The Ukrainian Constitution: Interpretation of the Citizens' Rights Provisions

Richard C.O. Rezie

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THE UKRAINIAN CONSTITUTION: INTERPRETATION OF THE CITIZENS' RIGHTS PROVISIONS

Richard C.O. Rezie *

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INTRODUCTION AND GENERAL SCOPE

The fall of the Soviet Union allowed Ukraine to become independent for the first time since its short lived independence during World War I.1 Within a few years of declaring its independence, Ukraine adopted a new Constitution on June 28, 1996.2 Ukraine’s new Constitution has provisions which purport to protect the rights of a Ukrainian citizen.3 These right-granting provisions, however, are almost uniformly subject to the adoption of future laws in the interest of the rights and freedoms of others, and also the authority of the state to protect public health, order, or welfare.4 One key example is the individual right to freedom of association in political parties and organizations.5 This right is limited by restrictions established by Ukrainian law in the interest of national security, public order, public health, and the rights and freedoms of others.6 These rights-limiting provisions which may be used to limit or remove previously granted rights under the laws of the Ukraine are often termed “claw back” provisions.7 In view of such “claw back” provisions, the main thrust of this Note is to explore, and possibly predict, the future effectiveness of the citizens’

3 See id. at ch. II.
4 See id. at ch. II.
5 See id. at ch. II, art. 36.
6 See id. at ch. II, art. 37.
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rights provisions within the Ukrainian Constitution. In particular, this Note provides a guide for those who may argue for an expansive reading of the rights provisions and a consequent narrow reading of the claw back provisions before the Constitutional Court of Ukraine.

To arrive at an authoritative interpretation of the claw back provisions, one must determine what Ukrainian agency or court will interpret the Constitution and what such body may use to accomplish this task. Recent legislation in Ukraine gives the Constitutional Court of Ukraine (Constitutional Court) sole jurisdiction to interpret the Ukrainian Constitution (Constitution) and decide whether or not a law is, indeed, constitutional. The Constitutional Court may interpret the Constitution using a number of factors. However, because the Constitution is internally inconsistent, the Constitutional Court cannot use the plain language of the Constitution. Instead, the Constitutional Court may use Ukraine's history to divine what was intended when the Constitution was written as well as what was intended to be avoided. Another possibility for interpreting the Constitution is using the political consensus which led to the Constitution's passage. Additionally, conditions may also effect constitutional interpretation in a social or public opinion context so as to facilitate the public good economically or socially. The Constitutional Court may use all of these factors as the U.S. Supreme Court does when interpreting the American Constitution or may use some or none of these factors, choosing instead the plain meaning of the Constitution.

9 Using the plain language is, in itself, an interpretive decision and is virtually impossible due to the Constitution's contradictory language. If the plain language, with no other factors, is used by the Constitutional Court, it would be intellectually dishonest and a betrayal of the true import of the Constitution. See generally Futey, supra note 7, at 29.
11 See id. (using the political consensus which led up to the adoption of the American Constitution to interpret the American Constitution).
12 Compare Lochner v. New York, 198 U.S. 45, 53 (1905) (holding that one does have a fundamental right to liberty of contract under the U.S. Constitution) with West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (holding that one does not have a fundamental right to liberty of contract under the U.S. Constitution).
13 See Martin, 14 U.S. at 324-26. See generally Lochner, 198 U.S. 45 (discussing the fundamental right to contract); see also generally West Coast Hotel Co., 300 U.S. 379 (balancing the interests between employer and employee).
In sum, this Note is meant to serve as a guide for those who wish to assure that the rights granted in the Ukrainian Constitution are not degraded. I hope to provide a basic framework that supports an expansive interpretation of the Constitution's citizens' rights provisions before the Constitutional Court. In Part I, I will discuss the historical basis of both the citizens' rights provisions and the claw back provisions. Part I will also show why the citizens' rights provisions were included in the Constitution and what they were intended to prevent: in short, why history mandates a broad interpretation of citizens' rights while the claw back provisions allow only the most narrow encroachments on the rights granted. Part II will discuss the political history of the inclusion of the citizens' rights provisions and claw back provisions. The intent of those who drafted the Constitution and the political compromises they made to gain passage of the Constitution will also be discussed. Part III will describe the function of the Constitutional Court, its legislatively mandated procedures, and the appeals process. It will also describe the various interpretive frameworks which other national and supra-national courts have developed to interpret similar provisions. In concluding, Part IV will first discuss the economic threats to Ukrainian sovereignty and democratization in Ukraine. Political threats to an unbiased interpretation of the Constitution, both external and internal, will also be evaluated. I will conclude by advocating the interpretive method which the Constitutional Court should embrace and discussing whether Ukraine will proceed on the road to democracy or backtrack down the path to authoritarianism.


A court which interprets constitutional provisions may use the nation's history and how this led up to the adoption of certain constitutional provisions to determine what those constitutional provisions were intended to allow or limit when adopted. Commentators of Ukraine law and history have advocated that the Constitutional Court should use Ukraine's history to aid in its interpretation of the Constitution due to the effect of history on the citizens' Constitutional rights

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provisions and the apparent intent of the Constitution to prevent future governmental excesses such as occurred under Soviet Rule.\textsuperscript{16}

In the 20\textsuperscript{th} century, Ukraine's history reveals an intent to follow "Western" values and ideology.\textsuperscript{17} Prior to the 1990s, Ukraine was independent only during one other period this century, namely in the closing days of World War I.\textsuperscript{18} The path that the Ukraine chose at that

\textsuperscript{16} See generally Futey, \textit{supra} note 7, at 29; ALEXANDER J. MOTYL, DILEMMAS OF INDEPENDENCE: UKRAINE AFTER TOTALITARIANISM (1993) (examining Ukraine's troublesome Soviet past and suggesting ways in which it can be overcome); SUBTELNY, \textit{supra} note 1.


Western ideals and values referred to throughout this document refer to the general principles of human rights, limited government, and a civil society which embraces rule of law which are generally acknowledged in Western Europe and North America. See Martha Bohachevsky-Chomiak, \textit{The Directory of the Ukrainian National Republic, in THE UKRAINE, 1917-1921: A STUDY IN REVOLUTION} 82, 94-95 (Taras Hunczak ed., 1977).

\textsuperscript{18} See SUBTELNY, \textit{supra} note 1, at 355-79; John S. Reshetar, \textit{The Communist Party of the Ukraine and Its Role in the Ukrainian Revolution, in THE UKRAINE, 1917-1921: A STUDY IN REVOLUTION} 159, 159, 162, 180 (Taras Hunczak ed., 1977) (stating that the Ukrainian Communist Party originally had little ethnic Ukrainian content and that Ukraine was oppressed by Russia which had little interest in Ukrainian independence); Jaroslaw Pelenski, \textit{The Origins of the Official Muscovite Claims to the "Kievan Inheritance,"} 1 \textit{HARV. UKRAINIAN STUD.} 29 (1977) (stating that Russia claims that Ukraine is part of Russia). See generally Alexander J. Motyl, \textit{The Foreign Relations of the Ukrainian SSR}, \textit{HARV. UKRAINIAN STUD.}, March 1982, at 62, 63 (1982) (arguing that Ukraine was not truly independent during Soviet rule); IVAN L. RUDNYTSKY, \textit{The Role of Ukraine in Modern History, in ESSAYS IN MODERN UKRAINIAN HISTORY} 11 (Peter L. Rudnytsky ed., 1987); IVAN L. RUDNYTSKY, \textit{Observations on the Problem of "Historical" and "Non-historical" Nations, in ESSAYS IN MODERN UKRAINIAN HISTORY} 37 (Peter L. Rudnytsky ed., 1987) (discussing the relationship among political independence, the existence of a politically conscious representative upper class, and the completeness or incompleteness of nations).
point in history was clearly pro-Western and opposite to the anti-Western path that Russia and the Union of Soviet Socialist Republics (USSR) chose. 19 Although the evolution of a rule of law and democracy in Ukraine were halted by the defeat of the Ukrainian National Republic after World War I, this evolution was reborn in the Soviet thaw of 1960-1980. 20


tion) included provisions granting rights to citizens and provisions which limited the authority of the government.\textsuperscript{22} The Hetman,\textsuperscript{23} for instance, could not use his position for personal revenge or violate the Orlyk Constitution when it seemed expedient for him to do so.\textsuperscript{24} Rather, the Ukrainian government was as bound by the provisions of the Orlyk Constitution as were the citizens.\textsuperscript{25} More recently, Drahomanov's (1884) draft Constitution provided extensive protection for speech, and the press, and additionally prevented illegal searches allowing limitations on these rights only in time of war.\textsuperscript{26} The contrast is stark between these early principles and the Ukrainian Constitution under the USSR where, due to political and military reality, the government was not bound by any provisions which granted rights and liberties to citizens due to political and military reality.\textsuperscript{27}

