as reports from relevant civil society organisations and international organisations such as the Venice Commission. These will be complemented by secondary sources that will primarily consist of media articles quoting the respective representatives, as this will enrich the data collected through primary sources with further data pieces that might otherwise remain out of reach. This data will be used for a juxtaposition against all the benchmark elements developed in the ideal model of executive-judiciary relations, with the addition of explanatory notes to legislative bills regarding the two courts, which will be used to help ascertain the degree to which the executive promotes legal certainty (point B1).

The data will be looked at in a relatively straightforward way. Put simply, the data will be juxtaposed to the benchmark elements and examined on whether it is bringing executive-judiciary relations closer to the benchmark or further away from it. It is imperative to note that single data pieces may not necessarily only be looked at separately, but rather in context and in conjunction with other data pieces, where applicable. For example, if statements by the executive appear to suggest improvements regarding legal certainty for one of the two courts, data pieces from the respective courts as well as from civil society organisations will, where applicable, be looked at in order to see whether the assumption from the executive statements can be corroborated or not. In such a way, it can be ascertained more precisely whether data pieces indeed point towards a particular impression regarding the overall executive-judiciary relations.

Limitations

It must be admitted that relying solely on interpretive content analysis means that several aspects that could be considered highly important in executive-judiciary relations could not be considered in this paper. The points this paper seeks to argue could certainly have benefited from additional qualitative angles from which the research objects could be looked at. For example, conducting interviews with members of the executive or the courts forming part of the research design, or with experts from academia, civil society and/or the international

community could provide additional insights to explore the actions and practices of representatives of the executive and the judiciary with regards to each other, in particular regarding details of the functioning of certain systems that might not find their way to the public sphere. Unfortunately, constraints resulting from the ongoing war in Ukraine proved to be the primary factor in the impossibility to conduct interviews. The author has sought to mitigate this by ensuring, through the use of reports by the international community and by civil society organisations in Ukraine, the findings from the data could be contextualised to the best possible extent.

Analysis and Research results

Introduction

The following section will analyse statements made by the DACK and the HACC and their representatives as well by executive leaders which are argued to have a role in the relations between the executive and these courts. The data collected for the purposes of this paper's analysis consists of the following: 11 documents and accompanying explanatory notes changing legislation regarding the DACK or the HACC, 11 online press releases by the two courts, 3 online publications by NABU, 5 audiovisual appearances (i.e. TV interviews or press marathons) by Volodymyr Zelensky, 4 audiovisual appearances by Petro Poroshenko, one audiovisual appearance by DACK head Pavel Vovk, 4 audiovisual appearances by HACC head Olena Tanasevych, 3 opinion documents issued by the Venice Commission and 15 reports by civil society organisations. The civil society organisations whose work was used in this paper include Transparency International Ukraine, DEJURE Foundation, the Anti-Corruption Action Centre and the organisation Automaidan. Beyond these primary source documents, a total of 20 secondary sources, mainly in the form of media articles referring to or quoting statements by relevant actors, were used. In total, 75 individual pieces of data were identified as relevant for the analysis of the DACK and 78 individual pieces of data for the HACC. The key points of analysis drawn from this data will be shown in this section. The coding results and other details on the coding procedure on which the analysis is based can be found in the Appendix section of this paper.

DACK

The following section will outline noteworthy points of analysis with regards to the DACK. These will be contrasted with the benchmark elements for ideal executive-judiciary relations previously set out. First, the benchmark elements regarding actions of the judiciary will be

juxtaposed to the gathered empirical data. The same will then take place regarding actions of the executive.

Restraint with actions and decisions affecting other state organs and government policy (A1)

Several instances were recorded that suggest limited restraint from the DACK in statements and actions affecting political organs. A prime example of this is seen in the call by the DACK in April 2019 for "the initiation of impeachment procedures against [Poroshenko]" in the Verkhovna Rada.[106] This was followed by a press release on the DACK website demanding a pre-trial investigation against the President, the Minister of Justice and the Head of the National Bank of Ukraine, who are regarded in the press release as a "direct threat to the court system of Ukraine" due to alleged interference in judicial activities regarding the nationalisation of Privatbank, one of the largest banks in Ukraine.[107] Further examples can be found in the section regarding criticism raised by the DACK against the executive, but the impression left by statements such as these is that the DACK has little restraint in seeing political organs as a fundamental threat that needs to be dealt with accordingly. This suggests limits in the DACK's institutional forbearance.

Are decisions perceived to be reasonable and resulting from the correct application of the law? (A2)

It seems noteworthy that the quality of decisions and their accordance with the rule of law appear to be questioned by several sides more or less explicitly.[108] This can be seen NABU's statements regarding investigations against the DACK (more on this below) and the widespread descriptions of the court and Vovk as being "notorious"[109] and "conspiring to use their position for political gain".[110] These perceptions possibly also provide the background for the Venice Commission view that the special jurisdiction of the "unreformed" DACK should be reduced

[106] 'Due to Pressure from the Government, DACK Judges Turned to the HCJ, the General Prosecutor's Office and the SBI', *Press Service of the District Administrative Court of Kyiv*, 23 April 2019, http://oask.gov.ua/node/3832?fbclid=IwAR0hdH6fZFnoiTZURgUQ03gKX7ImXm4nJrtJDZCQ6M6kWVOhsPbc8eXMDnE.
[107] Press Service of the District Administrative Court of Kyiv, 'Interference of the State Leadership in the Activities of the DACK: The GPU Entered Information into the EDPR and Started a Pre-Trial Investigation', 13 May 2019, http://oask.gov.ua/node/3862.
[108] See, for example, European Commission for Democracy through Law (Venice Commission), 'Urgent Joint Opinion on Draft Law No. 5068', 14; Anti-Corruption Action Centre and Automaidan, 'Sins of District Administrative Court of Kyiv', accessed 24 December 2022, http://oaskfails.antac.org.ua/en.
[109] 'There Are Many Presidents but There Is Only One KDAC. How Pavlo Vovk Became the Most Notorious Judge of the Decade' (Anticorruption Action Centre, 8 April 2021), https://antac.org.ua/en/news/there-are-many-presidents-but-there-is-only-one-kdac-how-pavlo-vovk-became-the-most-notorious-judge-of-the-decade/.
[110] Tetiana Bezruk, 'The Court That Rules Ukraine' (Open Democracy, 1 December 2020), https://www.opendemocracy.net/en/odr/kyiv-regional-administrative-court-rules-ukraine/.

and/or transferred to the reformed Supreme Court.[111] With regards to the DACK, questions on the correct application of the law seem to exist on several sides, casting doubts on its functional legitimacy and its accountability.

