

## **Suing the president: precedent or discussion point?**

### RESEARCH UPDATE

No. 37/285, October 21, 2002

*Yulia Tyshchenko, Head of Civil Society Programs*

#### *Introduction*

The past week brought a number of noteworthy events. The parliament voted in favor of the draft State Budget 2003 in the first reading. The newly-formed parliamentary majority practically collapsed. The problems of running business in an unstable and politically biased environment became notoriously visible in the arrest of a Russian citizen and one of Ukraine's richest people, Kostyantyn Hryhoryshyn. His friend and Ukrainian MP Volodymyr Sivkovych, a member of the newly-formed pro-Kuchma parliamentary majority, was beaten up by the special police when trying to protect Hryhoryshyn during the arrest operation.

The Crimean parliament formally urged the national parliament to amend the Constitution and give the state of a state language to Russian. To complete the picture, on October 15 a judge of the Kyiv Court of Appeal, Yuri Vasylenko, initiated a criminal case against the President of Ukraine, Leonid Kuchma.

The resolution to initiate the criminal case followed a lawsuit filed by leaders of the political opposition: Oleksandr Moroz, Yulia Tymoshenko, Oleksandr Turchynov, Hryhory Omelchenko and Josif Vinsky. The resolution contained a list of 11 articles of the Criminal Code on which the charges were based, including article 112 (assassination attempt against a statesman or a public figure), article 161 (discrimination based on racial, ethnic or religious origin of a person), article 163 (violation of confidentiality of private telephone conversations), article 170 (interference with legitimate activity of trade unions, political parties and NGOs), article 171 (interference with legitimate professional activity of journalists), article 191 (embezzlement of, waste of property through power abuse), article 333 (illegal export from Ukraine of raw materials, equipment that can be used for production of weapons, military and special technologies), article 346 (threat or violence against a statesman or civic activist), article 364 (power or position abuse), article 368 (bribery).

The lawsuit, filed by the opposition MPs, was submitted together with documents of the Ad Hoc Investigation Commission of the Ukrainian parliament that had been investigating the abduction and murder of an independent journalist, Georgy Gongadze. The collection of evidence also included recordings of dialogues from the tapes of former security officer Mykola Melnychenko, as well as statements of present and former MPs – Hryhory Omelchenko, Anatoly Yermak, Viktor Shyshkin, Mykola Chyviuk, Vasyl Chervoniy, Oleksandr Yelyashkevych and Oleksandr Zhyr. Based on the accusations, Judge Vasylenko announced he believed it was necessary to investigate the embezzlement of DM 12 million of the National Currency Fund in 1993 when Kuchma was Prime Minister of Ukraine. The charges against Kuchma also included his suspected involvement in sanctioning and arranging the sale of weapons to countries that were under international sanctions, power abuse, repression against politicians and journalists, as well as the refusal to sign two laws on the Cabinet of Ministers and the law on ad hoc investigation commissions, approved by the parliament, notwithstanding the fact that the parliament managed to override the Presidential veto. The resolution of Judge Vasylenko ordered Kuchma to sign the law within five days, as the country's leading information agency, UNIAN, reported on October 15.

According one of the initiators of the case, Oleksandr Turchynov, the lawsuit had been initially filed with the Kyiv Court of Appeal on October 14, 2002, but the court authorities blocked the case. Only after the MPs gave the case to all of the judges directly and sent a copy to the Supreme Court of Ukraine, one of the judges, Yuri Vasylenko, decided for the case to go ahead.

According to Vasylenko, analysis of the current legislation showed no special requirements and procedures for initiating a criminal case against the president of the state. "In my view, the President cannot be suspected of having committed so serious crimes for so long", Vasylenko explained his decision, "I concluded that the best option would be to investigate the cases" (www.correspondent.net, October 15, 2002). "[Former Attorney General] Mykhailo Potebenko threatened me, and [current Attorney General of Ukraine] Mr. Piskun wrote a complaint about me," the judge said and officially announced he did not use drugs and did not have any weapons.

As the next step, Judge Vasylenko formally sent the materials to the Office of Attorney General so that the

investigation could begin. He stressed that there were no special conditions or actions that would make a criminal investigation against the president different from criminal investigation of a criminal case against any other citizen of Ukraine.