The current 1997 Ukrainian Constitution seemingly attempts to prevent Soviet-style governmental control and abuse of the rights of citizens enumerated in the Constitution.\textsuperscript{28} One such abuse in the Soviet system was rule by the Central Committee of the Communist Party rather than the elected Supreme Soviet.\textsuperscript{29} In the Soviet system, the government was controlled by the Communist Party structure which mirrored the elected government structure.\textsuperscript{30} Article 37 of the current 1997 Constitution specifically prohibits political party struc-

\begin{itemize}
\item \textsuperscript{22} See \textit{Uhoda ta Konstituzya Pylypa Orlyka} art. 6, 7 (1710) (Ukr.).
\item \textsuperscript{23} Equivalent of an elected Prime Minister or President. \textit{See generally Subtelny, supra} note 1, at 110.
\item \textsuperscript{24} See \textit{Uhoda ta Konstituzya Pylypa Orlyka} art. 6, 7 (1710) (Ukr.).
\item \textsuperscript{25} See id.
\item \textsuperscript{26} See Mykhailo Drahomanov, \textit{Draft Constitution for the Ukrainian Society in the Free Union}, in \textit{Towards an Intellectual History of Ukraine: An Anthology of Ukrainian Thought from 1710 to 1995}, at 171, 172-73 (Ralph Lindheim & George S.N. Luckyj eds., 1996) (stating that citizens had the right to resist illegal government acts).
\item \textsuperscript{27} See \textit{generally} Futey, \textit{supra} note 7, at 29.
\item \textsuperscript{28} See \textit{generally} id.
\item \textsuperscript{29} See \textit{Subtelny, supra} note 1, at 386, 510-12; Motyl, \textit{supra} note 18, at 67 (stating that the Ukrainian Communist Party was an instrumentality of the Russian Communist Party in 1917).
\end{itemize}
tecture from mirroring the structure of the government. The apparent intent of this article is to prohibit any political party from forming its own government inside the elected government of Ukraine. Thus, its operation prohibits a Soviet-style government within Ukraine.

In the 1930s, Ukraine was subjected to illegal acts of the government of the USSR, most notably at Vinnytsia and during the engineered terror-famine of 1932-1933. Vinnytsia, a city in central Ukraine, was one of the cities where the NKVD conducted mass executions and burials. The corpses interred at Vinnytsia were exhumed by German forces during World War II and autopsies were performed.


The NKVD is the descendant, administratively, of the Cheka and the forerunner of the KGB. See CHRISTOPHER ANDREW & OLEG GORDIEVSKY, KGB: THE INSIDE STORY, ix (1990). All these agencies are organs of state security of the former USSR. See id; SUBTELNY, supra note 1, at 365, 374, 420, 461, 479, 488-90.
by international human rights groups. Many of the corpses were found with court documents on their persons sentencing them to terms of years in prison rather than death. This evidences the lack of rule of law in the USSR as court decisions were ignored by governmental agencies, most notoriously the NKVD.

The implementation of the terror-famine in Ukraine, 1932-1933 further evidences the absence of a rule of law. The terror-famine was an engineered famine in which five to nine million persons were starved to death in an attempt to force collectivization upon Ukrainian farmers. Such acts by the government were prohibited by the citizens’ rights provisions in the Constitutions of both the Ukrainian SSR and the USSR of the time. As with Vinnytsia and other crimes of the USSR’s government, these provisions were simply ignored.

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35 See id. at 168-210 (describing the items found with the NKVD’s victims).

36 See Anna M. Kvyzmi, Rule of Law and Legal Reform in Ukraine: A Review of the New Procuracy Law, 34 HARV. INT’L L. J. 611, 611 (1993) (discussing Soviet legal theory and how laws were not followed or enforced due to political expediency).


38 See Dolyna, supra note 32, at 120 (describing deaths from the engineered famine in Ukraine 1932-1933 at five to six million).

Russia has a historical lack of respect for courts and their judicial decisions. Although a full discussion of such conduct is beyond the scope of this Note, the incidents which are previously recounted here clearly support the lack of the rule of law in the USSR. Soviet law operated according to political expediency. In contrast, the 1997 Ukrainian Constitution prohibits such acts against the rule of law by the government in Article 60 and establishes rule of law in Ukraine. Article 60, once again, shows the effect of history on Ukraine’s current Constitution and the intent of the framers to limit the power of the sovereign (government of Ukraine).

Political reprisals and mass murder which were common in the USSR are prohibited by the current Constitution in Articles 27-29. The prohibition on such acts of the government evidences an intent to stop any carry-over of the USSR’s historical practices to the contemporary government of Ukraine.

A portion of the political ideology of the USSR, namely socialism (rather than international communism), remains ingrained in


See MAURO CAPPELLETTI & WILLIAM COHEN, COMPARATIVE CONSTITUTIONAL LAW 21-22 (1979) (stating that early Soviet Constitutions plainly rejected judicial review opting for political control of constitutional interpretation; it was not until 1977 that Soviet Constitutions were amended to recognize constitutional supremacy); TSEPOV, supra note 30, at 411 (arguing that the Soviet system ignored the very notion of human rights and the rights enumerated in the USSR Constitutions and the Republics’ Constitutions were never implemented).


See Kvzmik, supra note 36, at 611 (stating that socialist law differs from rule of law in that it is not to limit government but rather to facilitate political ends).

See id. at 611.

See UKRAYNSKA KONSTITUIZYA ch. II, art. 60 (1996) (Ukr.).

Such intent to limit sovereign immunity is also demonstrated by the Constitutional provisions which allow citizens of Ukraine to recover monetary damages from the government when their rights are violated. See id. art. 56.

See id. art. 27-29.

See Futey, supra note 7, at 29.
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Ukraine and embodied in the Constitution. Social welfare rights in the Constitution include: (1) the right to work; (2) the right to rest; (3) the right to be provided for when disabled; (4) the right to housing; (5) the right to an acceptable standard of living; (6) the right to protection of health and; (7) the right to education. These are termed positive rights as they require the government to do something, rather than prohibiting its action, which would consequently be termed negative rights. These rights demonstrate the socialist past of Ukraine under the USSR and socialism's current public appeal in Ukraine, once again demonstrating the effect of history on Ukraine’s Constitution.

Environmental disasters during the Soviet period, such as Chernobyl, also have a current effect on Ukraine’s Constitution. Environmental protection is held to be a right in Article 50. Chernobyl was a watershed event in Ukraine’s political development in that many Ukrainians began questioning Soviet rule after the catastrophe and whether the central government of the USSR actually cared about the plight of its citizens—specifically Ukrainians. Environmental protection provisions in the Constitution evidence not only a limiting intent on the government and on other citizens’ activities but also a mistrust of the government.

Historically, Ukraine has been a pro-Western nation which has favored citizens’ rights and limitations on governmental powers. Ukraine’s national identity is partially defined by opposition to Russia

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48 See id. Ukraine’s population was decimated by mass murders of the intelligentsia and the flight of the elites who were so endangered. See ZINOVIA SLUZHYNSKA, HUMAN RACE IN UKRAINE 100-02 (1995). Some have argued that the current population of Ukraine has been reduced to, largely, those who need and support such protection. See id. It is also argued that those who support capitalism and democratization are mostly dead or in foreign lands leaving Ukraine without a democratic intelligentsia to lead it into the future. See id.


50 See Futey, supra note 7, at 30.


53 See UKRAYNSKA KONSTITUIYA ch. II, art. 50 (1996) (Ukr.).

54 See id. art. 43, 45-49, 53; SOLCHANYK, supra note 52.

55 See SOLCHANYK, supra note 52, at xiii.

56 See UHODA TA KONSTITUIYA PYLYPA ORLYKA art. 6, 7 (1710) (Ukr.); LIAH GREENFELD, NATIONALISM: FIVE ROADS TO MODERNITY 191-274 (1992).
and is, as such, pro-Western. In fact, Ukraine became anti-Russian when Russia broke with its Westernization program during the Czarist era, previous to which Ukrainians had been among the leading proponents of Russian Westernization. Russian national identity after the Russian revolution is best summarized by Liah Greenfield:

'They fear not laws; right gives way to force, and justice lies conquered beneath the aggressive sword.' The Scythians were the negation of civilization, of all Rome stood for, the embodiment of the forces of darkness... Only in utter exasperation [about Russia's lack of national identity] could [the Russian intelligentsia of 1917] claim the name of this savage tribe.

Ukraine, therefore, has a national identity which supports Western thought, civil liberties, and limits on governmental authority.

Ukraine's pro-Western national identity is further indicated by the similarity between many citizens' rights provisions in its Constitution and the provisions in the U.S. Constitution which limit governmental power and provide rights for citizens. The negative rights provisions in Ukraine's Constitution which are based on its pro-Western national identity, history, and historical animosity toward Russia include: (1) the rights which are enumerated are not an ex-
haustive list of citizens' rights; (2) citizens have the right to equal protection under the law; (3) the inviolability of one's home; (4) the right to privacy in one's mail and correspondence; (5) the right to freedom in one's personal life; (6) the right to freedom of movement within Ukraine and to leave Ukraine; (7) the right to freedom of speech; (8) the right to freedom of religion; (9) the right to freedom of association; (10) the right to vote; (11) the right to assemble peacefully; (12) the right to engage in entrepreneurship, own property, and protect one's intellectual property; (13) the right to strike; (14) the prohibition on enacting retroactive laws. The similarity between provisions in Ukraine's Constitution and those in the U.S. Constitution as interpreted by the U.S. Supreme Court demonstrate an intent to regain Ukraine's Western national identity and historically Western ideology, as well as to set Ukraine apart from Russia in terms of national identity and history, especially during the Soviet period. Moreover, the Constitution seeks to create a civil society which was thought to be "capitalist subterfuge" during the Soviet period. Indeed, civil society did not even exist in the pre-1989 USSR.


