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The instrumentalisation of the judiciary in Ukraine: a man's authoritarian excesses or an approach to policy development?

Abstract :

Ukrainian President Viktor Yanukovich has already entered history as being the first national leader to use the judiciary to protect his own political interests. In its 21 years of independence Ukraine has lived through several periods: post-Soviet stagnation under Leonid Kravchuk, pseudo reform under Leonid Kuchma, anarchy during Viktor Yushchenko's period in office and finally the time of arbitrary justice and the emergence of political prisoners under Viktor Yanukovich.

The question is whether the political persecution launched against opposition leaders in Ukraine is a consequence of the inertia and lax attitude of the "Orange" period? Or are the roots of this rather more deeply set and therefore, in a way, has the authoritarianism of Viktor Yanukovich not been inevitable? The reform of the judiciary has been on the agenda since independence. It is happening all too slowly, without any real political determination and is encountering a range of stumbling blocks. Understanding why is important.

The first President Leonid Kravchuk (1991-1995) came to power after a compromise was reached within the ranks of the Ukrainian and Russian communist elites. Unlike Poland and the Czech Republic, there was no lustration in Ukraine as far as former Soviet apparatchiks were concerned. On the contrary: in the name of civilian peace in 1991 the nomenclature won all of the keys to be able to distribute the economic goods that were being privatised. Power remained in the hands of the same people with their habits of lifestyle comfort and governing methods based on strong power forced upon a population that was kept passive and obedient. Pluralism, as a new element of democracy was the only innovation introduced by the Kravchuk regime. No other more ambitious reform stands out during this period.

The period under the second Ukrainian President Leonid Kuchma (1995-2004) was marked by a fundamental event: this was Ukraine's entry into the Council of Europe in 1995. As a result the country had to bring its laws and legal customs in line with the European Convention of Human Rights. The reforms started quite slowly therefore and affecting rather more the shape than the spirit of the legislation. But Ukrainian civil society earned the support it needed to demand change.

With hindsight President Viktor Yushchenko's five year term in office (2005-2010) stands out as a period of missed opportunities in as that his administration seemed to think that reform would occur on its own. It seemed to believe that it was enough to declare Ukraine's European ambition for the reforms to take place. However this discourse was weak in the face of the country's Soviet heritage: almost total impunity of the police force; the judiciary's dependence on the executive power, the poor state of the penitentiary system and the population's poor civic culture etc ... The non-achievement of this government has caught up dramatically with several "Orange" leaders who have been the focus of unfair trials; the first of these being Yulia Tymoshenko, Yuri Lutsenko and Valery Ivashchenko.

The past two and a half years under President Yanukovich (as of February 2010) have revealed themselves to be a clear regression in terms of the democratic standards in application in Ukraine. The personality of this leader, driven by a desire for vengeance and concerned about any possible loss of power, is certainly to blame to a certain degree. But the reasons for the worsening political situation are more deeply set: the unequal development of civil society in the major towns and the provinces, the customs and habits of the State's civil servants, the opposition's structural and ideological weakness, etc. The present government has revealed all of the shortcomings and flaws in Ukrainian democracy. The cases of political persecution which have been condemned by the Council of Europe, the European Court of Human Rights (ECHR) and most democratic governments now seem to be a sad result of the inertia of the "Orange" government which did not undertake the reforms that were vital to protect the infant democracy.

In spite of this however citizen and legal resistance is slowly starting. Public demonstrations are becoming more and more frequent. Political prisoners are all defending themselves in court, and are counting, above all, on the decisions taken by the European Court of Human Rights. Even though the Court in Strasbourg cannot oblige the Ukrainian judiciary to free the prisoners its decisions do have significant moral and political impact.

