Ukraine's Presidents and the Judiciary: An Uneasy Relationship

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On March 11, 2020, Ukraine's Constitutional Court issued a decision dealing with the judicial reform of President Volodymyr Zelensky. The Court cooled down the reformist zeal of the presidential office by proclaiming major changes to the legislation on the judiciary unconstitutional. The Court's decision strengthens judicial independence in Ukraine which is tainted with the legacy of politicization of past presidencies.

President Yanukovych and the Judiciary

Commentators concerned with law and society issues in Ukraine are familiar with the term politicization of courts. For the last decade, three consecutive Ukrainian presidents started their terms in office with major reforms of the judicial system and the status of the judiciary in the country. In Ukraine's political environment, these reformist inclinations of Ukraine's presidents were often seen as attempts to get a hold over the courts.

In 2010, President Viktor Yanukovych pushed for legislative changes regarding the judiciary in Ukraine. In particular, the presidential majority in the parliament endorsed the new law on the judicial system and status of judges in Ukraine. The new law altered the balance between the executive and the courts. On the one hand, the reform heavily impacted the Supreme Court of Ukraine. It aimed to reduce the number of justices by almost three quarters. More importantly, the scope of the Supreme Court's jurisdiction and competences was reduced by the amendments. By bypassing constitutional provisions about the Supreme Court as the highest court in the country, the Yanukovych-era changes to the procedural codes demoted the Supreme Court's function to a merely symbolic one. The Court could no longer rule over facts of a case under its review. Instead, the new High Court was created in the system of high specialization courts to oversee cassations on decisions of courts with general jurisdiction. The role of the Supreme Court was downgraded to overseeing a handful of cases, in which the plaintiffs challenged contradictions in judicial practice of Ukraine's courts.

Furthermore, the Yanukovych-era changes enabled politicians to discipline judges. In this regard, the High Council of Justice was endowed with a prerogative to appoint judges to administrative positions of chief of a court and deputy chief in Ukraine's courts. The control over leadership cadres of the courts by a body which back then had only three members representing the judicial corpus , was seen as an attempt to tighten the hold over the courts by the executive.

During the Yanukovych era, Ukraine has witnessed a number of political trials against President Yanukovych's political rivals. The courts got involved in adjudicating criminal cases brought against the leaders of political opposition in Ukraine. In this regard, the former Prime Minister of Ukraine Yuliya Tymoshenko as well as politician Yuriy Lutsenko, were sentenced and imprisoned on dubious, politically charged grounds. These trials caused an international outcry regarding the politicization of Ukraine's courts and the declining state of democracy in Ukraine overall.

In spring 2014, following the demise of Yanukovych, the parliament voted for lustration of the judiciary. The lustration law was meant to cleanse the courts from both Yanukovych-era appointees and judges involved in the persecution of the Euromaidan protesters. On the one hand, the law dismissed all court presidents and their deputies on all levels as well

as sacked members of the High Council of Justice (HCJ) and the High Qualification Commission for Judges (HQCJ) from incumbent positions. On the other hand, the law created a special commission with a 1-year mandate to consider complaints against particular judges involved in persecuting the Euromaidan protesters. Moreover, by a separate decision, the parliament ousted a few judges of the Constitutional Court arguing that they were involved in usurpation of power by President Yanukovych. The parliament even called on the Prosecutor's Office to initiate criminal charges against those ousted justices of the Constitutional Court. Even though the post-Euromaidan elites declared the need to restore credibility and integrity of the judicial system, it may be argued that the lustration of the judiciary marked a major point of governmental interference with the judicial branch.