See UKRAYNSKA KONSTITUIZIYA ch. II, arts. 21, 22, 24, 30-36, 38, 39, 41, 42, 44, 58 (1996) (Ukr.).


See Yevdokymov, supra note 20, at 3.

See MOTYL, supra note 16, at 60.
II. CONTEMPORARY POLITICAL AND IDEOLOGICAL BASIS OF THE CITIZENS’ RIGHTS PROVISIONS AND THE CLAW BACK PROVISIONS

The framers’ intent is appropriately used by courts to interpret a constitution. Ukraine, prior to the 1997 Constitution’s adoption, experienced a proliferation of parties, perhaps in response to the end of Soviet one-party rule, including the Socialist party, the Peasant’s party, the Green party, the Nationalist parties, and the Christian Democrats.

The number of parties in post-independence Ukraine includes over thirty-eight registered parties in 1996. Although the Worker’s Party and the National Democratic movements were key factors in Ukraine’s transformation up until independence, four main groups of parties are most influential today. These groups are the Communists (which is the largest) and the Socialists (including the Peasant Party and the Agrarian Parliamentary Faction), who compose the leftist parties, the Ukrainian National Assembly and Congress of Ukrainian Nationalists, who can be described as rightists, and the center-right Na-

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67 The author considers it important, when considering Ukraine’s contemporary political environment, that Russia has recognized Ukraine, alleviating some of Ukraine’s fear of invasion and external interference. See Roman Szporluk, The National Question, in AFTER THE SOVIET UNION: FROM EMPIRE TO NATIONS 84, 95 (Timothy J. Colton & Robert Legvold eds., 1992) (stating that President Yeltsin recognized Ukrainian independence as early as November 1990).

68 See, e.g., Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 328-29 (1816) (stating what the framers of the U.S. Constitution intended and basing the U.S. Supreme Court’s interpretation of the applicable U.S. Constitutional provisions on the framers’ intent).


71 See generally Rusnachenko, supra note 69.

72 See Kuzio, supra note 70, at 123-25.
The Rukh party — which was powerful during Ukraine's independence movement — has a diminished role today.\textsuperscript{74}

Although political parties have proliferated, apathy and mistrust of parties and the government is common among Ukrainians.\textsuperscript{75} Rukh's platform of bringing Ukraine into line with the U.N. Universal Declaration of Human Rights\textsuperscript{76} is popular with Ukrainians — who continue to favor Western political ideas\textsuperscript{77}. The main impediments to the citizenry forcing democratization and libertarian reforms upon the government were, and continue to be, the lack of confidence in both the president and parliament\textsuperscript{78} coupled with the fragmentation of political parties.\textsuperscript{79}

Ukrainians embraced independence by a vote of over ninety percent\textsuperscript{80} and yet many never read the published drafts of the 1997 Constitution.\textsuperscript{81} This created a political disagreement between Moroz Oleksandr, the leader of the Socialist Party, and President Leonid Kuchma over how the Constitution should be ratified.\textsuperscript{82} President Kuchma favored popular ratification while Moroz favored parliamentary ratification, arguing that the people would ratify anything.\textsuperscript{83} The dispute came to a head when President Kuchma signed a decree fixing September 25, 1997 as the date for a national referendum on the Con-
Despite the decree, the Verkhovna Rada (Rada), the Ukrainian Parliament, adopted the Constitution two days after Kuchma signed the decree calling for a national referendum. The Constitution was passed in the Rada with virtually no support from the Communists. In fact, the Communists unsuccessfully attempted to block the Constitution’s passage entirely.

The debates which led up to the Constitution’s adoption included all parties in some way, but the most important Constitutional drafts were submitted by the Communist faction of the Rada, the Nationalists, and the Christian Democrats. Although the Communist and Peasant’s party initially withdrew from the Conciliation Committee which was officially drafting the Constitution – the Socialists participated only as observers due to a dispute regarding whether the Rada should be bicameral – these parties were lured back to the table by President Kuchma’s promise of a unicameral Rada.

The fall of the Soviet Union created an atmosphere which was conducive to the growth of “new” parties or, more precisely, the growth of parties other than the Communist party and its descendants which all wished to have input in the drafting of the Constitution.

85 The legislative branch of the Ukrainian government is composed of democratically elected representatives who are chosen on a local district basis. See Barabash, supra note 69.
86 See id. at 25.
87 See id. at 25 (describing Communist support for the old Soviet Constitution rather then the proposed Constitution).
89 See Visnyk, Comparative Characteristics of Various Drafts of the New Constitution of Ukraine Prepared by the Constitutional Commission and Political Parties, 1996 PARLIAMENTARY DEVELOPMENT PROJECT 1 (charting and distinguishing the characteristics of drafts written by the different political parties and the Constitutional Commissions).
90 See Ukraine, E. EUR. CONST. REV., Spring-Summer 1996, at 27, 28. Presumably the parties which refused to participate without the promise of a unicameral Rada felt that such organization would maximize the possibility that they would control the Rada. See Zamyatin, supra note 78, at 21. They were probably persuaded by the tradition of a unicameral legislature, or feared a bicameral legislature would lead to federalization of Ukraine and a loss of independence. See id.
91 See KUZIO & WILSON, supra note 80, at 18-41.
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One of the notable parties which emerged after the fall of the USSR is the Green party.\(^{92}\) The Green party has its genesis in the Chernobyl disaster and the other environmental catastrophes of the Soviet period.\(^{93}\) As the name implies, the Green party's interests are centered around environmental protection.\(^{94}\) The Green Party's impact in the Constitutional drafting process can be seen in the environmental protection clause in the Constitution.\(^{95}\) The Nationalist parties, although weakened by some seventy years of international communist rule, still exist and are popular in western Ukraine.\(^{96}\) These Nationalist parties are not national socialists but rather democratic in their ideology.\(^{97}\) Christian Democrats have also created a party.\(^{98}\) Indeed, Christianity, although never truly exterminated in Ukraine, has experienced a popular re-birth since religious freedom was established.\(^{99}\)

One of the largest problems encountered during the drafting of the Constitution was a lack of consensus.\(^{100}\) When one compares the three most important draft proposals of the Constitution (Nationalist, Communist faction of the Rada, and Christian Democrat proposals) with the current 1997 Constitution, it appears that the Constitution is one of compromise.\(^{101}\) Such deduction may lead to the conclusion that items not chosen were intended to be excluded from the Constitution.

When one compares the various drafts of the Constitution proposed by the Ukrainian political parties and the language adopted, clear choices by the Rada are evident.\(^{102}\) Overall, the draft proposed by the Communist faction of the Rada (which is similar – in major


93 See SOLCHANYK, supra note 52, at xix-xx.

94 See id.

95 See UKRAYNSKA KONSTITUZIYA ch. II, art. 50 (1996) (Ukr.).

96 See WILSON, supra note 32, at 152 (noting that Ukrainian liberation struggles have served to mobilize nationalists in western Ukraine).

97 See id. at 148. See generally Rusnachenko, supra note 69 (discussing the relationship between the Workers' and National Democratic Movements in Ukraine).

98 See Visnyk, supra note 89.

99 See SUBTELNY, supra note 1, at 193-94, 400-02, 519-20, 541.


101 See Visnyk, supra note 89.

102 See id.
parts identical — to the USSR Constitution) has been rejected.\textsuperscript{103} The drafts proposed by the Congress of Ukrainian Nationalists and the Christian Democratic Party (which are substantially similar) were adopted virtually verbatim.\textsuperscript{104} As the drafts of the parties which favor personal liberty and democratic ideals were the basis of the Constitution, it is clear that their intent, even if not stated eloquently, should be the basis of Constitutional interpretation. In short, the framers’ intent was democratic and favored individual freedom.

III. THE CONSTITUTIONAL COURT’S ROLE IN INTERPRETING THE CONSTITUTION\textsuperscript{105}

Ukraine’s Constitution purports to protect virtually all the rights which the U.S. Constitution does by direct statement or judicial interpretation.\textsuperscript{106} Guaranteed rights include the negative provisions which prohibit the government from acting, such as freedom of speech, religion, assembly, personal affairs, movement, freedom to strike, own property, protect one’s intellectual property, conduct entrepreneurial activity, vote, and the right to privacy in one’s correspondence and dwelling place.\textsuperscript{107} The Constitution also prohibits the government from subjecting a citizen to double jeopardy, retroactive laws, and providing unequal protection under the law.\textsuperscript{108} Moreover the Constitution states that the enumeration of rights is not exhaustive and may not be degraded.\textsuperscript{109}

A. Procedural Issues Involved with Bringing a Case Before the Constitutional Court

The Constitutional Court of Ukraine is the sole interpreter of the Ukrainian Constitution\textsuperscript{110} and its decisions are binding upon the par-

\textsuperscript{103} See id.
\textsuperscript{104} See id.
\textsuperscript{105} See generally, e.g., ‘Visnyk Konstytutsiynoho Sudu Ukrainy’ Bimonthly Sees the Light, AMERICA, Nov. 1, 1997, at 11 (stating that Visnyk Konstytutsiynoho Sudu Ukrainy is the bulletin of the Constitutional Court).
\textsuperscript{106} Compare UKRAYNSKA KONSTITUIZA ch. II (1996) (Ukr.) with U.S. CONST. amend. I-X.
\textsuperscript{107} See UKRAYNSKA KONSTITUIZA ch. II, arts. 21, 22, 24, 30-36, 38, 39, 41, 42, 44, 51, 52, 54, 58, 61-63 (1996) (Ukr.).
\textsuperscript{108} See id. at arts. 24, 58, 61.
\textsuperscript{109} See id art. 22.
\textsuperscript{110} There is some dispute as to whether all courts or just the Constitutional Court may interpret the Constitution. See Analysis of the Draft Law on the Judicature for
ties and throughout Ukraine prospectively. The Constitutional Court may declare statutory acts as well as presidential edicts unconstitutional and thereby nullify their operation. Ukraine has created a concentrated system of judicial review in which only one court is able to interpret the Constitution. The enabling legislation for the Constitutional Court came into effect on October 16, 1996 and it began accepting cases on January 1, 1997.