Perception as an impartial and independent court (A3)

A number of instances were identified which cast doubt over the DACK's impartiality score. For example, descriptions by Vovk in August 2019 of Poroshenko's tenure as one where legal disorder was "the norm" and expressions of his overall (political) views on Poroshenko's presidency and of his conviction that Poroshenko could "absolutely" be arrested,[112] leave significant doubts that he or the court he presides over could act as an impartial arbiter in cases linked to Poroshenko.

In addition, conversations and statements between DACK judges around questions such as "how are we going to seize power?" or Vovk's self-described "political prostitution" in the recordings published by NABU[113] can leave the impression that political control is prioritised more highly in the DACK than acting in the interest of the public and the rule of law, further denting the DACK's image as an impartial arbiter. This was also shown in the abovementioned call for impeachment procedures against President Poroshenko. While such demands could help portray the DACK as an independent institution in that they underline the DACK's distance to the executive, they certainly do not leave the impression that impartiality is employed. This suggests limited restraint in undertaking actions that are likely to be perceived as undermining the DACK's impartiality.

Criticism raised towards the executive (A4)

When it comes to criticism and public comments by the DACK regarding the executive, several relevant incidents were found. This includes Vovk's abovementioned claim on legal disorder being the norm under Poroshenko as well as the calls regarding impeachment procedures. Another instance was found in early 2020 in which Vovk described a bill adopted by the Verkhovna Rada as "not thought through".[114] Furthermore, following a complaint to the

[111] European Commission for Democracy through Law (Venice Commission), 'Urgent Joint Opinion on Draft Law No. 5068', para. 63.
[112] Dmitriy Gordon, Judge Vovk: Pyotr Alekseevich Portnov will have a bite, find it, get it. And Poroshenko will ask for political asylum somewhere, 23 August 2019, https://gordonua.com/publications/sudja-vovk-portnov-petra-alekseevicha-perekusit-najdet-dostanet-i-poroshenko-budet-gde-to-politicheskoe-ubezhishche-prosit-1211151.html.
[113] Sonia Lushakova, '"Did you doubt our political prostitution?" How Vovk's new tapes showed the judicial empire of power', *Ukrainska Pravda*, 19 July 2020, https://www.pravda.com.ua/articles/2020/07/19/7259869/.
[114] Pavlo Vovk, 'Will the question of jurisdiction in land disputes become the beginning of the end of economic specialisation in light of draft law No. 3296 from 31 March 2020', *Sudebno-Yuridichdeskaya Gazeta*, 14 April

European Court of Human Rights regarding NABU investigations, Pavlo Vovk stated that "the ECtHR is already a little familiar with the 'professional' actions and methods of work of NABU",[115] implicitly accusing the latter of unprofessionalism. This was also implied in his description of NABU as a „circus body" following the arrest of Vovk's brother in a case of suspected bribery.[116] In July 2020, Vovk talked of "foreign agents try[ing] to seize the judicial branch of power [in order to] control the president and the country. For this, institutions such as NABU are used.".[117] After an announcement by President Zelensky in April 2021 on the idea of liquidating of the DACK, Vovk reacted by again stating the Zelensky was subject to manipulations by "agents of foreign influence".[118] Such statements publicly expressing unconstructive criticism, can be understood as a non-observance of the idea of mutual toleration, as they suggest that executive leaders and bodies and their actions are not legitimate, putting notable strain on executive-judicial relations. This is even more the case given the relatively high quantity of identified data points pointing at such sorts of criticism by the DACK (see Appendix, page 79).

Promotion of legal/legislative certainty by the executive in its judicial policies (B1)

The relevant statements of executive representatives seem unexpectedly minor in light of the many attention-calling statements by the DACK. The major trend spanning across the presidencies of both Petro Poroshenko and Volodymyr Zelensky has appeared to be the idea of liquidating the DACK and/or transferring some of its jurisdiction to reformed courts, such as the Supreme Court. The first such indication can be found in December 2017, when the Office of President Poroshenko was reported as believing that the DACK should be liquidated as "leaders of the socialist corruption competition".[119] decided to liquidate the DACK and even received an approval for such a step by the High Council of Justice. However, in the final version of a presidential decree on the liquidation of courts, the DACK was not on the list of

2020, https://sud.ua/ru/news/blog/166272-ne-stanet-li-vopros-yurisdiktsii-v-zemelnykh-sporakh-nachalom-kontsa-khozyaystvennoy-spetsializatsii-sudov-v-svete-zakonoproekta-no-3296-ot-31032020.

[115] 'ECHR to Consider Complaint of Kyiv's District Administrative Court Head Vovk against NABU', *Interfax-Ukraine*, 20 April 2021, https://en.interfax.com.ua/news/general/738800.html.

[116] 'Court send brother of judge Vovk under arrest for two months', *BBC News Ukraine*, 9 May 2021, https://www.bbc.com/ukrainian/news-56686926.

[117] 'Judge Vovk: A "group of foreign agents" is trying to take over the judicial branch of power', *Radio Svoboda*, 21 July 2020, https://www.radiosvoboda.org/a/news-suddya-vovk-inoagenty/30738953.html.

[118] 'Judge Vovk reacted to Zelensky's initiative to liquidate the District Administrative Court of Kyiv', *Radio Svoboda*, 13 April 2021, https://www.radiosvoboda.org/a/news-pavlo-vovk/31201563.html.

[119] Mykhailo Zhernakov and Iryna Shyba, 'How Poroshenko failed the judicial reform, and what the future president should do', *Ukrainska Pravda*, 14 March 2019, https://www.pravda.com.ua/articles/2019/03/14/7209169/.

liquidated courts.[120] Zelensky, responding to a public petition calling for a liquidation of the DACK, stated in November 2020 that a consultation process with the HCJ would be commissioned in this regard in line with constitutional requirements.[121] This was followed up with further announcements regarding DACK liquidation by Zelensky: In April 2021, on the day of his submission of a draft bill envisaging such a liquidation, the Office of the President stated that "trust towards the [DACK] was lost".[122] In the explanatory notes to the bill, Zelensky's office stated that the liquidation would "help to raise the level of trust to the judiciary and to ensure the functioning of an independent and impartial court".[123]

The latter statement stands in contrast to the portrayals of the becoming of the bill made by civil society organisations. Before the bill was passed in December 2022 (i.e. a year and a half after submission to the Verkhovna Rada),[124] civil society organisations pointed out that the DACK was difficult for an executive to liquidate because the DACK is a "convenient" court that can legalise or cancel any decision, depending on how that would suit the government.[125] This argument was repeated when the DACK cancelled the competition for Ukraine's chief anti-corruption prosecutor in December 2021, prompting a statement by civil society that the decision was timed "exactly so that some of the selection committee members can explain why they don't want to make a decision". [126] The openly hostile comments by the executive as well as the continued criticism by civil society suggests that actually, the executive's long-existing plans for the liquidation of the DACK actually brought about a legislative uncertainty and thereby constituted clear limits in the institutional forbearance exercised by the executive.