President Poroshenko and the Judiciary

President Petro Poroshenko, who was elected in the spring 2014 to lead the country, launched his own reform of the judiciary by pushing for constitutional amendments and new laws regarding courts in 2015-2016. Institutionally, the reform suspended the three high specialization courts in favor of the Supreme Court, which got its prerogatives back. The adoption of the new Law on the Constitutional Court in 2017 allowed for individual complaints to be tabled before the Constitutional Court. Nowadays, any citizen of Ukraine can challenge the constitutionality of Ukraine's laws applied to them in a final court decision before the Constitutional Court. This change can potentially lead to more activist and less positivist constitutional adjudication in Ukraine.[1] In 2018, the parliament commissioned the creation of the High Anti-Corruption Court, which shall tackle high-profile corruption in Ukraine. The new Court is one in a series of criminal justice bodies to deal with corruption in Ukraine that have been introduced since 2015 (anti-corruption bureau, special anti-corruption prosecution, and agency on corruption prevention). Finally, Poroshenko's reform re-launched the bodies of judicial self-government with the intention to de- politicize the appointment procedure of judges, raise professional standards within the judiciary, as well as enhance its independence. The empirical outcome of the Poroshenko's reform is yet to be studied in detail. Some political scientists remain skeptical if the reform has impacted informal behavioral norms within the judiciary itself despite extensive institutional changes.

President Zelensky and the Judiciary

President Volodymyr Zelensky, who took office in May 2019, also pushed for legislative changes regarding the judiciary. In October 2019, the pro-presidential parliamentary majority has voted to amend the Laws on the Judicial System and the High Council Justice in Ukraine, both adopted in 2016 as part of Poroshenko's reform. The amendments introduced further change to the institutional set-up of the judiciary in Ukraine.

On the one hand, Zelensky's law was concerned with reforming the Supreme Court once again. It proposed to reduce the number of Supreme Court justices from 200 to 100. Additionally, the law reduced the maximum threshold for justices' salaries in the Supreme Court. The biggest changes concerned the bodies of judicial self-government in Ukraine. The law sought to re-launch the incumbent High Qualification Commission for Judges (HQCJ). It gave the High Council of Justice a prerogative to appoint the members of HQCJ. Additionally, the law envisaged the creation of a new body within the HCJ. The new Commission of Integrity and Ethics within the HCJ was endowed with the power to put forward disciplinary charges against the justices of the Supreme Court, members of the HQCJ and the HCJ. It was written into the law that the Commission could monitor the activities of individual justices of the Supreme Court and, in particular, to check the legality of justices' income and financial assets. In other words, Zelensky's law pushed for tightening up of the hold over the judiciary. Given the

[1] Nekoliak, Andrii, and Vello Pettai. 2020. "Navigating Ethnopolitical Disputes: Ukraine's Constitutional Court in the Tug-of-War over Language." In *Decentralization, Regional Diversity, and Conflict: The Case of Ukraine,* edited by Maryna Rabinovych and Hanna Shelest. Palgrave Macmillan (forthcoming).

uneasy legacy of politicization of courts in Ukraine, the law could have been used for disciplining the bodies of judicial self-governance, interfering in the work of justices of Ukraine's Supreme Court.

A clear judgment from Ukraine's Constitutional Court

The Constitutional Court abrogated the above-described provisions of the Zelensky law. Regarding the issue of the number of Supreme Court justices, the Court pointed out that such reorganization made without substantive revisions of the Supreme Court's functions in the Constitution is inadmissible. The Court pointed out that in any case the change in the number of justices may be possible after prior consultations of the Presidency and the HCJ, which was not adhered to in case of Zelensky's law. Additionally, the Court pointed out that intervening in the terms of incumbency of the Supreme Court justices constitutes a violation of their judicial independence.

On the account of HQCJ, the Court said that endowing the HCJ with a prerogative to appoint the members of the commission without having established an interim period is unconstitutional. It claimed that the continuity between the incumbent HQCJ and the 're-launched' HQCJ instituted by the Zelensky law should be guaranteed. Otherwise, having no interim period would mean infringing on the process of holding qualification exams and appointing candidates to the positions in courts.

On the account of the ethics and integrity commission, the Court argued that creating a body that would oversee the bodies of judicial self-government and the Supreme Court and endowing it with the prerogative to charge the incumbents of those bodies constitutes a violation of judicial independence. In view of the Court, the law created a prerequisite to 'control' the judiciary by creating a new commission without any constitutional foundation behind such body. Finally, the Court stopped at some other deficiencies of the Zelensky law with respect to disciplinary procedures regarding the judiciary. The Court called on the parliament to amend the legislation in light of its decision.

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