The Law of Ukraine on the Constitutional Court of Ukraine (Law on the Constitutional Court) does not permit private citizens to file appeals before the Constitutional Court. A private citizen may,

Ukraine, A.B.A. CENT. AND E. EUR. L. INITIATIVE, June 20, 1997, 3, 8. Ivan Tymchenko, Chairman of the Constitutional Court (equivalent to U.S. Chief Justice), stated that the Constitutional Court will interpret the Constitution alone and the Supreme Court of Ukraine will have to stay proceedings during the process. See Roman Woronowycz, "Ukraine's Court System: The Constitutional Court," UKRAINIAN Wkly., Mar. 2, 1997, at 3.

See Futey, supra note 8, at 15, 16, 17. The Constitutional Court's jurisdiction is limited to interpreting the Constitution. See id. at 16. Courts of general jurisdiction, of which the highest court is the Supreme Court of Ukraine, have jurisdiction over all other matters. See id. The Crimean Constitution is part of Ukrainian law and subject to the Constitution. See Law on Crimean Constitution is Approved, CURRENT DIGEST OF THE POST-SOVIET PRESS, Apr. 17, 1996, at 22 (condensing and translating Vladimir Skachko, SEVODNYA, Mar. 23, 1996, at 4).


See ALLAN R. BREWER-CARIAS, JUDICIAL REVIEW IN COMPARATIVE LAW 185 (1989) (defining a concentrated system of judicial review). Ukraine may, however, have a mixed system as the Ukrainian Supreme Court is empowered to interpret the decisions of the Constitutional Court. See generally id. at 265-326; Law of Ukraine on Statutory Legal Acts of Ukraine art. 133, 138 (1995) (Ukr.), translated in Law of Ukraine on Statutory Legal Acts of Ukraine, 1995 PARLIAMENTARY DEVELOPMENT PROJECT 1 (stating that the Constitutional Court is "to determine the constitutionality of explanatory acts" relating to the status of Ukrainian citizens).

See Futey, supra note 8, at 15, n.3; Constitutional Court Established, UKRAINIAN LEGAL & ECON. BULL., Nov. 1996, at 5. The Law of Ukraine on the Constitutional Court of Ukraine was drafted and passed by the Rada. See Futey, supra note 8, at 15. The law contains a number of unclear and repetitive provisions as well as arguably inadequate protection of citizens' rights. See Analysis of the Draft Law on the Judicature for Ukraine, supra note 110, at 3.

See Futey, supra note 8, at 18. The standing commissions of the Rada can apply to the Constitutional Court for opinions. See Law of Ukraine on the Standing Commissions of the Verkhovna Rada of Ukraine, art. 14 (1995) (Ukr.), translated in The
however, be able to bring a case before the Constitutional Court by filing or defending an action in a court of general jurisdiction, in which case the judge would be responsible for filing an appeal with the Constitutional Court if issues requiring Constitutional interpretation were presented. For instance, if a criminal case involved an issue of privacy rights (i.e. police search), the court of general jurisdiction would file an interlocutory appeal with the Constitutional Court and the case would be halted until the constitutional issue was resolved.

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A citizen may also directly petition the Constitutional Court under Article 42 of the Law on the Constitutional Court if that person’s rights are violated — or may be violated — by a law which is unconstitutional. This route is by petition, not appeal from a decision. Thus, in essence, a citizen may file a petition in regard to a law which is never enforced against that citizen. Due to the concentration of all constitutional interpretive power in the Constitutional Court, the Court has been burdened with an enormous case load with over 1,000 petitions filed and a number of appeals filed in the spring of 1997.

The speed at which the Constitutional Court can decide these cases is questionable. As a result, the length of time that must be allocated for important decisions is unclear. The courts of general ju-


116 See Futey, supra note 8, at 19 (citing The Law of Ukraine on the Constitutional Court).

117 See Woronowycz, supra note 110, at 3.

118 See id. at 3.

119 See Futey, supra note 8, at 21 (citing The Law of Ukraine on the Constitutional Court).

120 See id. at 22.

121 Appeals are, basically, discretionary although it is unclear how much latitude the Constitutional Court has to refuse cases over which it clearly has jurisdiction. See id. at 21, 22. Discretionary means that the Constitutional Court has the power to refuse cases not within its jurisdiction (which is limited to violations of the Constitution and, especially relevant here, laws which violate citizens’ rights under the Constitution) and possibly even cases within its jurisdiction. See id. In concluding that the Constitutional Court has jurisdiction, it must conduct an interpretive act. One example would be a petition for the violation of a citizen’s right to freedom of speech, where the Constitutional Court would have to determine that the law which was in question was (at least arguably) unconstitutional prior to having jurisdiction. See generally id. Such predetermination for jurisdiction should be avoided by finding that the filing of an appeal or petition simply creates jurisdiction. The procedure laid
Jurisdiction have jurisdiction over "criminal behavior" which is described as an illegal act of the state rather than an unconstitutional law.\textsuperscript{122}

Additionally, the procedure for the appointment of Constitutional Court judges raises another issue, as terms of appointment are for nine years without possibility of re-appointment, rather than life tenure.\textsuperscript{123} The judgeships will, presumably, come up for reappointment\textsuperscript{124} concurrently, leading to the natural question of whether or not judges are being chosen with an eye toward particular outcomes of pending cases. Judges on the Constitutional Court may also be tempted to decide cases with an eye toward future political or employment aspirations rather than strictly relying upon the law, which is particularly so, in areas where the law is fuzzy, such as the claw back provisions.\textsuperscript{125}

B. Interpreting the Constitution: Methods Used by Other Courts and the Appropriate Method for Ukraine

The threshold question with which the Constitutional Court must deal is the problem of interpreting a document which encodes social goals as positive Constitutional rights.\textsuperscript{126} Social and economic rights reduce the legitimacy of the entire document as they are effectively unenforceable, yet given preeminence next to rights which are interpreted by the law on the Constitutional Court seems to reject this possibility in that the procedure for accepting a case is multileveled and requires the issue to be one requiring Constitutional interpretation. \textit{See generally id.}

\textsuperscript{122} \textit{See id.} at 18 n.11.

\textsuperscript{123} \textit{See id.} at 17.

\textsuperscript{124} \textit{See} Futey, \textit{supra} note 8, at 17. The Constitutional Court Judges were appointed at the same time with all their terms limited to nine years, therefore, so long as a significant number of the Judges do not die or retire while in office the Constitutional Court will be virtually replaced in its entirety in nine years. \textit{See generally id.}

\textsuperscript{125} \textit{See id.} at 17.

\textsuperscript{126} \textit{See generally} Futey, \textit{supra} note 7, at 28-30.

Social goals which are stated in the Constitution as positive rights of citizens include: (1) the right to work; (2) the right to rest; (3) the right to be provided for when disabled; (4) the right to housing; (5) the right to an acceptable standard of living; (6) the right to protection of health; (7) the right to education; and (8) the right to environmental protection. \textit{See Ukraynska Konstituziya} ch. II, arts. 43, 45-49, 50, 53 (1996) (Ukr.). \textit{See generally} Jos{\textdegree} Maria Morenilla Rodriguez & Jean-Claude Soyer, \textit{Report on the Legislation of Ukraine}, 16 HUM. RTS. L. J. 344, 348 (1995) (stating that three general areas of rights are granted: (1) civil and political; (2) procedural and criminal; and (3) social and economic).
tended to limit government action and are, hence, enforceable.\textsuperscript{127} Although there is some question as to whether the Constitution is enforceable in some parts—and whether this determination could erode the effectiveness of other rights provisions—this Note will assume that the Constitutional Court will enforce all of the Constitution’s provisions.\textsuperscript{128}

Constitutional interpretation, especially in the field of citizens’ rights will probably center around provisions which limit citizens’ rights.\textsuperscript{129} As previously noted, the provisions which limit a Constitutional right—in the interest of public order, morality, or the rights and freedoms of others—are termed claw back provisions.\textsuperscript{130} One right so limited is the right to freedom of thought and speech:

Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs. Everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice. The exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility or public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or supporting the authority and impartiality of justice.\textsuperscript{131}

These limitations are vague\textsuperscript{132} as the broad wording of the claw backs gives the Rada much discretion to limit rights.\textsuperscript{133} They may be

\textsuperscript{127} See Futey, supra note 7, at 30.
\textsuperscript{131} UKRAYNSKA KONSTITUZIYA ch. II, art. 34 (1996) (Ukr.) (emphasis added).
used, in their broadest reading, to limit the right which they qualify to
the point of voiding that right. To avoid nullifying the rights
granted in the Constitution, the Constitutional Court must perform
some variant of a balancing test. In such a test, the Constitutional
Court must balance the interests of the state and the people's interests
in order to give full effect to all articles of the Constitution. When a
test is not specified, the court must determine the appropriate test.
The court should consider the larger objectives of the Constitution in
constructing the test which include: (1) the historic origins of the
rights enshrined; and (2) the relationship between the articles in the
document.

