The Most Dangerous Branch

Constitutional Crisis in the Republic of Moldova

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On 7, 8 and 9 June 2019, from Friday to Sunday, the Moldovan Constitutional Court delivered six rulings which were rather atypical, to say the least. The court ordered the dissolution of the new parliament and declared all parliamentary acts unconstitutional, then invalidated the nomination of the new prime minister and the appointment of the government, and lastly, removed the Moldovan president from office and replaced him with the former prime minister as interim president.

These decisions puzzled many. "Recent decisions of the Constitutional Court are difficult to understand and seem to be arbitrary in the light of the text of the Constitution and of international rule of law standards," wrote Thorbjørn Jagland, the Secretary General of Council of Europe in his statement on the situation in Moldova. One week later, however, the situation became even more bizarre when the court announced a new judgment repealing each of its six rulings. What was going on in Chișinău and why?

Friday: Rejecting the president

First, on 7 June, the court adopted a decision of inadmissibility (Decision 83/2019). President Igor Dodon, former head of the Socialist Party, lodged the application, seeking an interpretation of the constitutional time limit for government formation. The time limit was of vital importance because main parliamentary parties had struggled to form a coalition government since the elections in February. There was no clear winner of the elections because the Socialist Party, then in opposition, received the most votes at 31%, Acum, a new political alliance between two parties, came in second (26%) and the then governing Democratic Party third (24%).

The Constitution stipulates that the president has a duty to nominate a candidate for the office of prime minister following consultations with the parliamentary fractions (Article 98.1). And it derives from the established case law of the court that the president is obliged to nominate a person who enjoys the support of the parliamentary majority (Judgments 32/2015 and 12/2019). The Constitution gives parties "a period of three months" to form a coalition government before the president "may dissolve the parliament" (Article 85.1.).

The court declared the presidential application inadmissible by referring to a kind of *res judicata*. "The time-limit applicable to the formation of the government has already been the subject-matter of a previous judgment and no new interpretation is needed." The court also reminded the president that *in claris non fit interpretatio*: clear constitutional text does not require interpretation.

But beyond rejecting the president's application, the court did offer a new interpretation of the three-month term nevertheless. As precedent cases indicate, the court argued, the term runs from the date of the election's validation. It means that if interpreted as three calendar months, that deadline passed on 9 June, Sunday. (The Court validated the results of February elections on 9 March.) However, the court declared without citing any precedent that three months amount to 90 days. The 90-day fixed term, the reasoning went on to say, avoids "time discrepancies where not all months of the year have the same number of days." It meant that the deadline passed on 7 June, Friday, the very day the court announced its decision.

Saturday: Legislative and executive branches paralyzed

In spite of the court's decision, the MPs met on 8 June. Parliament elected Maia Sandu (Acum) as prime minister and Zinaida Greceanîi (Socialist Party) as speaker of parliament. The decisions and further acts were immediately challenged by two leading MPs of the Democratic Party. The court delivered three judgments in response to the petitions on the same day.

In Judgment 13/2019, the court gave a constitutional interpretation and held that the deadline passed, therefore the parliament's mandate expired. The parliament "is not entitled to perform lawmaking activity, neither to exercise the powers" provided by the Constitution, "nor to form the leading units of the parliament." Actions and legislative acts after the three months period "amount to a serious breach of constitutional provisions and are null *ab initio*," the court warned the parliament.

Although the Constitution contains that parliament "may be" dissolved once the deadline has been exceeded, the court, referring to its case law, insisted that the dissolution was mandatory: The president "shall" dissolve the parliament without delay and announce the date of snap elections. The court emphasized that political parties are responsible for the deadlock.

Judgment 14/2019 is a constitutional review of the laws and decisions adopted by the parliament on the same day, 8 June. First, it declares unconstitutional the election of speaker of the parliament. Second, it declares unconstitutional the legislative acts adopted on 8 June. "Despite the fact that the judges of the Constitutional Court have publicly announced, by Judgment 13/2019, that any act adopted after 7 June is unconstitutional, the MPs had ignored the authority of the court and continued their unconstitutional practice, adopting legislative acts, forming leading units and electing a government," the court added.

Judgment 15/2019 is a constitutional review of two presidential decrees on the nomination of the new prime minister and the appointment of the new government. Both decrees were declared unconstitutional. The court ruled that the new government was unconstitutional because it was formed more than 90 days after the validation of parliamentary elections. It meant that Moldova had virtually two governments: the old one, backed by the Constitutional Court, was refusing to leave, while the new one, enjoying the support of the majority in parliament, was considered illegal.