AN ABUSIVE INTERPRETATION OF THE PENAL CODE

Former Prime Minister Yulia Tymoshenko, former Minister of the Interior, Yuri Lutsenko and former interim Defence Minister Valery Ivashchenko have all been charged with the same crimes: abuse of power or function based on articles 364 and 365 of the Ukrainian penal code. In Yulia Tymoshenko's case this article has been used in regard to the delivery of Russian gas in Ukraine which she "accepted without the permission of the President or the government"; Yuri Lutsenko is accused of having employed a driver, who was one year older than the age defined for this post in the Interior Ministry, for having organised celebrations on the na-

tional Police Day and for having tailed the driver of the former n°.2 of the Ukrainian secret services in 2004 as part of an investigation into the poisoning of former President Viktor Yushchenko; Valery Ivashchenko is accused of having approved some controversial privatisations in Crimea. All three are in prison and have been sentenced to 7, 4 and 5 years in prison respectively. All three have lodged complaints with the European Court of Human Rights and Yuri Lutsenko was vindicated on 3rd July 2012 as far as the conditions of his arrest and his provisional detention were concerned, since they were deemed to be "illegal" [1].

The Council of Europe has explicitly requested that Ukraine modify these two articles in its Penal Code so that criminal charges can no longer be brought as a consequence of political decisions. This request was most recently made in resolution 1862 (2112) [2]. In particular the Parliamentary Assembly of the Council of Europe (PACE) adopted the following text:

2. The Assembly expresses its concern with regard to the criminal proceedings initiated under Articles 364 (abuse of office) and 365 (exceeding official powers) of the Criminal Code of Ukraine against a number of former government officials, including the former Minister of the Interior, Mr Yuriy Lutsenko, the former acting Minister of Defence, Mr Valeriy Ivashchenko, and the former first Deputy Minister of Justice, Mr Yevhen Korniyshuk, as well as the former Prime Minister, Ms Yulia Tymoshenko.

3. The Assembly considers that Articles 364 and 365 of the Criminal Code are overly broad in application and effectively allow for ex post facto criminalisation of normal political decision making. This runs counter to the principle of the rule of law and is unacceptable. The Assembly therefore urges the authorities to promptly amend these two articles of the Criminal Code in line with Council of Europe standards and to drop the charges against former government officials which are based on these provisions. The Assembly wishes to emphasise that the assessment of political decisions and their effects is the prerogative of parliaments and, ultimately, of the electorate, and not of the courts. In this respect, the Assembly asks the President of Ukraine to consider all legal means available to him to release these members of the former government

1. <http://www.robert-schuman.eu/breve.php?num=25103&typ=art>

2. <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta12/FRES1862.htm>

and to allow them to stand for the upcoming parliamentary elections. It considers that strict international standards delimiting political and criminal responsibility need to be developed.

Since then the Ukrainian parliament – enjoying a mainly pro-presidential majority – has on several occasions refused to include the modifications of these two articles of the Penal Code in its agenda, as requested by the Council of Europe. The authorities in Kyiv prefer to disappoint their European partners rather than go against the wishes of the country's President, who it seems, does not want to release charismatic leaders like Yulia Tymoshenko and Yury Lutsenko on the eve of the legislative elections in October 2012.

"It is not desirable to decriminalise everything that involves the abuse of power," believes Valentyna Telyshenko, who represents Yulia Tymoshenko, Yuri Lutsenko and Valery Ivashchenko at the ECHR. *"These articles might also for example be used to bring charges against policemen who torture prisoners during questioning in order to make them confess. So the crime should be retained but it has to be reformulated. In my opinion, as far as politicians in office are concerned, an additional term should be included to take into account personal interest and material enrichment – which are quantifiable motives – which is not the case with Ms Tymoshenko, Mr Lutsenko and Mr Ivashchenko [3]."*

THE LUTSENKO CASE

The Lutsenko case, which is the most absurd and the one which has made the most progress in terms of its progress before the ECHR, is extremely emblematic in demonstrating how the judiciary works in Ukraine: *"we are quite right in arresting Yuri Lutsenko and keeping him in prison,"* claimed the General Prosecutor Viktor Pshonka obstinately, just three days after Ukraine's condemnation by the ECHR. Even though the Justice Minister conceded dryly: *"We shall fulfil our commitments to the ECHR"*, it is to be feared that Kyiv will simply pay the 15,000€ fine for damages to the opponent as concluded in the condemnation of the Ukrainian State, without changing the way it behaves in court - since on July 3rd the ECHR only spoke of the

conditions of the arrest and preventive imprisonment of Yuri Lutsenko. It will have three other requests to look into however: regarding torture, the basis of the case that led to the conviction of one of the key figures of the "Orange" Revolution to four years in prison and the other case that is presently on trial, the so-called "illegal" tailing of a driver of the former n° 2 of the Ukrainian secret services, who was then suspected of being involved in the poisoning of Viktor Yushchenko.