The plain language of the Constitution may lead one to a binu-
cated analysis of laws limiting rights within the meaning of the claw
back provisions. First, one must determine if the law was pursuing a
legitimate governmental interest within the meaning of the claw back,
such as national security, public safety, territorial indivisibility, or

(noting that eliminating false accusations against public officials and insults have
been held permissible state ends in regulating speech).

133 See BERNARD H. SIEGAN, DRAFTING A CONSTITUTION FOR A NATION OR REPUBL-
IC EMERGING INTO FREEDOM 34-36 (2nd ed. 1994) (arguing that the Constitution is
inconsistent with aspirations of freedom and abundance).


U.S. 398, 444 (1934); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328-29
(1816); Lochner v. New York, 198 U.S. 45, 53 (1905) (balancing property rights
with the concept of liberty). See generally West Coast Hotel Co. v. Parrish, 300
U.S. 379 (1937) (balancing the interests between employer and employee).

Lingens, 103 Eur. Ct. H.R. (ser. A) at 34 (1986); Home Bldg. & Loan Ass'n 290
U.S. at 442, 444; Martin, 14 U.S. at 328-29. See generally Lochner, 198 U.S. 45;
West Coast Hotel Co., 300 U.S. 379 (balancing the interests between employer and
employee).

137 See Black v. Law Society of Canada, [1986] A.R. 259, 276, appeal dismissed,


139 See UKRAYNSKA KONSTITUZIYA ch. II, arts. 34, 35, 36 (1996) (Ukr.). Such analy-
sis may be impractical as some articles of the current Ukrainian Constitution include
the purpose/interest distinction (e.g. article 34) while others simply state that the
right may be restricted in the interests of certain principles (e.g. articles 35, 36). See
id.
health and morality of the population.\textsuperscript{140} Second, the law’s purpose must be analyzed to determine if it comports with the purposes allowed in the claw back; such as public safety, morality, and the rights and freedoms of others.\textsuperscript{141} Hence, though a bifurcated analysis is possible under the plain language of the Constitution, such analysis is clearly inadequate to protect individual rights. Such analysis provides no real limits to governmental power, for one can imagine no law of the Soviet regime which would not pass this cursory scrutiny, all Soviet laws were to pursue national security and public safety in the interest of public safety and morality.\textsuperscript{142} Hence, a balancing test is more appropriate.

In conducting this balancing test, the Constitutional Court should weigh the rights of citizens more heavily than the interests of the state.\textsuperscript{143} Soviet history reveals a long-standing pattern of disregard for human rights and rule of law.\textsuperscript{144} The Constitution attempts to reverse that trend.\textsuperscript{145} Such constitutional intent to limit governmental power is evident from the constitutional provisions which provide for monetary damages against the government when one’s rights are violated.\textsuperscript{146} Soviet-style government and abuse of human rights are also shown to be against the intent of the Constitution through constitutional prohibitions on parties controlling the government and the enumeration of

\textsuperscript{140} See id. (describing permissible governmental interests in restricting freedom of speech, freedom of religion and philosophy, and freedom of association as including some or all of national security, territorial indivisibility, public order, morality of the population, protecting the rights and freedoms of other citizens, or health of the population).

\textsuperscript{141} See id. (stating that such purposes include preventing disturbances or crimes, protecting the health of the population, protecting the reputation or rights of other persons, protecting confidential information, or protecting impartial justice).


\textsuperscript{144} See Subtelny, supra note 1, at 413-21, 478, 500-03.

\textsuperscript{145} See Futey, supra note 7, at 29; Law of Ukraine on Statutory Legal Acts of Ukraine art. 4 (1995) (Ukr.), translated in Law of Ukraine on Statutory Legal Acts of Ukraine, 1995 PARLIAMENTARY DEVELOPMENT PROJECT 1 (stating that the Constitution has the highest legal effect and ordinary laws must conform to it).

\textsuperscript{146} See Futey, supra note 7, at 34.
human rights as protected citizens' rights.\textsuperscript{147} Hence, due to historical precedent and the drafters' intent to avoid future abuses, the clawback provisions should be construed narrowly against the government.\textsuperscript{148}

Politics and the economy mandate a narrow reading of the clawback provisions against the government. Politically, the draft of the Constitution with broader clawback provisions proposed by the Communist faction of the Rada was rejected for the narrower provisions in the Nationalist and Christian Democrat draft proposals.\textsuperscript{149} The rejection of Soviet-style government which was proposed by the Communist faction of the Rada\textsuperscript{150} shows an intent not to follow its traditions of state control. Furthermore, the adoption of proposals by parties which do not favor extensive government controls on citizens' lives shows an intent to grant citizens broad, meaningful rights. Hence, the clawback provisions should be construed narrowly to give full effect to the political intent of the drafters of the Constitution.\textsuperscript{151}

Ukraine's current economic situation does not provide a valid reason for construing rights provisions in the government's favor. Ukraine's economy is improving and government intrusion has proven to be ineffective and actually harmful in the past— as shown by the fall of the USSR and the collapse of the Soviet economy.\textsuperscript{152}

\textsuperscript{147} See id. at 29; A. Lytvynenko, The Law and the Culture: Theory and Practice, PRAVO UKRAINE: EHURYDCHYNAI EZIHURNAL, June 1997, at 92 (arguing that Soviet law was to accomplish a political agenda, but that present law should safeguard culture and the values of the community); UKRAYNSKA KONSTITUZIYA ch. II, art. 37 (1996) (Ukr.). See generally Mykola Ryabchuk, Democracy and the So-Called "Party of Power" in Ukraine, 3 POL. THOUGHT (1994) at 154 (discussing the role of the post-communist nomenklatura in Ukraine).

\textsuperscript{148} See discussion infra Sections I., II. The inclusion of the claw back provision in the Constitution may have been due to an intent to copy the European Convention on Human Rights, due to political necessity, or both.

\textsuperscript{149} See Visnyk, supra note 89.

\textsuperscript{150} See id.

\textsuperscript{151} See discussion infra Sections II, IV.B. See generally Futey, supra note 7, at 30-31 (concerning clawback provisions as related to citizens' constitutional rights).

but also personal, freedom in order to flourish. Ukraine's economy, therefore, not only supports a broad reading of citizens' rights and a narrow reading of the claw back provisions, but depends on such interpretation for its success.

The question remains as to how the Constitutional Court might arrive at an interpretation. I propose that when a right is granted but limited by public order, health, morality, the rights and freedoms of others, or the action of law (or all of these), the limit should be strictly construed. The appropriate test is formulated by requiring absolute governmental necessity to facilitate a clear government interest linked with clear support by the plain language of the claw back provision of the government's asserted objective, as well as a narrow tailoring of the means to the legitimate ends enumerated in the claw back. Public order must be interpreted narrowly to avoid the excesses of the Soviet period when it was used to restrict the rights of those who disagreed with the government. A narrow reading of the public order exception on a given right would force the government to show an imminent danger which is sufficiently dangerous to the state (for example, armed insurrection, rather than a peaceful demonstration).

When taken together with other claw back terms, which may be interpreted as a whole, public order may be interpreted to require danger to health, morality, or the rights and freedoms of others. The rights and freedoms of others must also be construed narrowly so that no more restrictions are placed on the activities of citizens than the government. The claw backs must also be interpreted not to apply when rights are specifically granted to individuals. Health, when construed narrowly, requires an imminent danger of death or grievous bodily harm to other persons. Such restriction is reasonable when construed narrowly and applied to extreme cases (for example, screaming "fire" in a crowded theater as a limit on freedom of speech).

Probably the most amorphous concept is morality. Strictly speaking, the criminal nature of all crimes is a moral choice; for example murder is a moral interpretation and morality determines when it is illegal (such as in war) or permissible (such as in the case of self-defense). A strict reading of morality would limit its application to circumstances requiring a moral choice to make an act criminal, in essence limiting morality exceptions to those instances which are historically and virtually uniformly acknowledged by current western

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153 See Futey, supra note 7, at 30.
154 See discussion infra Section IV. A,B; Futey, supra note 7, at 30.
155 See generally Futey, supra note 7, at 29 (stating that the intent of the Constitutional drafters was to avoid Soviet-style rule).
thought as being immoral. When strictly construed the claw back provisions have the potential for innocuous action and need not negate the rights which they qualify.\textsuperscript{156}

"Established by law" or "envisaged by law" are other problematic terms in the Constitutional rights grants.\textsuperscript{157} In its broadest reading, simple laws which do not have the legal force of a constitution and are not enacted by similar procedures requiring a super-majority in the Rada could serve to overrule the Constitution.\textsuperscript{158} It is illogical for simple laws to be able to override a Constitution which purports to be the supreme law of Ukraine.\textsuperscript{159} Future laws should, therefore, be construed to violate the Constitution when they go beyond regulatory functions and begin to erode the right itself. The proper way to change Constitutional law is through the amendment process, not by the less stringent process of enacting legislation.\textsuperscript{160}

Although the proceeding proposal appears to be the most appropriate interpretive test for Ukraine’s unique position and history,\textsuperscript{161} national and supra-national courts have articulated other tests. One


\textsuperscript{157} See UKRAYNSKA KONSTITUZIYA ch. II, arts. 29, 30, 31, 32, 33 (1996) (Ukr.).

