False Dilemma

The President of Ukraine vs the Constitutional Court

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21.01.2021 doi: 10.17176/20210121-144606-0

On 29 December 2020, Volodymyr Zelenskiy, President of Ukraine, suspended the Constitutional Court's Chairman Oleksandr Tupytskyi from office by Decree 607/2020. This step is part of his ongoing conflict with the Constitutional Court caused by Decision 13r-2020 of the Constitutional Court in late October 2020. Although the rule of law is being undermined in this conflict this is not due to the false dilemma between the rule of law and the fight against corruption as purported by the president.

The origins of the conflict

On 27 October 2020, the Constitutional Court of Ukraine invalidated a large part of the anti-corruption legislation in force: It deprived Ukraine's anti-corruption bodies – the National Anti-Corruption Bureau (the NABU) which is in charge of criminal investigation of corruption offences, and the National Agency for the Corruption Prevention (the NACP) which performs a function of the verification (audit) of financial declarations of public officials, including judges – of their power. The Court challenged the constitutionality of the anti-corruption system in the context of judicial independence and concluded that the NACP's (an executive body) prerogatives to gather, store, and publish asset declarations of all public servants without exception for judges gives the executive control over the judiciary and may be abused. In addition, the Court annulled Article 366-1 of the Criminal Code of Ukraine which provided for punishment of public servants (a fine, or community service, or up to two years imprisonment) if they knowingly include false information in their financial declarations or intentionally fail to submit such declarations. As a result, Decision 13-r/2020 paralysed Ukraine's anti-corruption mechanism.

The Court failed to offer complete and persuasive arguments for its position. Moreover, three judges involved in the decision, including a judge-rapporteur, had been notified by the NACP that their financial declarations were incomplete which indicates a possible conflict of interests. In general, Decision 13-r/2020 pictured the Constitutional Court as a corrupted body and caused a constitutional crisis.

Creating a false dilemma

President Zelenskiy challenged the Court's decision as 'arbitrary and unfounded'. On 29 October 2020, he submitted a draft law no 4288 'On the renewal of public confidence in the constitutional judiciary' to the parliament to declare the Court's decision null and void. Also, he called upon the parliament to terminate the powers of the judges of the Constitutional Court. The problem is that this draft is unconstitutional itself as the Constitution of Ukraine grants neither the president nor parliament the power to annul the Court's decisions or remove judges from their offices. However, the President framed the confrontation with the Constitutional Court as a contradiction, false dilemma, between the fight against corruption, and the rule of law. On the one hand, there is the Constitutional Court which does not enjoy public support and credibility. Decision 13-r/2020 was interpreted as an attempt to help corrupt political elites to avoid responsibility. On the other hand, the President, who in his fight against corruption exceeds his powers and violates the Constitution. This is a Ukrainian paradox: two principles – an effective fight against corruption and for the rule of law which should go hand-in-hand – were presented as controversial and even mutually exclusive.

The artificiality of this contradiction was stressed in the joint letter from the President of the Council of

Europe's Group of States against Corruption and the President of the Venice Commission sent to the Speaker of Ukraine's parliament on 31 October 2020:

> *'There can be no effective fight against corruption without an independent judiciary[…]Terminating the mandate of the judges is in blatant breach of the Constitution and of fundamental principle of separation of powers. Violating the Constitution, even if for an arguably good cause, cannot lead to a culture of constitutionalism and respect for the rule of law, which the fight against corruption pursues.'*

He who has ears to hear, let him hear: the Venice Commission's position

On 25 November 2020, President Zelenskiy requested an urgent opinion of the Venice Commission on the constitutional situation created by Decision no 13-3/2020, asking the Commission to evaluate three issues: (i) the state of anti-corruption legislation after the Court's decision; (ii) a conflict-of-interest situation; and (iii) the Court's compliance with due process including reasonableness of the decision and respect for the limits of the constitutional petition. On 11-12 December 2020, the Commission issued two urgent opinions: 'On the legal situation regarding anti-corruption mechanisms following Decision 13-r/2020 of the Constitutional Court of Ukraine' jointly with the Directorate General of Human Rights and Rule of Law of the Council of Europe (CDL-PI(2020)018) and 'On the Reform of the Constitutional Court' (CDL-PI(2020)019). The first one deals with the President's first question, while the second one addresses the latter two questions.