[120] Fedir Prokopchuk, 'A Court that could already be gone. What you need to know about the District Administrative Court of Kyiv that wants an impeachment of the president', *Hromadske*, 23 April 2019, https://hromadske.ua/posts/sud-yakogo-moglo-ne-buti-sho-treba-znati-pro-okruzhnij-adminsud-kiyeva-yakij-hoche-impichmentu-prezidenta.
[121] 'Regarding the Liquidation of the District Administrative Court of Kyiv', *Electronic Petitions of the Online Representation of the President of Ukraine*, 13 November 2020, https://petition.president.gov.ua/petition/102742.
[122] 'Zelensky submitted to the Verkhovna Rada a draft law on the liquidation of the DACK', *Radio Svoboda*, 13 April 2021, https://www.radiosvoboda.org/a/news-oask-likvidaziya/31201373.html.
[123] 'Explanatory Notes on the Law on the Liquidation of the District Administrative Court of Kyiv', 2825-IX § (2022), w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=71646&pf35401=546001.
[124] Stanislav Pohorilov and Roman Petrenko, 'The Verkhovna Rada liquidated the scandalous DACK, but the judges will continue to work', *Ukrainska Pravda*, 13 December 2022, https://www.pravda.com.ua/news/2022/12/13/7380542/.
[125] Mykhailo Zhernakov and Olena Makarenko, 'Special jurisdiction: how the DACK affects the country and what to do about it', *Ukrainska Pravda*, 17 April 2021, https://www.pravda.com.ua/articles/2021/04/17/7290555/.
[126] Igor Kossov, 'Controversial Court's New Ruling Might Cancel Anti-Corruption Prosecutor Contest', *The Kyiv Independent*, 20 December 2021, https://kyivindependent.com/national/controversial-courts-new-ruling-might-cancel-anti-corruption-prosecutor-contest.

Criticism raised and pressure exerted by the executive against the DACK (B2 and B3)

When it comes to criticism expressed by the executive against the DACK, one can identify several challenges to the DACK's overall legitimacy. For example, statements by NABU regarding its investigations against the DACK and its head Pavlo Vovk point to suspicions of "illegal enrichment" against Vovk,[127] to the taking of "deliberately unlawful judicial decisions" and "interventions in the activity of [other] judicial bodies"[128] as well as to the discovery of a "criminal organisation headed by [Vovk]" and the "use of the administrative justice system as a tool for seizing power in the judiciary".[129] These statements appear to challenge the functional legitimacy of the DACK and particularly Pavlo Vovk, as they suggest that, in the view of NABU, the DACK does not fulfil its functions in accordance with the rule of law. Regardless of the grounds for NABU's statements and actions by the DACK that may have led to them, based on the data analysed for these two categories, one is left with the impression that NABU has a limited level of toleration for the DACK and its way of functioning. When taken together with Vovk's abovementioned descriptions of NABU, one can see little, if any, mutual toleration between NABU and the DACK.

Examples of statements in a similar vein can also be found in the Office of the President. This includes the abovementioned view of the DACK as "leaders of the socialist corruption competition"[130] by the office of President Poroshenko, or the claim of the office of President Zelensky that "trust in the [DACK] was lost".[131] This, taken together with the abovementioned statement from the explanatory notes to the bill on the liquidation of the DACK, seems to leave the impression of a certain level of pressure put on the DACK to act in the interest of the executive and to thereby avoid liquidation, challenge by the executive to the legitimacy of the DACK, as the executive suggests that Ukraine's political system would be better off without it. It should be kept in mind that for categories B2 and B3, only few data points were found to be relevant and applicable (see coding results in the Appendix section), meaning that this part of the analysis should be read with a pinch of salt. The resulting limitations will be discussed in the summary part of this section.

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[127] 'NABU conducts searches in the District Administrative Court of Kyiv in the case of illegal enrichment of its Chairman' (National Anti-Corruption Bureau of Ukraine, 26 May 2017), https://nabu.gov.ua/novyny/nabu-zdiysnyuye-obshuky-v-okruzhnomu-adminsudi-kyyeva-u-spravi-pro-nezakonne-zbagachennya.

[128] 'Clarification regarding searches in the District Administrative Court of Kyiv', National Anti-Corruption Bureau of Ukraine, 26 July 2019, https://nabu.gov.ua/novyny/rozyasnennya-shchodo-obshukiv-v-okruzhnomu-adminsudi-kyyeva.

[129] 'Abuse at the DACK: New Episodes (Video Transcript)' (National Anti-Corruption Bureau of Ukraine, 21 July 2020), https://nabu.gov.ua/novyny/zlovzhyvannya-v-oask-novi-epizody-rozshyfrovka-video.

[130] Zhernakov and Shyba, 'How Poroshenko failed the judicial reform, and what the future president should do'.

[131] 'Zelensky submitted to the Verkhovna Rada a draft law on the liquidation of the DACK'.

Consultations with the DACK on relevant government policies (B4)

When it comes to the question of consultations with the judiciary on DACK reform, the following can be said: The impression left by the many statements from above is that neither does the judiciary bring justice, nor does the executive seek to ensure justice is made. This, together with the abovementioned points on legislative uncertainty, arguably indicates that the executive can be perceived to seek to achieve certain judicial decisions while at the same time implicitly questioning the legitimacy of the DACK through the recurrent public talk about its liquidation. The abovementioned reactions of the DACK to this appear to suggest limited consultation with the judiciary with regards to liquidation ideas. This shows both limited toleration of the DACK and a lack of forbearance by the executive. The recurring announcements in this regard can amount to an understanding that the executive sees no (or limited) legitimacy in the DACK. Statements by NABU regarding investigations against the DACK add to the many strains in executive-DACK relations. This reduces public confidence in the judicial system and in the political system overall and is by extension unlikely to strengthen Ukraine's democracy.

HACC

The following section will outline noteworthy points of analysis with regards to the HACC. These will be contrasted with the benchmark elements for ideal executive-judiciary relations previously set out. First, the benchmark elements regarding actions of the judiciary will be juxtaposed to the gathered empirical data. The same will then take place regarding actions of the executive.