\textsuperscript{158} See \textit{generally} Futey, \textit{supra} note 7, at 30.


\textsuperscript{160} See UKRAYNSKA KONSTITUZIYA ch. II, art. 57 (1996) (Ukr.) (requiring that notice be given of new laws by a method "established by law" – without such notice the law is not in force).

\textsuperscript{161} The Constitution was adopted by the Rada rather than by a popular vote. See Skachko, \textit{supra} note 84, at 24 (describing the Rada’s marathon – about 25 hours – cession which adopted the Constitution). The Rada clearly has greater bargaining power, sophistication, and the ability to write a clear Constitution (reducing reliance by citizens who act within what they believe to be their rights) – in short, the Constitution could be interpreted as an adhesion contract. That interpretation would lead to interpreting the Constitution against the government whenever there is an ambiguity and the citizen’s legal theory is reasonable. See, \textit{e.g.}, Vargas \textit{v.} Ins. Co. of N. Am., 651 F.2d 838, 839 (2nd Cir. 1981); Henningsen \textit{v.} Bloomfield Motors, Inc., 161 A.2d 69, 76, 94-95 (N.J. 1960); \textit{see also, e.g.}, C & J Fertilizer, Inc. \textit{v.} Allied Mut. Ins. Co., 227 N.W.2d 169, 174 (Iowa 1975) (holding that the inevitable result of enforcing all provisions of an adhesion contract would be an abdication of judicial responsibility).
claw back provision interpretive method is a four part test. This method is used by the European Court of Human Rights to interpret the claw back provisions in the European Convention on Human Rights (the Convention). The Convention tracks the wording of the Ukrainian Constitution with one major difference. The Convention limits the operation of the claw backs to instances "necessary in a democratic society" while the Ukrainian Constitution omits this language. One can imply such language in the Ukrainian Constitution due to its overall objectives which appear to be a democratic civil society.

This interpretive method first determines if there is an interference with an enumerated right by a public authority. Second, the basis of the intrusion is ascertained. If there is a basis in domestic law for the intrusion, the analysis continues -- if there is no basis in domestic law, the intrusion is illegal. The next phase of the test involves the interpretation of the claw back provision -- if the purpose of the interference with the right enumerated is covered by the claw back (i.e. public order), the process continues. If the purpose of the intrusion is to do away with the enumerated right, it is illegal. The intrusion into the protected right is then subjected to a "pressing social need" standard (not "useful, reasonable, desirable, or indispensable"). The basis of this standard is that intrusion into rights should not be allowed unless it is "necessary" in a "democratic society."

163 See id.
166 See Rodriguez & Soyer, supra note 126, at 349, 358-60 (arguing that claw back provisions must be minimal and conform with the theory of democratic society).
168 See id.
169 See id.
170 See id. at 23.
171 Id. at 25.
Moreover, the intrusion into a constitutionally protected right must be “proportionate to the legitimate aim pursued” by the government agency.173 Further, the aim must be given by the governmental agency and be “relevant and sufficient.”174

Other courts use a tripartite test.175 The first part is the determination of whether the intrusion into the enumerated right is prescribed by law.176 The second part is to determine what the objective of the intrusion is, whether it is legitimate, and whether there is a relationship between the intrusion into the right and the legitimate objective as enumerated in the claw back.177 If the limitation passes the first two parts of the test, it must be necessary in a democratic society or, more precisely, the limitation must aid free society more than the right being limited.178 Moreover, the right and the limitation of the right must be weighed based on their social utility and importance in a free society.179 This test also requires that no less intrusive means exist to pursue the legitimate government interest.180

Due to the intent of the Constitution to change the Soviet system of government which did not respect the rights of citizens as protected in the Soviet Constitutions, the provisions which guarantee rights to citizens must be construed in a manner which is most favorable to those rights guaranteed.181 Further, one of these tests must be adopted due to the plain language of the Constitution. Article 1 states that Ukraine is a democratic and law-based state.182 Article 3 recognizes “[t]he human being, his or her life and health, honor and dignity, inviolability and security . . . as the highest social value” and that “[h]uman rights and freedoms and their guarantees determine the es-

174 Id.
180 See id.
181 See generally Futey, supra note 7, at 29-31.
sence and orientation of the activity of the state." Moreover, the rights granted are "not exhaustive," "shall not be abolished," and "shall not be diminished." Beyond the interpretive techniques outlined above, the Constitutional Court may go beyond the Constitution to find natural human rights as the rights enumerated in the Constitution are stated to be not exhaustive. In any event, if Ukraine is to continue the development of its pro-Western national identity, the rights of its citizens must be emphasized.

IV. CONCLUSIONS AS TO THE FUTURE INTERPRETATION OF THE CLAW BACK PROVISIONS AND RECOMMENDATIONS AS TO UKRAINE'S FUTURE COURSE OF ACTION

A. The Current Economic Situation in Ukraine and the Effect it may have on Constitutional Interpretation

Outside pressures may effect the interpretation of a constitution - paramount in these is the economic situation in the nation. The economic situation in a nation will affect politics and legal enactments as well as, potentially, Constitutional Court rulings. In Ukraine’s Constitutional Court, such pressure may be especially severe on Justices who are not appointed for life and, hence, may seek to protect their

183 Id. art. 3.
184 Id. art. 22.
185 See id. (stating that the rights enumerated in the Constitution are not exhaustive). Such natural rights may be found in the body of Western thought and are substantially similar to the rights which are guaranteed in the Constitution if the claw back provisions are construed narrowly.
186 Compare Lochner v. New York, 198 U.S. 45, 53 (1905) (holding that one does have a fundamental right to liberty of contract under the U.S. Constitution) with West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (holding that one does not have a fundamental right to liberty of contract under the U.S. Constitution).
187 Compare Lochner, 198 U.S. at 53 (holding that one does have a fundamental right to liberty of contract under the U.S. Constitution) with West Coast Hotel Co., 300 U.S. 379 (holding that one does not have a fundamental right to liberty of contract under the U.S. Constitution). See Black v. Law Society of Canada, [1986] A.R. 259, 278-79, appeal dismissed, [1989] 1 S.C.R. 591 (arguing that the change in U.S. Constitutional interpretation from Lochner to West Coast Hotel was due to a change in the idea of freedom in the United States because of the economic situation).
future legal and political careers when interpreting the Constitution.\(^{188}\) Further, the economy is currently Ukraine’s greatest problem.\(^{189}\)

The current economic situation in Ukraine is improving.\(^{190}\) The rates of increase of inflation and unemployment are falling and are predicted to continue decreasing, moving from a decrease in the rate of increase to an actual decrease in the rates of inflation and unemployment.\(^{191}\) Personal income appears to be improving and is predicted to begin increasing.\(^{192}\) In general, the Ukrainian economy appears to be improving, although it is still poor when compared with the industrial and post-industrial economies of Western Europe and America.\(^ {193}\)

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\(^{188}\) See UKRAYNSKA KONSTITUZIA ch. XII, art. 148 (1996) (Ukr.).

\(^{189}\) See Victor P. Perebenessyuk, The Potential for Conflict in Ukraine, PERSP. CONTEMP. UKR., July-Aug. 1995, at 1, 2.

\(^{190}\) See Ukraine, 1st Quarter supra note 70, at 11 (describing Ukraine’s economic situation and related factors). See generally Ukraine, 1996-1997, supra note 152 (describing Ukraine’s economy from 1996-97); Ukraine, 2nd Quarter, supra note 152; Ukraine, 4th Quarter, supra note 79; Ukraine, 3rd Quarter, supra note 87, at 14-15 (describing the economic reorganization of cabinet members aimed at stimulating the economy); Guidelines for the Plan of Economic and Social Development and the State Budget of Ukraine for the Year 1994, 1994 PARLIAMENTARY DEVELOPMENT PROJECT 1-9 (describing the government’s plan to regulate the economy and foster economic growth) [hereinafter Guidelines for the Plan of Development].

\(^{191}\) See Ukraine, 1st Quarter supra note 70, at 11. See generally Ukraine, 1996-1997, supra note 152 (describing Ukraine’s economy from 1996-97); Ukraine, 2nd Quarter, supra note 152; Ukraine, 4th Quarter, supra note 79 (describing Ukraine’s economic situation and related factors); Ukraine, 3rd Quarter, supra note 87, at 14-15 (describing the economic reorganization of cabinet members aimed at stimulating the economy).

\(^{192}\) See Ukraine, 1st Quarter supra note 70, at 11. See generally Ukraine, 1996-1997, supra note 152 (describing Ukraine’s economy from 1996-97); Ukraine, 2nd Quarter, supra note 152; Ukraine, 4th Quarter, supra note 79 (describing Ukraine’s economic situation and related factors); Ukraine, 3rd Quarter, supra note 87, at 14-15 (describing the economic reorganization of cabinet members aimed at stimulating the economy).