The Venice Commission strongly criticised the Constitutional Court, stressing that the Court's reasoning is flawed in many respects: First and foremost, the Court failed to address the matter of conflict of interests and did not explain the reasons for refusing the request for recusal. Second, the Court did not point to any evidence nor did it develop any specific argument regarding its assertion that Article 366-1 is disproportional and unconstitutional as such. Finally, the Venice Commission challenged the Court's core statement that the NACP's power regarding the judges' declarations contradicts the principle of separation of powers. According to the Commission, 'there is no single model as to how verification of judges' declarations is to be organised' and 'there is no requirement under international standards that judges should be submitted to any special regime in this respect'. In general, the Commission acknowledged that Decision 13-r/2020 lacks 'clear reasoning, has no firm base in international law, and was possibly tainted with a major procedural flaw – an unresolved question of a conflict of interest of some judges'. This decision had not only the immediate negative effect on the fight against corruption in Ukraine, but also undermined public trust in constitutional justice.

Nonetheless, not even this decision authorises any actor to violate the Constitution:

> *'Parliament and the Executive must respect the role of the Constitutional Court as gatekeeper of the Constitution and need to implement it decisions. In turn, a Constitutional Court… deserves institutional respect but, on the other hand, must respect its own procedures and for the sake of constitutional stability and legal certainty, must issue decisions that are generally consistent with its own case-law… within the parameters of its legal authority and jurisdiction.'*

To help Ukraine move from this false dilemma, the Commission outlined the mechanism of implementation of the Court's decision in Ukraine's anti-corruption legislation (considering that the reasoning of the Constitutional Court of Ukraine is far from clear in the most of paragraphs, the legislature enjoys a large margin of appreciation in its implementation) as well as reform of the Constitutional Court (through the amendments to the Law on the Constitutional Court). Thus, a poor decision of the Constitutional Court should be a matter of interpretation and implementation by the legislative; it gives reason to think about reforms of the constitutional justice but cannot lead to the termination of judges' powers or breach of judicial independence.

On 15 December 2020, the Parliament adopted Law 1079-IX 'On amendments to the Law of Ukraine 'On the prevention of corruption' and restoration of the institutional mechanism for the prevention of corruption', which came in force on 30 December 2020. The President's initiative to annul the Court's decision and dismiss the judges has not been withdrawn but it has lost its relevance.

Overcoming judicial independence

At the end of 2020 President Zelenskiy issued a decree to remove the Chairman of the Constitutional Court, Oleksandr Tupytskyi, from office. He is suspected of seizure of land (Article 197-1) and treason (Article 111 of Criminal Code of Ukraine). Notably, the criminal prosecution against Judge Tupitskyi began on 30 October 2020, after Decision 13-r/2020.

The President's Decree 607/2020 'On the suspension of the Judge of the Constitutional Court of Ukraine from office' refers to Article 154 (3) of the Criminal Procedural Code of Ukraine:

> *'1. Suspension from office may be applied to a person who is suspected of or charged with committing a medium-gravity, grave or especially grave crime or, irrespective of the gravity, to a person who is an officer of a law enforcement body…3. The matter of suspension from office of the persons appointed by the President of Ukraine shall be decided by the President of Ukraine on the grounds of the public prosecutor's motion in accordance with the procedure set forth by law. Suspension of a judge from his office shall be carried out by the Higher Qualification Commission of Judges of Ukraine on the grounds of a reasoned motion of the Prosecutor General of Ukraine in accordance with the procedure set forth by law…'*

Decree 607/2020 is based on three assumptions: First, Judge Tupitskyi was appointed in May 2013 by the President of Ukraine. Second, Decree 607/2020 removes a judge from office temporarily (for two months) but does not terminate his power. Third, since there is no special procedure for the temporary removal of the Constitutional judges, the ordinary procedure is applied. However, Decree 607/2020 is based on a misinterpretation of the Constitution: Neither the Constitution of Ukraine nor the Law 'On the Constitutional Court' foresees 'suspension from office of the Constitutional Court's judges' (contrary to ordinary judges, Article 131 of the Constitution of Ukraine and Article 154 (3) of the Criminal Procedural Code). The fact that a special procedure to suspend the Constitutional Court judges does not exist does not mean that the judges can be temporarily removed from office as any other official appointed by the President. It means that the suspension cannot be applied against the Constitutional Court's judges. According to the Ukrainian legislation, the judges can be dismissed; their power can be terminated; they can be detained or arrested, however, within the special procedures which are aimed to ensure the Court's independence. Equating Constitutional Court judges with other officials contradicts the principle of judicial independence: can the Constitutional Court be independent if the President has the power to suspend the judges from office like any other appointed official within the ordinary procedure? In addition, this approach violates the principle of equality within the judiciary. The Constitutional Court of Ukraine is composed of eighteen judges, of which only six are appointed by the President. Thus, if we assume that the President can suspend Constitutional Court judges, his power can be applied only to the judges appointed under the Presidential quota.