Restraint with actions and decisions affecting other state organs and government policy (A1)

One instance of non-restraint of the HACC is shown in an open letter published by the HACC in January 2021, calling for the HCJ to refrain from undermining the independence of the HACC. Specifically, the letter points out that the HCJ had been undertaking disciplinary proceedings against HACC judges for their decisions and rulings (although reviews of decisions are dealt with at appellate level) and that its activities could "represent a threat to the independence of the HACC".[132] At the end, the letter calls for judicial institutions and the President "to take measures within their powers" to ensure constitutional guarantees for the independence of the HACC are upheld. However, despite the reported significant impediment

[132] Meeting of HACC judges, 'Request on Ensuring the Guarantees for the Independence of the HACC', Open letter, 27 January 2021, https://hcac.court.gov.ua/userfiles/media/new_folder_for_uploads/hcac/self-government/decisions/27.01.2021_2.pdf.

of the HCJ on the HACC's independence, the HACC refrained from questioning its legitimacy and called its addressees only for action that is in accordance with the current law. This suggests that even in extraordinary situations in which it perceives its very foundations to be threatened, the HACC refrains from resorting to possibly illicit calls for other actors to take measures against other bodies that could challenge its adherence to the notion of institutional forbearance. Still, in order to enhance the perception that this is indeed so, it is even more important that actions and decisions of the HACC such as these are seen to result from a reasonable and correct application of the law. This will be looked at in more detail in the next section.

Beyond this, an instance showing restraint towards the executive has also been identified: In an interview with Deutsche Welle published on the day of the HACC launch, when asked about possible cases regarding high-level politicians (e.g. former President Poroshenko) or legislative proposals regarding corruption investigations, the head of the HACC Olena Tanasevych stated that she "cannot give any comments [on this, as] this would be inappropriate" and that "legal norms [passed by the Verkhovna Rada] must be implemented [by all state organs]".[133] This suggests a certain level of forbearance employed by Tanasevych with regards to statements and actions affecting the executive that has been identified in several analysed data points (see Appendix, page 77).

Are decisions perceived to be reasonable and resulting from the correct application of the law? (A2)

As far as the quality of the HACC's work is concerned, criticism was found only scarcely. In the monitoring activities on the HACC undertaken by Transparency International Ukraine (henceforth TI) in the years 2020-2021, only vague hints at critical views on decisions could be found, which were attributed to controversial rulings by the Constitutional Court of Ukraine that the HACC must abide by.[134] In the TI monitoring period of July-December 2020, it is noted that NABU and SAPO "highly appreciate[d] the efficiency and speed of interaction with the

[133] Kateryna Lutska, Anti-Corruption Court head about meeting Zelensky, convictions and the case of Poroshenko, Deutsche Welle in Ukrainian, 5 September 2019, sec. 06:30-09:00, https://www.youtube.com/watch?v=eif0CrCfvtk.

[134] Transparency International Ukraine, 'HACC Cases', accessed 25 December 2022, https://ti-ukraine.org/en/ti_format/news/hacc-cases/; Kateryna Ryzhenko and Serhii Kurinnyi, 'Summary of the Report on the Results of Monitoring the High Anti-Corruption Court's Work' (Transparency International Ukraine), accessed 22 December 2022, https://drive.google.com/file/u/0/d/1t3qrOPk569kuCXs3sYwtEYFnnRXdBWAA/view?usp=embed_facebook; Kateryna Ryzhenko, Serhii Kurinnyi, and Oksana Shtohryn, 'Final Report on Results of the Second Stage of the Monitoring of the Work of the HACC for the Period from 1 April 2021 to 23 February 2022' (Transparency International Ukraine), accessed 22 December 2022, https://drive.google.com/file/u/0/d/1Okw8AK31ASFJd3QR-aLFyEiUpEfcmQWj/view?usp=embed_facebook.

HACC" compared with courts of general jurisdiction and recorded no violations of procedural and professional ethics in the work of the HACC.[135] The HACC is commended for its „proactiveness in its approach to the application of the law" and its efforts to improve proceedings where necessary and possible.[136] A point of criticism can be seen in the remarks on the HACC's decision to not publish some of its rulings, undermining its credentials on transparency and by extension on its explanatory accountability. However, overall, no doubts in the moral standards and the integrity of HACC judges or their decision were found to have been expressed. The perception of the HACC's work as being of high quality and ensuring its accountability is crucial in ascertaining that the HACC works in the interest of the rule of law instead of its own interests or those of the executive.

Perception as an impartial and independent court (A3)

In its appearance in public, the HACC and, particularly, the Head of the Court, Olena Tanasevych, appear to be keen to maintain their independence and impartiality. Following her election as head of the HACC, Tanasevych noted that no priority would be given to high-level cases because "all cases are [priority cases]".[137] As mentioned above, Tanasevych declined requests for comments on possible cases against (former) members of the executive, as she claimed this could affect her perception as an impartial person. In a TV interview she also underlined that the focus of the HACC would lie not in issuing maximum punishments and "being popular among the population, but in ensuring high-quality justice […] that is proportionate to the actions done by the person [standing in court]".[138] While an ordinary audience member, who might be interested in the delivery of justice at high speed, could feel disappointment in hearing continuous declinations to comment investigated and trialled cases of corruption, Tanasevych's statements ensure there are no doubts about her impartiality.

In September 2019, Tanasevych described her interactions with President Zelensky as a "[very paradigmatic] example of interaction between state authorities", which, up to that point, focused on securing a suitable location that could enable the HACC to undertake its work.[139] Her

[135] Ryzhenko and Kurinnyi, 'Summary of the Report on the Results of Monitoring the High Anti-Corruption Court's Work', 10.
[136] Ryzhenko, Kurinnyi, and Shtohryn, 'Final Report on Results of the Second Stage of the Monitoring of the Work of the HACC for the Period from 1 April 2021 to 23 February 2022', 15.
[137] Vasyl Pekhnyo, 'Not a privilege, but a burden of responsibility': Interview with the Head of the Anti-Corruption Court, Hromadske, 7 May 2019, https://hromadske.ua/posts/cya-posada-ne-privilej-a-tyagar-vidpovidalnosti-intervyu-z-ochilniceyu-antikorupcijnogo-sudu-tanasevich?tag=olena-tanasevich.
[138] Olena Trybushna, On pressure against judges, corruption and the SAPO chief: Interview with HACC Head Tanasevych, 24 Kanal, 14 December 2021, https://www.youtube.com/watch?v=5IlD9xEzbEM, 05:45-07:30.
[139] Lutska, Anti-Corruption Court head about meeting Zelensky, convictions and the case of Poroshenko, sec. 05:45-06:15.

meetings with NABU and SAPO representatives, she said, dealt with questions of electronic document management between the organs of the Ukrainian anti-corruption institutional infrastructure. The HACC appears to point out the aspects of cooperation with the executive as well as the areas where commenting would be considered inappropriate. It is possibly for that reason that Tanasevych prefers to emphasise that "the HACC is not a part of the anti-corruption system [together with NABU and SAPO] but belongs to the judiciary branch of power".[140] Overall, the statements and actions of the HACC leave few, if any, doubts around its credentials regarding impartiality and independence.