\(^{193}\) See Ukraine, 1st Quarter supra note 70, at 11. See generally Ukraine, 1996-1997, supra note 152 (describing Ukraine’s economy from 1996-97); Ukraine, 2nd Quarter, supra note 152; Ukraine, 4th Quarter, supra note 79 (describing Ukraine’s economic situation and related factors); Ukraine, 3rd Quarter, supra note 87, at 14-15 (describing the economic reorganization of cabinet members aimed at stimulating the economy).
While Ukraine's economy shows many positive signs, a full recovery may be distant.\textsuperscript{194} Ukraine is, however, moving toward a Western economy as the shadow economy shrinks.\textsuperscript{195} Ukraine has the potential for a strong economy due to its well trained workforce and excellent natural resources.\textsuperscript{196} Moreover, Ukraine is demographically a Western nation with low rates of mortality and natural increase.\textsuperscript{197} Although the legal framework for economic development is incomplete,\textsuperscript{198} the main continuing problem is the industrial complex Ukraine inherited from the USSR at independence as it is "out-dated, energy intensive . . . and heavily polluting."\textsuperscript{199}

Perhaps the greatest economic pitfall in Ukraine's future is the energy crisis it faces.\textsuperscript{200} Ukraine currently must rely on Russia for much of its fuel.\textsuperscript{201} Ukraine continues to attempt to reduce its dependence on Russian oil and gasoline.\textsuperscript{202} There remains the potential for Russia to use Ukrainian dependence on Russian fuel to coerce political choices in Ukraine.\textsuperscript{203} As a lack of fuel can virtually shut down the Ukrainian economy, the card which Russia holds is a high one.\textsuperscript{204} It remains to be seen if Ukraine will reduce the potential for such Rus-

\textsuperscript{194} See Ukraine, 2nd Quarter, supra note 152, at 9.
\textsuperscript{196} See UKRAINE AND UKRAINIANS THROUGHOUT THE WORLD 98-100 (Ann Lencyk Pawliczko ed., 1994).
\textsuperscript{198} See On Privatization in Ukraine, UKRAINIAN LEGAL & ECON. BULL., July 1997, at 19, 21.
\textsuperscript{199} Ukraine, 1996-1997, supra note 152, at 13.
\textsuperscript{201} See id.; Conrad Fritsch, Practical Experience in Restructuring Collective Agricultural Enterprises in Ukraine, UKRAINIAN LEGAL & ECON. BULL., July 1997, at 14 (arguing that privatization of agricultural and other governmental holdings is also a serious problem).
\textsuperscript{202} See Smolansky, supra note 200, at 74-75, 85.
\textsuperscript{203} See id.
\textsuperscript{204} See id. at 85; Oleh Havrylyshyn, Ukraine's Economic Crisis and Western Financial Assistance, 3 POL. THOUGHT (1994) at 161, 168.
sian coercion by finding other sources of energy or if Russia will continue to use this dependence for political coercion.

Economically, the positive rights in the Constitution will be very expensive in a limited state budget. It is the duty of the Chamber of Accounting to pay for what is mandated in the Constitution. Hence, there is a legal mandate and an easily identifiable government agency to sue if the social rights are not fully implemented. Further, paying for the entitlements may be simply impossible, even under court order, as in 1996 alone the government was in arrears by 1.3 billion dollars in payments to its employees.

If the Ukrainian economy experiences serious down turns or collapse, the Constitutional Court will be under considerable political pressure to allow significant government intrusion in all aspects of the economy and citizens’ lives. Politically, an economic crisis would tend to make the Soviet system appear more appetizing in spite of all its trappings of political and social repression. Hence an improving if not robust economy will be more conducive to reliable constitutional interpretation and political stability.

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205 See Havrylyshyn, supra note 204, at 161-68.

206 Russia has threatened to cut off oil to Ukraine in the past. See Smolansky, supra note 200, at 74-75, 85.


209 See Ukraine, 3rd Quarter, supra note 87, at 18.

210 See generally RUDNYTSKY, Trends, supra note 19 (discussing the populist, conservative, communist, and nationalist trends which lie latent in Ukrainian political ideology); MOTYL, supra note 16; SUBTELNY, supra note 1, at 510-37 (discussing attempts to reform the Soviet regime and Ukraine’s uncertain future).

211 See generally MOTYL, supra note 16; SUBTELNY, supra note 1, at 510-37 (discussing economic conditions and political attitudes in Ukraine).

B. Political Dangers to the Citizens' Rights Granting Provisions Including Foreign Intervention

Ukraine must overcome a legacy of massive political and economic corruption as well as colonialism and the lack of civil society.\(^\text{213}\) Ukraine faces several problems in overcoming these problems including: (1) the "party of power" namely the nomenklatura;\(^\text{214}\) (2) Russian interference;\(^\text{215}\) and (3) Ukraine's internal political situation.\(^\text{216}\)

Ukraine continues to be dominated by former Communists.\(^\text{217}\) In fact, politics in Ukraine are dominated by a 9/36 formula in which out of a total population of 36 million, 9 million residents of Western Ukraine support democracy while 27 million Eastern Ukrainians, who actually decide the nation's course of action, favor a more Soviet-style government.\(^\text{218}\) The Ukrainian Constitution shows this pro-Soviet bent in that the social guarantees in the Constitution were copied from the Soviet Constitution.\(^\text{219}\)

One of the greatest dangers faced by Ukraine is adverse foreign influence, namely from Russia.\(^\text{220}\) Russia considers Ukraine a security threat as an independent nation.\(^\text{221}\) Ukraine is considered virtually a


\(^{214}\) See Ryabchuk, *supra* note 147, at 154, 159 (stating that the "party of power" (the Communist party which controlled Ukraine until recently) and the nomenklatura (the old party apparatus) must be appeased to insure reforms are successful).


\(^{217}\) See generally Barabash, *supra* note 69 (describing the democratization process in Ukraine).

\(^{218}\) See Lysyj, *supra* note 216, at 3.

\(^{219}\) See Melnyk, *supra* note 51.

\(^{220}\) See Morozov, *supra* note 215.

\(^{221}\) See John W.R. Lepingwell, *The Russian Military and Security Policy in the "Near Abroad,"* SURVIVAL, Autumn 1994, at 70, 70-74, 79-80; Francis Fukuyama, *The Ambiguity of "National Interest,"* in RETHINKING RUSSIA'S NATIONAL INTERESTS 10, 18, 22 (Stephen Sestanovich ed., 1994) (stating that it is within Russia's national interest to protect Russian minorities in Ukraine and that the G-7 world would support Russia in doing so); Sergei B. Stankevich, *Toward a New "National Idea,"* in RETHINKING RUSSIA'S NATIONAL INTERESTS 24 (Stephen Sestanovich ed.,
province of Russia by Russian historians and culture.\textsuperscript{222} In short, Russia views Ukraine as a nation which it can "work on" and as a nation which is not truly independent.\textsuperscript{223} Thus, Russian national identity is the USSR\textsuperscript{224} and as such, Ukraine is an integral part of Russian national identity.\textsuperscript{225} Past Russian influence on Ukraine has been disastrous for Ukrainian national identity and has resulted in personal tragedy for the Ukrainian populace.\textsuperscript{226} There is no reason to believe that future Russian domination will be more tolerable or productive.\textsuperscript{227}

Notwithstanding future fears and choices as to how the citizens' rights provisions in the Constitution will be interpreted due to external forces and the party of power, current issues have arisen as to constitutional interpretation and enforcement.\textsuperscript{228} One such issue is the freedom of the press provision in the Constitution.\textsuperscript{229} Prior to the adoption of the Constitution, freedom of the press was in doubt.\textsuperscript{230} One such instance was in regard to those who spoke in a manner which would tend to be divisive to the various ethnic groups in Ukraine.\textsuperscript{231}

In August 1992, President Kravchuk issued a decree stating that those who used freedom of speech to split the population of Ukraine along ethnic lines would be expelled from Ukraine.\textsuperscript{232} The danger continues today in that most popular television stations are controlled by the executive branch of the government as are one-quarter of the

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\textsuperscript{222} See Solchanyk, supra note 52, at 128.
\textsuperscript{223} See Arkady Moshes, The Crisis in Ukrainian and Russian Policy, MOSCOW NEWS, Aug. 8-14, 1996, at 5.
\textsuperscript{224} See Roman Solchanyk, Russia, Ukraine, and the Imperial Legacy, 9 POST-SOVIET AFF. 337, 339, 341-42 (1993).
\textsuperscript{225} See id. at 339.
\textsuperscript{226} See generally Subtelny, supra note 1, at 403-24, 453; Sluzhynska, supra note 48, at 100-02 (arguing that those who favor democracy have been systematically killed, depleting Ukraine's gene pool).
\textsuperscript{227} See Solchanyk, supra note 52, at 19, 20, 128; Grabowicz, supra note 213, at 8, 10.
\textsuperscript{229} See Naboka, Part I, supra note 132; Naboka, Part II, supra note 228, at 14.
\textsuperscript{230} See Motyl, supra note 16, at 15.
\textsuperscript{231} See id.
\textsuperscript{232} See id.
5,500 publications in Ukraine.

State control of instruments of mass media may be unconstitutional due to Article 42 which prohibits the wrongful use of monopolies.

Another constitutional question is whether the state can tax publications so as to control them, which may be prohibited by Article 92. Further, writers need licenses to sell their work, which may lead to censorship, and many members of the press have been murdered after printing articles about government corruption and theft. It remains to be seen how these issues will be resolved but, if such state control of the press is allowed, the Constitutional guarantee of freedom of speech appears to be in jeopardy.

The rule of law is also jeopardized by President Kuchma’s apparent dislike of the Constitution. If political leaders and, thereby, the government itself does not respect or follow the Constitution, earlier USSR patterns of simply ignoring the law may reoccur. It is of utmost importance, if the rule of law is to prevail, that the Constitution and the decisions of the Constitutional Court be followed no matter how unpopular or harmful to personal political careers.