The ECHR's decision deems the arrest and provisional imprisonment of Yuri Lutsenko illegal. But the Court does not have the power to free him. However, lawyer, Valentyna Telyshenko, who represents Yuri Lutsenko in his appeals to the ECHR, is counting on the following requests at the Court to bring justice back to this case: *"for the first time in the Court's history political persecution has been acknowledged within a country. Observations like this open the way to similar opportunities for Yulia Tymoshenko and Valery Ivashchenko. This decision comprises a precedent for all of the ECHR's work. Regarding Yuri Lutsenko it will facilitate the arguments in his next appeals which will come soon – once the Ukrainian judiciary has taken all of its decisions at all levels of national justice,"* says Ms Telyshenko [4].

The hearings at the two trials of the former Interior Minister provided a bizarre spectacle. In the case of the employment of his driver and the celebrations organised on Police Day in 2008 and 2009 the State accuses Yuri Lutsenko of wasting 40,000 hryvnia –UAH- (4000 €). This sum was rapidly put together by police veterans who wanted to pay it back. But the General Prosecutor refused to take the sum. The former Minister's defence asked to question 16 witnesses at the trial. This was refused outright. However the accusation was able to bring forward some 86 witnesses.

Several of them like Valery Melnyk [5] and Mykola Legenky [6], have publicly declared the threats and pressure they underwent during questioning. Others have tried to go back on their original statements for the same reasons. No one confirmed the guilt of the former Minister during the trial. But all was in vain. The judges seemed to feign deafness. *"Political motives are*

3. <http://ukrainianweek.com/Politics/40318>

4. <http://tyzhden.ua/Politics/55284>

5. <http://ukrainianweek.com/Columns/50/43444>

6. <http://ukrainianweek.com/Columns/50/43448>

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clear" commented another lawyer, Olexiy Baganets, who said that he was threatened by the General Prosecutor [7].

THE TYMOSHENKO CASE

The charges made against former Prime Minister Yulia Tymoshenko, her conviction to seven years in prison, as well as the number of investigations taken out against her embody all of the faults and lacuna in the Ukrainian legal system. But this is not the only thing. The Tymoshenko case is also a reflection of a society that is trapped by its own contradictions. The total mistrust that reigns amongst the political elites and civil society impedes any effective move to counter arbitrary justice. The opposition has now been decapitated and is unable to draw up a programme that can bring together all of those who are unhappy with the present administration. Ukrainian politics remains and is above all an area that revolves around a few key figures. This is why Tymoshenko and Lutsenko's imprisonment has had such a negative effect on the future of pluralism in Ukraine.

Yulia Tymoshenko's defence on a national level is also the work of just a few professional lawyers, some Human Rights activists, of her political party, the BYUT [8], and her family. As far as the ECHR is concerned a complaint was lodged on 10th August 2011. It was rapidly acknowledged as admissible. "The request refers to all of

the articles in the European Convention of Human Rights that have not been respected. This means the threat of death, torture, illegal arrest, deprivation of the right to fair trial and of course to political persecution," explains Valentyna Telychenko. Discussions between the ECHR and the Ukrainian government are ongoing. A hearing is planned for 28th August.

Undoubtedly, in the hope of gaining time, Kyiv has constantly postponed the hearings at the Appeal Court over the so-called "gas case" It seems they are counting on delaying a further complaint before the ECHR for as long as possible. However sooner or later this will be inevitable.

The Ukrainian administration is not the only one to use jurisprudence to eliminate its political opponents. It will surely not be the only one to discover that authoritarianism promises nothing but international isolation. The obstinacy with which Kyiv is attempting to remove charismatic opponents from political life shows that Viktor Yanukovich has not taken this threat into account.

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7. <http://ukrainianweek.com/Politics/42763>

8. <http://byut.com.ua/>

9. <http://www.decitre.fr/livres/gazprom-9782915879353.html>

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