Criticism raised towards the executive (A4)

As far as statements of the HACC with regards to the executive are concerned, no indication was found that the HACC questioned the legitimacy of executive leaders or that it has in some way subjugated itself to the executive or its narratives on combatting corruption. When faced with questions regarding her interactions with President Zelensky or NABU, Olena Tanasevych appeared to express views that were in some points different to her executive counterparts' perspective without directly challenging the executive actors or risking relations with them. For example, when confronted with a statement by Zelensky that the HACC would issue its first convictions already in the same autumn, she replied that it was impossible to foresee the length of criminal proceedings in court due to factors such as the number of accused persons and the scope of the case.[141]

Tanasevych gave almost the same reply when faced in September 2021 with a reported claim by NABU chief Artem Sytnyk that 2022 would be an ostentatious year with regards to results of the activities of anti-corruption organs.[142] Such statements successfully tread the fine line between asserting the independence of the HACC (by not embracing the narrative of the executive and potentially compromising the HACC's impartiality) and refraining from outright criticism of the executive that could be perceived as overstepping the HACC's competences. The same can be said of the abovementioned open letter regarding the HCJ as well as of Tanasevych's description of the HACC's interactions with the Presidential Office as "paradigmatic". Statements such as these suggest a certain level of toleration in the HACC for

[140] See, for example: Trybushna, On pressure against judges, corruption and the SAPO chief, sec. 06:45-07:00; Kateryna Ryzhenko et al., 'Study on the Capacity, Management and Interaction of the Bodies of the Anti-Corruption Infrastructure of Ukraine' (Transparency International Ukraine), accessed 19 January 2023, https://ti-ukraine.org/research/chy-spromozhni-ta-efektyvni-antykoruptsijni-instytutsiyi-doslidzhennya-ti-ukrayina/.
[141] Lutska, Anti-Corruption Court head about meeting Zelensky, convictions and the case of Poroshenko, sec. 03:00-04:45.
[142] Trybushna, On pressure against judges, corruption and the SAPO chief, sec. 03:30-05:00.

the legitimate use of powers by the executive as well as a level of forbearance that ensures views of the executive are not questioned while different views are expressed constructively and in a climate of respect.

Promotion of legal/legislative certainty by the executive in its judicial policies (B1)

The executive's approach to promoting legal/legislative certainty with regards to the HACC was analysed as follows: With regards to the development of the High Anti-Corruption Court, Poroshenko's tenure can be regarded as a stalling of the development process. The HACC was mentioned for the first time as a specialised court of Ukraine in the Law on the Judiciary and the Status of Judges, which was passed by the Verkhovna Rada in June 2016.[143] In order for the HACC to be launched, a separate law was necessary to outline its jurisdiction, its functioning and all other relevant aspects. However, in March 2017, President Poroshenko stated that first, an "anti-corruption chamber" should be established.[144] Then, in September 2017, Poroshenko himself stated that, unlike international organisations, he did not believe Ukraine needed a specialised court focused on corruption because "all courts in [Ukraine] should be anti-corruption",[145] despite the fact that no convictions on corruption were taking place in the ordinary courts at the time, as there was a lack of capacity to deal with them.[146] Following international pressure, Poroshenko submitted a draft bill establishing an anti-corruption court, which ended up being passed into law in June 2018. The setup of the HACC took another while: In December 2018, Poroshenko expressed hope that the HACC would be set up by February 2019,[147] and in January 2019, he promised that the HACC would be formed by the presidential election in March/April 2019.[148] When the HACC judges were officially appointed to their positions in April, President Poroshenko welcomed the "extraordinarily transparent" selection process which helped to ensure the HACC would strengthen Ukraine's judicial system to the

[143] 'Law on the Judiciary and the Status of Judges (Version passed on 2 June 2016)' (2016), https://zakon.rada.gov.ua/go/1402-19/ed20160602#Text.
[144] 'Poroshenko on the Anti-Corruption Court: First a corresponding chamber is necessary', *Ukrainska Pravda*, 17 September 2017, https://www.pravda.com.ua/news/2017/09/15/7155225/.
[145] Philip Ling and Rosemary Barton, 'Ukrainian President Petro Poroshenko Rejects Call for Anti-Corruption Court' (CBC News, 26 September 2017), https://www.cbc.ca/news/politics/poroshenko-rejects-anti-corruption-court-1.4306843.
[146] Vaughn and Nikolaieva, 'Launching an Effective Anti-Corruption Court', 5.
[147] 'Anti-Corruption Court to Be Set up in February, Poroshenko Says', *Unian Information Agency*, 16 December 2018, https://www.unian.info/politics/10379013-anti-corruption-court-to-be-set-up-in-february-poroshenko-says.html.
[148] 'Poroshenko Promised to Form an Anti-Corruption Court before the Elections', *Ukrainska Pravda*, 23 January 2019, https://www.pravda.com.ua/news/2019/01/23/7204682/.

benefit of the Ukrainian state.[149] Ultimately, as mentioned above, the HACC was officially launched in September 2019.

The multiple and somewhat contradictory announcements regarding the establishment of the HACC provided a climate of (legal) uncertainty that is unlikely to have fostered public confidence in the judicial system and in the executive's will to genuinely work on legislation designed to create an independent court. This was also recognisable in civil society statements regarding the process of the HACC's establishment. This provided grounds to the argument that President Poroshenko actually "opposed the idea of an independent court … [that would] make 'shutting down' a legal case more difficult".[150] While in the end, following pressure from the international community and civil society organisations, the HACC was indeed established and Poroshenko appeared to acknowledge the legitimacy of the court, the statements accompanying the political process of its establishment have arguably created a sense of legislative uncertainty that did not meet the requirements of the idea of explanatory accountability or strengthen public confidence in the judicial reform process.