'Creative' presidents

Zelenskiy is not the first president who attempts to remove Constitutional Court judges in bypassing the Constitution. For instance, in 2007 the Constitutional Court found itself at the centre of constitutional crises. Back then, President Viktor Yushchenko, who was pushing to dissolve the parliament, dismissed three judges of the Constitutional Court to ensure control over the constitutional justice. Although these three dismissals were equally arbitrary, President Yushchenko deployed different tactics. Soon after the political compromise was reached and all parties

agreed on early parliamentary elections, Yushchenko reinstated two judges, Volodymyr Ivaschenko and Valerii Pshenychnyi. The same day, these judges announced their resignation. These moves looked like a result of bargaining: The President cancelled his decrees regarding the judges so that he would not be accused of pressing the Constitutional Court; the judges got a chance to voluntarily resign and keep the status of 'retired judge' which entails a number of social benefits. Interestingly, in 2007 the Constitutional Court was not ready to back up its own judges. Particularly, the Court refused to consider the constitutionality of President's Decree 369/2007 on the removal of judge Pshenychnyi; after the President cancelled his Decree, the question of constitutionality did not matter anymore.

The situation with the third judge, Suzanna Stanik, was different. She did not accept removal from office and appealed. The Supreme Court of Ukraine decided in her favour. As a result, President Yushchenko had to reinstate judge Stanik to implement the Supreme Court's decision (the process of appeal took almost one year). Yet, the very next day the President made a second attempt to remove judge Stanik from office. This time, the President was very 'creative': he annulled the Decree which appointed Suzanna Stanik as a judge.

President Zelenskiy's Decree 607/2020 'On the suspension of the Judge of the Constitutional Court of Ukraine' demonstrates the same level of 'creativity' in circumventing the principle of judicial independence. The difference from 2007 is that now, after the judicial reform, amendments to the Constitution and the adoption of the Law 'On the Constitutional Court of Ukraine' in 2017, the judges are supposed to enjoy a higher level of guarantees of their independence: Neither the President, nor the Parliament can dismiss a Constitutional Court judge but it is the Court which shall decide on a dismissal by a majority of at least two thirds of its constitutional composition (Article 149-1 of the Constitution; Article 21 of the Law 'On the Constitutional Court of Ukraine').

Above the law

The current confrontation between the President and the Chairman of the Constitutional Court undermines the rule of law. While the President impairs judicial independence the Constitutional Court's Chairman ignores the President's decree and continues to perform his functions.

Judge Tupytskyi insists, that: First, the presidential decree on his temporal removal from office is null and void (however, there has been no legal procedure to establish this); second, since the President did not appoint him as Chairman of the Constitutional Court (Tupytskyi was elected by the judiciary) his powers are not affected by the decree and he can perform his administrative functions. In addition, judge Tupytskiy claims that since the Procuracy General failed to notify him of a suspicion within the procedures, he does not have the status of suspect. Thus, the presidential Decree on his suspension is not only unconstitutional, but also illegal in terms of criminal procedural law.

At the moment of writing this, the sides of the conflict took a break, both literally and figuratively: in time of pandemic and in the middle of quarantine restrictions in Ukraine, President Zelenskiy went to Bukovel for skiing, while judge Tupytskyi had a family rest in Dubai. This small detail illustrates well a constant striving of the Ukrainian elites to be above the law.

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SUGGESTED CITATION

Cherviatsova, Alina: False Dilemma: The President of Ukraine vs the Constitutional Court, Verfassungsblog, 21.01.2021, doi: 10.17176/20210121-144606-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20210121-144606-0.