Sunday: President replaced by the prime minister

On 9 June, the court adopted two "advisory opinions" on the interim president and dissolution of Parliament. The first opinion concludes that the president of the Republic deliberately refused to comply with his constitutional duties, i.e. refused to proceed with the dissolution procedure of the parliament and setting of the date of snap elections, which "represents, under Article 91 of the Constitution, a temporary impossibility to exercise his powers in this respect." Moreover, the ruling affirms that the prime minister in office, Pavel Filip, acts in the capacity of interim president of the Republic.

In the second advisory opinion, the court examined the petition of the interim president, appointed earlier that day, on the circumstances justifying the dissolution of the parliament. The court repeated that the three-month term has been exceeded without a new government being appointed. The interim president thus shall issue a decree on parliament's dissolution and set the date of the snap elections. In sum, the court suspended the Moldovan president and replaced him with the former prime minister, who dissolved parliament and called for new elections in September.

One week later: End of unconstitutional resistance

The would-be new government held that the coalition was formed just in time. Both Socialists and Acum launched a stinging attack on the court, the sole authority of constitutional jurisdiction. MPs declared that apex legal institutions in Moldova "have been seized" by influential oligarchs, calling for the resignation of top legal officials. At the same time, the Constitutional Court and Democratic Party insisted that the political deadlock must be solved only by constitu-

tional means, that is, by holding early parliamentary elections. "Those who call for the dissolution of the court are, in fact, enemies of democracy," the court voiced.

"Unless we have a clear statement from the EU or the US saying we support government A or government B, I think the likeliest outcome is early elections," an expert anticipated in The New York Times. Many others warned that the two parallel governments raised the possibility of escalation. Nevertheless, prime minister and interim president Pavel Filip announced on 14 June that the government formed by the Democratic Party has resigned. "This decision was prompted by the strong pressure government employees have been under these days," he added.

President Dodon declared that "usurpers," who exercised public power illegally, recognized their defeat. He urged the Constitutional Court to revise its rulings as a matter of urgency. "Otherwise, I reserve the right to address the government and the parliament to appoint new judges to the court." The new prime minister Sandu went further and called for the resignation of the constitutional justices.

On 15 June, Saturday, the Constitutional Court "*ex officio*" revised the six rulings adopted on 7-9 June and repealed each of them. "The reason underlying the repeal was the de facto situation of the Republic of Moldova, particularly the announced transfer of power to the government of prime minister Maia Sandu and of the coalition forged in the parliament. This judgment of the court is meant to be a source of social peace, rule of law, democracy, as well as a safeguard of a proper framework of human rights protection, by combating a political crisis of great magnitude."

It seems very easy to point out that the Constitutional Court answered fabricated petitions in an unprecedented way. The court adjudicated the cases arbitrarily, gave a series of interpretations which were, without doubt, contrary to the text of the constitution, and the court was unfairly prejudiced in favor of the Filip government and against president Dodon and the Sandu government. It would be cheap to conclude that the crisis was simply the usurpation of power by the Constitutional Court, and indirectly by the oligarch Vladimir Plahotniuc, by far the richest man in the country and leader of the Democratic Party, who left the country soon after the resignation of the Filip government.

Republic of Moldova: A divided nation

Moldova's recent history was marked by frequent clashes between rival political parties. The country witnessed several constitutional crises in recent years. Cooperation under a shared constitution proved to be illusory, a cold civil war was the reality.

Cooperation between the Socialists and Democrats was impossible because president Dodon and the Socialists aim at strengthening Moldova's ties to Russia, while the Democratic Party is committed to working with the EU and the US government. A coalition between the Democrats and the anti-corruption ACUM was also impossible, as they have been in open warfare for years. The coalition between Socialists and ACUM was unlikely because the latter promises that the country has a future within the EU.

The Russian government publicly backs the Socialist Party and President Dodon. Socialists are accused of taking Kremlin orders. President Dodon disobeyed the Constitution several times. The Constitution states that the president has the power to reject legislation once, but is then obliged to promulgate it if "the Parliament abide by its previously adopted decision." (Article 93.2.) The Constitutional Court suspended President Dodon over his failure to sign into law a number of pieces of legislation. He has been regularly suspended from office also for his refusal to appoint ministers. The speaker of parliament took over presidential responsibilities during suspensions and signed the bills into law (Advisory Opinion 5/2018).

The electorate is sharply divided, with almost equal shares preferring to join the European Union (40 %) and the Russian-led Eurasian Union (43%). On top of that, unification with Romania is still the ultimate goal for many people in Moldova. On the one hand, there is a widespread nostalgia for the Soviet times encouraged by the current Russian government; on the other, values of constitutional democracy also enjoy considerable popular support.