During Volodymyr Zelensky's presidency, there have been a number of adaptations to the legislative framework governing the HACC and its jurisdiction. The most noteworthy one took place in September 2019, briefly after the launch of the HACC, the Verkhovna Rada passed a bill initiated by Zelensky that was designed to reduce the burden of cases on the court and limit its jurisdiction to cases investigated by NABU.[151] In the explanatory note of the bill, the Office of the President explained that the transfer of over 3500 cases to the HACC in line with its previous jurisdictional competences could overwhelm the 38 HACC judges and prevent them from working on cases regarding high-level corruption that are investigated by NABU, which represented only five percent of those 3500 cases. Therefore the legal changes would „ensure effective judicial proceedings … regarding corruption crimes within a reasonable timeframe and eliminate the risks of excessive workload" on HACC judges.[152] Such a legislative change was also promoted publicly by NABU and SAPO and welcomed by civil society, as this "saved

[149] *Speech by President Petro Poroshenko on the Occasion of the Official Appointment of Judges to the High Anti-Corruption Court of Ukraine*, 2019, https://www.facebook.com/petroporoshenko/videos/622740828149459/.
[150] Transparency International Ukraine, 'The battlefield: How the Anti-Corruption Court was launched', 20 December 2019, https://ti-ukraine.org/news/pole-bytvy-yak-zapuskaly-antykoruptsijnyj-sud/.
[151] 'Law of Ukraine on amendments to some legislative acts of Ukraine regarding the Commencement of the work of the High Anti-Corruption Court', 100-IX § (2019), https://zakon.rada.gov.ua/go/100-20.
[152] 'Explanatory Note to the Law of Ukraine on Changes to the Law on the High Anti-Corruption Court', 100-IX § (2019), http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=66258&pf35401=492797.

the HACC from being overloaded with cases … and blocked in its work".[153] The statements underlying this policy move can be understood as seeking to ensure that the available resources of the HACC are more closely matched with the workload and avoiding an overload of the court while not removing any certainty regarding the overall functioning of the HACC.

One noteworthy instance of legislative uncertainty regarding the HACC can be found in the attribution of permanent premises to the HACC. In the explanatory notes to relevant bills that were passed in the Verkhovna Rada in June 2020, the reported purpose of these legal changes was "a permanent provision of premises to the [HACC] in which a part of it is temporarily located, … This will allow an uninterrupted continuation of the work of the HACC".[154] This would allow for meeting "needs … for reconstruction works … and for the realisation of basic guarantees of the independence of the [HACC]".[155] After the Cabinet of Ministers, which had been tasked with the transfer of the management of the premises to the HACC according to the legislation, made the decision to give the premises to the HACC for permanent use in May 2021,[156] the HACC released a statement welcoming the step.[157] While the Cabinet of Ministers possibly could have ensured legal certainty was achieved sooner after the adoption of the relevant legislation, the statements around this legislation from all sides suggest that the question of permanent premises for the HACC was considered at least "partially resolved". [158] Overall, the coding results for this category (see Appendix) stand out compared to the others in that they are not as clear-cut as many of the other categories. The impression is that this is largely due to a stark difference in the executive's approach to the legislative status of the HACC before and after its launch.

[153] 'NABU and SAPO addressed the Verkhovna Rada with a request regarding Zelensky's bill', *Ukrainska Pravda*, 17 July 2019, https://www.pravda.com.ua/news/2019/07/17/7221150/; Ryzhenko et al., 'Study on the Capacity, Management and Interaction of the Bodies of the Anti-Corruption Infrastructure of Ukraine', 38.
[154] 'Explanatory Notes to the Law of Ukraine on the Restructuration of State Enterprise "Antonov"', 730-IX § (2020), https://itd.rada.gov.ua/billInfo/Bills/pubFile/78253.
[155] 'Explanatory Notes to the Law of Ukraine on Changes to the "Law on the High Anti-Corruption Court" Regarding the Provision of Premises to the Court and Other Questions on the Work of the Court', 729-IX § (2020), https://itd.rada.gov.ua/billInfo/Bills/pubFile/78085.
[156] Cabinet of Ministers of Ukraine, 'Order on questions of implementatino of the Law of Ukraine on the restructuration of the state enterprise "Antonov"', 347-r § (2021), https://www.kmu.gov.ua/npas/deyaki-pitannya-vikonannya-zakonu-u-a347r.
[157] 'The Cabinet of Ministers of Ukraine adopted an order on the transfer of the premises to the sphere of administration of the High Anti-Corruption Court', HACC Press Centre, 22 April 2021, http://court.gov.ua/hcac/pres-centr/news/1109747/.
[158] Ryzhenko et al., 'Study on the Capacity, Management and Interaction of the Bodies of the Anti-Corruption Infrastructure of Ukraine', 17.

Criticism raised and pressure exerted by the executive against the HACC (B2 and B3)

When it comes to questions on raising points of criticism regarding the HACC and the executive refraining from being perceived as exerting pressure on the HACC, the following can be said:

During the official launch of the HACC in September 2019, Zelensky used his speech to congratulate all stakeholders on the opening of the HACC and noted the high expectations Ukrainians citizens had for the court when it came to punishing corrupt people and returning citizens' faith in justice. [159] Zelensky also noted that the question of setting appropriate limits to HACC jurisdiction remained unresolved (see a more detailed discussion on this above). A statement that was similar in nature was found in an interview with Olena Tanasevych on the opening of the HACC in September 2019, in which the interviewer refers to a claim by Zelensky that „the first convictions by the HACC would be expected already in the coming autumn". [160] The statement by Zelensky might not classify as an interference in the work of the HACC (the illicitness of which he underlines by saying that he cannot give tasks to the HACC). However, his statements reflect the general atmosphere of public expectations and concomitant political pressure focusing on punishment, which had become particularly apparent during the electoral campaigns in the spring and summer of 2019.[161] Such an approach could be seen as encouraging HACC judges to act in the interest of fulfilling public expectations rather than the interest of the rule of law. A similar kind of expectation is seen in the abovementioned statements by Zelensky and NABU chief Sytnyk that HACC president Tanasevych was confronted with.

Consultations with the HACC on relevant government policies (B4)

Another sign of the apparent spirit of mutual toleration and even cooperation between the executive and the HACC can be found in a request in March 2021 by the latter to the former for a legislative change allowing specialised courts to hold litigants responsible for unreasonable or maliciously motivated absences from court hearings and other parts of the trial where litigants' presence is required to move the case forward.[162] Prior, litigants at the HACC could not be held responsible for such contempt of court and could therefore stall proceedings without fearing significant consequences and negatively impact the efficiency of the HACC's

[159] *Zelensky and Tanasevych at the Opening of the HACC*, 2019, https://www.youtube.com/watch?v=7tbUtwaI2ts.
[160] Lutska, Anti-Corruption Court head about meeting Zelensky, convictions and the case of Poroshenko, sec. 03:00-04:15.
[161] Ryzhenko et al., 'Study on the Capacity, Management and Interaction of the Bodies of the Anti-Corruption Infrastructure of Ukraine', 21–22.
[162] 'Law of Ukraine on Amendments to the Code of Ukraine on Administrative Offenses Regarding the Powers of High Specialised Courts in Considerations on Cases on Administrative Offenses', 1995-IX § (2022), https://zakon.rada.gov.ua/go/1995-20.

work.[163] In the legislative proposal filed by the Minister of Justice Malyuska to the Verkhovna Rada in May 2021, this reasoning was also taken up in the explanatory notes to the proposal, which note that passing the law would "strengthen judicial independence and raise the level of respect towards judicial organs and proceedings".[164] This can be seen as a prime example of interaction between executive and judiciary regarding judicial politics, where the two branches cooperated to improve the work of the HACC to ensure timely case resolution and to thereby fulfil their respective obligations towards citizens to a more satisfactory extent.