Political infighting as well as fragmented political parties also continue to plague Ukraine. The Rada has adhered to Western principles and rejected Communist proposed Constitutional amendments

233 See Naboka, Part I, supra note 132; Naboka, Part II, supra note 228, at 14 (stating that the Ukrainian Center for Economic and Political study believes that the economic advantages government owned media have over private media sources violates the prohibition on the wrongful use of monopolies and taxation in Articles 42 and 92 of the Constitution).

234 See Naboka, Part I, supra note 132; Naboka, Part II, supra note 228, at 2, 14 (stating that the Ukrainian Center for Economic and Political study believes that the economic advantages government owned media have over private media sources violates the prohibition on the wrongful use of monopolies and taxation in Articles 42 and 92 of the Constitution).


238 See Naboka, Part I, supra note 132; Naboka, Part II, supra note 228.

239 See S. Holovatey Criticizes the Organs of the Government, SVOBODA, Sept. 25, 1997, at 1 (stating that Holovatey commented that President Kuchma asked him to sabotage the passage of the Constitution).

240 See Melnyk, supra note 51.
which would have limited the Constitutional Court’s power and transfer its interpretive power to the Rada. The Communist Party, however, continues to wage war on these democratic forces by insinuating that the democratic forces are anti-Constitution because the social rights in the Constitution are not being enforced (due to a lack of funds). Political repressions also continue and may even involve the filing of criminal charges and the denial of medical care while in jail. Further, the Rada began impeachment proceedings against President Kuchma for vetoing a bill three times which may indicate cracks opening in the rule of law.

The recent elections to the Rada may determine how the interpretation of the Constitution will unfold. On August 28-29, 1997, the Rada, in special session, did not pass proposed constitutional amendments which were mainly proposed by the left. As the elections to the Rada, in the spring of 1998, created a Socialist/Communist majority, it is possible that the Constitution will be significantly amended. This may include giving power back to local Radas which are mostly leftist, thereby diluting presidential power.

In fact, some predict continuing Socialist/Communist control of the Rada. If democratic forces retain control (whether or not they call themselves Communists or Socialists), then the discussion as to how the Constitution should be interpreted will continue to be criti-

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245 See Lysyj, supra note 216, at 3.
246 See Kolomayets, supra note 241, at 1.
249 See Lysyj, supra note 216 (arguing that western Ukraine democrats are outnumbered by central and eastern Ukrainian voters who favor a more leftist government).
If not, Constitutional interpretation may be degraded to the point of irrelevance.

C. Western Aid: Why it is Needed

The Ukraine’s land area is the largest in Europe (aside from Russia which extends into Asia) and its population is the fifth largest, yet is virtually unknown throughout the world. It is clearly in the strategic and economic interest of the nations of Europe and America to aid Ukraine in its democratization process. Economic aid is necessary to help create the political stability needed for democratization. After seventy years of Soviet rule, Ukraine is also in dire need of political and legal aid in terms of theory and practice in a democratic society. Ukraine is also in danger from the former Soviet elites in Russia who may prefer empire to the self-determination of nations.

Lawyers, legal associations, and libraries in democratic societies could be of much aid in providing information. Democratic nations can also assist Ukraine by providing continuing aid and information to Ukrainian government agencies. Lawyers and those with legal expertise in the areas of interpretation of citizens’ rights provisions may also be of aid in defining legal terminology in Ukraine and, thereby, make the provisions of the Constitution more effective.

See Clem, supra note 197 (discussing the political and demographic tragedies in Ukraine’s past).
See MOTYL, supra note 16, at 1, 4.
See id.
See generally Futey, supra note 7, at 30.
See Szporluk, supra note 253, at 179.
See Bohdan Peter Rekshynskyj, Legal News by the Ukrainian Legal Foundation: The “Ukrainian Center for Human Rights” Program (visited Sept. 18, 1997) <http://news.std.com/sabre/UFPWWW_Etc/Law/ULF/LN9502.html> (stating that foreign aid should include texts for higher education, instruction to educate judges, aiding in publication and dissemination of texts, and aiding Ukraine to comply with international legal standards).

See COMMISSION ON SECURITY AND COOPERATION IN EUROPE, IMPLEMENTATION OF THE HELSINKI ACCORDS: FOCUS ON SERIOUS CHALLENGES FACING UKRAINE (1994) (discussing the applicability of the CSCE Helsinki Final Act to bolstering Ukrainian democratization).

See generally Bohdan Peter Rekshynskyj, Legal News by the Ukrainian Legal Foundation: Counteracting Constitutional Chaos (visited Sept. 18, 1997)
in need of immediate aid in terms of legal education and theory, hence, Western aid should not be conditioned upon its actions on other issues such as its budget deficit. The main goal of all foreign assistance should be to allow Ukraine to maintain its independence long enough to finish the development of its national identity and fulfill its democratic destiny.

If Ukraine is allowed to develop freely and continues to move toward a democratic society and a rule of law, the future of the rights of its citizens seem bright. However, Russian domination or interference will, most likely, destroy the advances Ukraine has made and drag Ukraine back into the abysmal legal vacuity of Russia’s past (and potentially future) national identity.

D. The Appropriate Interpretive Method for Ukraine and its Future Use

The current Ukrainian Constitution does make great strides toward a democratic society. It provides for rights of citizens and states honest limitations which, when strictly construed, mirror the limitations on citizens rights which the U.S. Supreme Court has recognized and which may prevent the government from simply ignoring the rights of citizens as occurred in the Soviet period. To some degree clarity is also a positive point in the Constitution in that limits on citizens’ rights are expressed – other factors which are not mentioned probably cannot be legitimately used to limit rights.

On the other hand, the claw back provisions which qualify the rights which are guaranteed have the potential to limit the rights they qualify to the point of ineffectiveness. Furthermore, the inability to enforce economic and social rights which are guaranteed places into question the effectiveness of the entire document. These economic and social rights are theoretically and practically unenforceable against the government. Moreover, these rights may be simply too expensive for the Ukrainian Government to provide in the current

<http://news.std.com/sabre/UFPWWW_Etc/Law/ULF/LN9505.html>; Rekshynskyj, supra note 256 (arguing that standardization of Ukrainian legal terminology is needed).

259 See TEDSTROM, supra note 212, at 5.

260 See Futey, supra note 7, at 34.

261 See id at 30.

262 See id.

263 See id.
Furthermore, if some constitutional positive rights are not followed, it is possible that the negative restrictions on government action may be equally ignored. Further, it is obvious that the inclusion of positive rights in a manner other than goals in a preamble was unwise due to Ukraine’s unique history and current economic difficulties.265

Ukraine faces serious challenges in enforcing the Constitution’s citizens’ rights provisions without letting them be swallowed up by the claw backs. If it is to succeed, Ukraine must stay independent, as “democracy and empire are incompatible.”266 It must defeat internal tendencies to return to Soviet-style rule or simply amend the Constitution when it conflicts with an illegitimate governmental goal.267 It must rise above its history of assassination of her national leaders by foreign powers and Russification.268 Further, it must reconcile the ethnic divisions within its society269 and the ethnic crisis in Crimea.270 Finally, Ukraine’s news media must break the Soviet mold of control-

265 See Futey, supra note 7, at 30.
268 See Oleksander Rudenko-Desniak, Ukrainians in Russia, PERSP. CONTEMP. UKR., Nov.-Dec. 1995, at 1, 5, 6 (excerpting a speech delivered Nov. 16, 1994); Lepingwell, supra note 221, at 70, 79-81.
ling public opinion through symbols and yellow journalism and begin to operate as an independent check on the government.  

Ukraine must overcome these obstacles in steps, first establishing a state, then followed by rule of law, civil society, a market economy, and democracy.  

Ukraine has made great strides down this path. Russia is not currently a military threat. Ethnic division has been combated by a "zero option" of citizenship, which gives citizenship to all those citizens of the USSR who were permanent residents of Ukraine on the date of its independence.  

Hence, Ukraine has chosen not to define itself as an ethnic state, which has served it well in combating ethnic infighting. Ukraine has also compiled a good record on human rights, expounding: (1) a liberal ethnic policy which is deferential to ethnic minorities; and (2) a path independent from Russia and toward the Council of Europe's norms for civil rights and environmental protection. In fact, in investigating Ukraine's application to join the Council of Europe, the recommendation for admission was largely based on Ukraine's favorable human rights record.

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272 See MOTYL, supra note 16, at 68-70; George Schöpflin, Postcommunism: The Problems of Democratic Construction, DAEDALUS, Summer 1994, at 127, 131 (stating that rule of law is necessary for political and economic stability).


276 See Ian Bremmer, Russians in Ukraine, PERSP. CONTEMP. UKR., Sept.-Oct. 1995, at 1, 3, 7 (arguing that Russians have generally chosen to integrate politically and ethnically and support Ukrainian political thought).


279 See Ukraine Sets Course for the West, supra note 64, at 26 (stating that return to the USSR is impossible as the Confederation of Independent States did not work).

To continue down the path Ukraine has chosen, and to fully join the Western family of nations, the Constitutional Court must choose one of the interpretive models I have expounded in this Note. A failure to do so will inevitably lead to greater governmental intrusion in what the Constitution describes as protected rights. Governmental control is not the answer.

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