The constitutional crisis has its roots in historical circumstances. Although the official narrative finds the origins of Moldova as an independent state in the XIV century, the territory was then occupied successively by the Ottoman Empire, the Russian Empire, and the Soviet Union, while between 1918 and 1940 the country was a part of Romania. For sure, any state is a construction, but the current state borders of Moldova were constructed arbitrarily or at least in an incidental manner. Consider, for example, the breakaway Moldovan territory of Transnistria, where Moscow keeps thousands of "peacekeepers."

As a typical result of historical migration of people and conflicts of states, Moldova is multi-ethnic and multi-lingual: almost 80% ethnic Moldovans and/or Romanians, 15% Slavs (Ukrainians, Russians, Bulgarians), and 4% Gagauz, while 30% of the population speak Slavic languages, and Russian is the language of inter-ethnic communication.

The difference between Moldovan and Romanian national identities is a matter of controversy. A research found that exclusively Romanian ethnic self-identification was less than 2%. However, Moldovanism and Romanism can be seen as two competing visions in Moldova. The former identity is based on a complex of history, culture, religion, and language, all of which are claimed as being distinctive and different from the Romanian identity. The latter insists that these are regional variants of a common Romanian history and pan-Roman culture.

The constitutional status of the official language also mirrors difficulties of political identity. The Declaration of Independence names the official language as "Romanian." In contrast, the Constitution states that "the Moldovan language, based on the Latin alphabet" is the official. (Article 13) Although the two languages differ in accent and some vocabulary words only, the uncertainty represents that in Moldova language does not unify but separates (Judgment 36/2013).

The achievements of the Constitutional Court

The story of the constitutionalism in Moldova dates back to 1989 when the Moldavian Soviet Socialist Republic, a part of the Soviet Union, took its first step towards independence. For the Republic of Moldova, 1991 is seen as a "year zero" when its independence from the Soviet Union and its own political system were proclaimed by the Declaration of Independence. After adopting interim constitutional measures, the final Constitution was enacted in 1994.

The Constitutional Court belongs to the third generation of the Kelsenian constitutional courts. The Constitution grants the Court, established in 1995, the status of the sole authority of constitutional jurisdiction and of guarantor of the supremacy of the Constitution (Article 134). Although the Constitution gives a long list of competences of the Court (Article 135), it contains neither direct individual access to justice nor *actio popularis*.

The Court played no significant role during the inception years. Its pursuit of constitutionalism dates back only a few years. Chief Justice Alexandru Tănase, based on his expertise and striking judicial ambition, had a chance to dominate the adjudication between 2011 and 2017. Under his leadership, the court imported many international standards of judicial review. His successor, Chief Justice Mihai Poalelungi, former Justice of the European Court of Human Rights, went further and applied proportionality principle intensively in fundamental rights protection. Implantation of constitutional ideas and practices into domestic jurisprudence was a pioneering work.

Unfortunately, the court made a fatal mistake in 2016. During a deadlock, when the parliament could not reach a compromise and elect a new head of state, the Constitutional Court declared a constitutional amendment of 2000 introducing the parliamentary election of the president unconstitutional. As a consequence, before the judgment, the president was elected by parliament, with the vote of 3/5 of the MPs, following the judgment, the president is directly elected by citizens.(Judgment 7/2016). The presidential elections in 2016 resulted in the surprise victory of Igor Dodon.

Final remarks

Observers of Moldovan politics and law have witnessed that poor democratic traditions, weak civil society, and imperfect legal institutions made the constitutional

system vulnerable. Constitutional institutions could not cope with legal and extra-legal difficulties. The cold civil war was characterized by paralyzed constitutional institutions and distrust towards them. It seems that this month the cold civil war ended in a victory for president Dodon and his allies.

The stories of Russia, Turkey, Hungary, and many other countries epitomize the phenomenon, in which legal stability crumbles because of a disintegrating constitutional system and the public finds itself wishing for a strong executive. This path may lead towards populist authoritarianism. In the new system, constitutional judiciary is not abolished but neutralized in a seemingly democratic way. "Juristocracy" is reportedly replaced with "parliamentary sovereignty." But in reality, authoritarian leadership emerges at the expense of not only constitutional judiciary but also of parliamentarianism.

The lesson may be that an effective and efficient government is impossible when only constitutional checks work. And, conversely, an authoritarian executive may emerge when constitutional checks do not work at all. A tentative warning may be that Moldova will not simply be going from a form of oligarchic control to constitutional democracy. There is a possibility that the country will be transformed from a defective constitutional democracy to presidential autocracy.

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