Summary

Overall, the impression left by the relations between executive actors and the High Anti-Corruption Court and by the coding results in the Appendix section is that these are more conducive to democracy compared to those with the DACK. They are marked by a level of quality in the actions of the HACC that is recognised by executive bodies and non-governmental organisations alike. The HACC puts great importance at maintaining its impartiality and its public perception as an impartial body that has the interest of the rule of law at its heart. This can be recognised in the way the HACC expresses views that differ from the ones put forward by the executive without questioning the latter's legitimacy. This stands in great contrast to the statements identified as pertaining to the DACK, which appeared to express views on executive representatives that challenged the legitimacy of executive organs and could not be seen as in line with the idea of impartiality. While prior to the establishment of the HACC, the executive appeared somewhat reluctant to change the status quo and saw no need in establishing the HACC, the statements made since then appear to indicate more democracy-friendly relations. This is shown by the executive's talk on provision of permanent premises to the HACC that could subsequently be officially managed by the latter as well as its statements on the bill seeking to ensure that the HACC's resources are proportionate to its workload and that the HACC can go about its work processes as efficiently as possible. This again stands in stark contrast to the impression left by executive statements on legislative plans related to the DACK, which have been perceived as not bringing legal certainty. Overall, unlike for the DACK, the executive appears to respect the independence of the HACC and does not appear to undermine its work in any fundamental way. Therefore, the relations between the two are marked by a

[163] Kateryna Ryzhenko and Serhii Kurinnyi, 'Report on the Results of the Interim Monitoring of the Work of the HACC for the Period from 1 April to 31 July 2021' (Transparency International Ukraine), 13, accessed 22 December 2022, https://drive.google.com/file/d/1sCzN9XRgnH-i2ycKHybCZnDPJFJgcvgu/view?usp=embed_facebook.

[164] 'Explanatory Notes to the Law of Ukraine on Amendments to the Code on Administrative Offences of Ukraine', 1995-IX § (2022), w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=71895&pf35401=547459.

sense of independence, mutual respect and willingness to cooperate where this serves the interest of the rule of law in Ukraine.

The coding results in the Appendix section reveal the abovementioned methodological limitation of relying solely interpretive content analysis. Particularly for categories A2 (Perception of judicial decisions as reasonable) and all categories from Table 2 (Ideal Actions of the executive with regards to the judiciary in a democracy), only a low number of relevant data points were found to be appropriate for this paper's analysis. This suggests that in particular for the mentioned categories, the conduct of analysis methods helping to shine a light on actions and practices of representatives of executive and judicial organs appears useful in order to give more weight to the analysis. While the results of this paper's analysis do provide some insights, they thus also reveal the potential for further research in this area in the future.

Conclusion

This paper has aimed to investigate the role of international insulation in judicial appointments and the impact this may leave on executive-judiciary relations when viewed through the lens of democracy. For this purpose the author has decided to undertake a comparative study between two courts in Ukraine and the development of their relations with the executive branch of power. The key difference between the two courts of special jurisdiction – on one hand, the High Anti-Corruption Court (HACC) and, on the other, the District Administrative Court of Kyiv (DACK) – is that the appointment procedure of the HACC entailed veto powers by international experts, while the appointment procedure of the DACK did not.

First, this paper saw a theoretical discussion of the notion of international insulation, followed by the development of a conceptual framework of ideal executive-judiciary relations in a democracy. Significant roles are argued to be played in these relations by the notions of legitimacy, accountability and the mutual toleration and institutional forbearance towards the respective other branch of power. These sub-concepts are arguably enhanced by the quality of the work of the two branches of power as well as the principle of impartiality for the judiciary. The discussion culminated in a list of actions that are ideally taken or refrained from by the two branches of power with respect to each other in a democracy. The constructed ideal model was subsequently used a basis for the analysis of the executive's respective relations with the DACK and the HACC.

The study revealed that relations between the HACC and the executive appear to be more conducive to executive-judiciary relations in a democracy compared with executive-DACK relations. Decisions of the DACK have been perceived as insufficiently reasoned, tainted and scandalous and have in several instances impeded the work of the executive. Statements and actions by the DACK and its representatives appear to question the legitimacy of executive bodies and actors to undertake their tasks. The executive, in turn, was not successful in following through with its reform announcements regarding the DACK, putting into question its genuine will for implementation and raising doubts about its overall intention regarding the DACK. The resulting legal uncertainty as well as the general spirit of animosity governing executive-DACK relations therefore show a remarkable distance to the ideal model of executive-judiciary relations constructed in this paper.

Relations between the executive and the HACC, on the other hand, were marked by a climate of mutual respect and actions by the Court that have not been called into question with regards

to their quality. This is seen, among others, in the visible endeavours of the HACC to maintain its public perception as an impartial court by not succumbing to public pressure to discuss cases of high-level of corruption or challenging the legitimacy of executive actors. The executive, while at first sceptical regarding the need for a court such as the HACC before its establishment, has not been perceived to undermine the independence of the HACC and provided it with resources that stand in proportion to its workload. The material reviewed in this paper therefore suggests that executive-HACC relations are marked by a sense of independence and willingness to cooperate where this serves the interest of the rule of law in Ukraine and are, as a result, more conducive to democracy.

Therefore, the tentative conclusion of this research is that international insulation indeed fosters executive-judiciary relations that are more conducive to democracy. The introduction of external actors with no affiliation with the political system of the beneficiary state appears to assist in the selection and appointment of candidates for judicial positions who are more likely to be (perceived as) impartial and therefore to serve the interest of the rule of law rather than the interests of political or other judicial actors. This, in turn, suggests that decisions and actions by judges appointed in such a way are more likely to be recognised as legitimate and having quality by citizens and executive actors. Therefore the latter have less of an interest to undermine the independence of these judges, be it through legal or illegal means. The following mutual recognition between the two branches of power of each other's legitimacy and their forbearance in undertaking actions that could affect the respective other suggest that such relations prove beneficial for democracy.

This research can only provide a small puzzle piece to considerations on executive-judiciary relations and judicial reform within the wider framework of studies on democratisation. Possible further research on this topic could include interviews conducted with stakeholders from relevant executive and judicial organs as well as experts and civil society representatives in order to further strengthen the contextualisation of the statements and actions analysed as part of this research paper and to further investigate particularly those categories for which only few relevant data points were collected. Beyond the High Anti-Corruption Court, the inclusion of international insulation for the High Council of Justice, the High Qualification Commission of Judges and, possibly, for the Constitutional Court could provide grounds for the inclusion of Ukraine in multi-state comparative studies in this area. The theoretical construct, tentatively developed for the purposes of this paper, could provide a foundation for further theoretical

considerations that could allow for further development on the way we can learn about executive-judiciary relations in a democracy.

Since the Revolution of Dignity, Ukraine has embarked on a wave of reforms, including in the judicial sector. International insulation has ended up becoming a central aspect in its judicial reform efforts, not least in order to fulfil requirements set by international partners to assist Ukraine in its path to European integration. The full-scale war of aggression notwithstanding, Ukraine remains steadfast and resolute in its endeavour to ensure the country is governed by the rule of law. While it may be yet too early to say that Ukraine has indeed cut the Gordian knot of judicial reform, the first indications, as investigated in this research paper, seem to indicate that Ukraine is on the path of bringing its executive-judiciary relations closer to what they are ideally like in a democracy.

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Appendix – Coding results

The following table outlines the results of the coding undertaken for the purposes of this paper. The table offers an insight into the code labels used for each of the benchmark elements for ideal executive-judiciary relations in a representative liberal democracy that are developed in the Conceptual framework section of this paper. This is complemented by a brief description of each code label, an example quote attributed to that code label as well as the number of coded segments for the two cases analysed in this paper – the District Administrative Court of Kyiv (DACK) and the High Anti-Corruption Court (HACC).

In total, 75 individual pieces of data were identified as relevant for the analysis of the DACK and 78 individual pieces of data for the HACC. It should be noted that, since the categories of the ideal model are overlapping (see page 29), some pieces of data were deemed appropriate for consideration for coding in more than one category.

	Code label	**Description of code**	**Example quote**	**No. of coded segments for the…**	
A1: The judiciary employs restraint with regards to actions and decisions that affect other judicial organs or political organs and government policy.				DACK	HACC
1.	Employs restraint	The judicial organ refrains from actions that could affect other judicial or executive organs or government policy or their public perception. The judicial organ does not make comments that could be seen to do so.	"Cannot give any comments on [possible cases against Poroshenko]… this would be inappropriate"	1	28
2.	Employs little to no restraint	The judicial organ undertakes actions and makes statements that could (intentionally or incidentally) affect other judicial or executive organs or government policy or their public perception.	„[calls for] the initiation of impeachment procedures against former President [Poroshenko]"	17	1

A2: The judiciary ensures that judicial decisions are perceived as reasonable and as resulting from the correct application of the law.				DACK	HACC
1.	Judicial decisions perceived as reasonable	In the eye of the public and particularly organisations from civil society and the international community, decisions by the judicial organ are perceived as reasonable and as a result of the correct application of the law.	"[the court's] proactiveness in the application of the law"	0	9
2.	Judicial decisions perceived as unreasonable	In the eye of the public and particularly organisations from civil society and the international community, decisions by the judicial organ are not perceived as reasonable and as a result of the correct application of the law.	"[DACK judges are] conspiring to use their position for political gain"	8	1

A3: The judiciary is (perceived as) impartial and independent.				DACK	HACC
1.	Impartial and independent	The judicial organ's statements are perceived as reflecting impartiality and independence. This includes perceptions of a lack of prejudice and of seemingly illicit links or relations with other state organs.	"The HACC is not part of the anti-corruption system [together with NABU and SAPO], but belongs to the judiciary branch of power"	1	30
2.	Partial and/or not independent	The judicial organ's statements are not perceived as reflecting impartiality and independence. This includes perceptions of instances of prejudice and of seemingly illicit links or relations with other state organs.	„[Poroshenko could] absolutely [be arrested]"	14	0
A4: The judiciary raises points of criticism towards the executive in a climate of mutual respect.				DACK	HACC
1.	Respectful and constructive criticism	The judicial organ's remarks of criticism towards the executive are marked by constructiveness and respect for the power constitutionally attributed to the executive.	"the interaction with President Zelensky was a very paradigmatic example of interaction between state authorities"	0	13
2.	Disrespectful and	The judicial organ's remarks of criticism towards the executive are	„NABU is a circus body"	20	0

	unconstructive criticism	marked by unconstructiveness and an undermining of the power constitutionally attributed to the executive.			
B1: The executive promotes legal/legislative certainty in its judicial policies.				DACK	HACC
1.	Promotes legal/legislative certainty	The executive ensures that legislative proposals and enacted bills are seen as enhancing the independence and the work of judicial organs. Legislative proposals and bills are not seen as undermining the functioning of judicial organs.	"[this law will] strengthen judicial independence and raise the level of respect towards judicial organs and proceedings"	0	6
2.	Fails to promote legal/legislative certainty	The executive fails to ensure that legislative proposals and enacted bills are seen as enhancing the independence and the work of judicial organs. Legislative proposals and bills are seen as undermining the functioning of judicial organs.	"Poroshenko publicly resisted [the creation of the HACC]"	11	9

B2: The executive raises points of criticism towards the judiciary in a climate of mutual respect.				DACK	HACC
1.	Respectful and constructive criticism	The executive organ's remarks of criticism towards the judiciary are marked by constructiveness and respect for the power constitutionally attributed to the judiciary.	"We haven't yet managed to resolve the question of [the HACC's] jurisdiction"	0	4
2.	Disrespectful and unconstructive criticism	The executive organ's remarks of criticism towards the judiciary are marked by unconstructiveness and an undermining of the power the power constitutionally attributed to the judiciary.	„[DACK is among] leaders of socialist corruption competition"	4	0
B3: The executive employs restraint with regards to actions that are perceived as exerting pressure on judicial institutions to make specific decisions.				DACK	HACC
1.	Employs restraint	The executive organ refrains from actions that could affect judicial organs or their public perception. The executive organ does not make comments that could be seen to do so.	"I know I [as president] can't tell [the HACC] what to do"	1	2
2.	Employs little to no restraint	The executive organ undertakes actions and makes statements that could (intentionally or incidentally) affect judicial	"[The DACK uses] the administrative justice system as a tool for seizing power"	4	3

		organs or their public perception.			
B4: The executive engages in consultations with the judiciary regarding (legislative) changes to the judiciary system.				DACK	HACC
1.	Consultations with the judiciary (seem to) take place	The views of the judicial organ with regards to a particular policy are taken into account and/or reflected in the judicial policies implemented.	„the [HACC] addressed the Ministry of Justice …with a request to…"	0	2
2.	Consultations with the judiciary do not (seem to) take place	The views of the judicial organ with regards to a particular policy are not taken into account and/or reflected in the judicial policies implemented.	„trust in the DACK is lost"	10	0