### *Reactions*

The very fact of opening a criminal case against the head of the state is unprecedented in Ukrainian legal practice. Although Ukraine is not the country in which the judiciary follows precedents, the case has a rather strong ethical meaning of demonstrating that everyone is equal to others in the eyes of the law. In addition to giving moral satisfactions to all those who opposed the idea of impunity of selected Ukrainians, the fact of initiating a criminal case against the state's top official is a political event. On the one hand, the decision of Judge Vasylenko could be interpreted as a demonstration of independence of the Ukrainian judiciary; on the other hand, it continues the trend that developed in Ukraine during the recent parliamentary elections, i.e., using the courts for settling political scores. It is possible that the transfer of the political problem into the legal sphere may distract attention from Kuchma's possible involvement in actions that the Criminal Code of Ukraine sees as crimes.

In a sense, one may agree with Ukraine's first president and now leader of the parliamentary faction of SDPU(o) Leonid Kravchuk that the decision of the judge of the Kyiv Court of Appeal is a "telling fact" that proves democracy and shows that a criminal case can be initiated against anyone in the state, for laws and the Constitution are the same for everyone. Yet, it is clear that the opposition MPs who filed the lawsuit will be trying to make the best of it in terms of political gains.

According to Speaker of the parliament, former presidential chief of staff Volodymyr Lytvyn, the case is a "political order" that has no legal basis. The Speaker described the case as a "naïve and prospectless step" ([www.korespondent.net](http://www.korespondent.net), October 16, 2002) and argued that the Constitution provides for a different procedure of starting a criminal case against the president. The Speaker hinted at the impeachment procedure that has not yet been specified in a law.

Presidential chief of staff Viktor Medvedchuk described the decision of Judge Vasylenko as "legal nihilism" and argued that a judge of the Court of Appeal did not have the power to initiate a criminal case against the person who enjoys immunity to prosecution. Minister of Justice Oleksandr Lavrynovych also saw the judgment as illegitimate. He said that "the very fact of initiating a criminal case is rather questionable, and from the legal point of view it survives no criticism, as the Constitution provides for two categories – members of the parliament and the president – who are immune" (Interfax-Ukraine, October 16, 2002).

Article 105 of the Constitution says that "President of Ukraine enjoys immunity for the duration of his service". Article 111 of the Constitution lists causes due to which the president can be removed from office: "impeachment as a result of his state treason or other crime", to be initiated in the parliament "by the majority of the constitutional composition of the Verkhovna Rada of Ukraine", i.e., supported by at least 301 MPs.

Yet, arguments of the critics of Judge Vasylenko are also not impeccable. For instance, Viktor Shyshkin, an opposition member of the parliament and former Attorney General of Ukraine, argues that the critics' comments mixed up things that "are regulated by different legal directions. Presently the point is not the impeachment, but the start instance, the initiation of a criminal case. [This is] not bringing to responsibility for a crime... these are stages of different levels. There is a category of persons to whom a special order of bringing to liability is applied" (Ukrainska Pravda, October 16, 2002). According to Shyshkin, "there are only two categories of persons to whom a special order is applied: judges and attorneys... other categories of citizens are equal, including an MP and a president".

Minister of Justice Oleksandr Lavrynovych believes that the decision to open the criminal case against the head of the state should be abolished, but, in his view, to do so is the power of the Supreme Court. It would take a relevant petition from the Attorney general or from the judge himself to the Supreme Court. Noteworthy, the Supreme Court does not view consideration of the decision of Judge Vasylenko as impossible. "The Supreme Court has no right to comment on documents of the kind of the resolution in question. If such a document arrives to the supreme institution of the judiciary, as it is envisaged by the procedural law, the Supreme Court will consider it and adopt a relevant decision," head of the press service of the Ukrainian parliament Liana Shlyaposhnikova told the press on

October 15 (Interfax-Ukraina, October 15, 2002).

Another noteworthy point is that the Office of Attorney General of Ukraine cannot simply close down the case, initiated by the Court of Appeal. According to comments of Viktor Shyshkin, “the procurature may not close down the case without having performed at least minimum sequence of investigative actions. This is true for a case opened against any citizen, the President of Ukraine included”. According to the former Attorney General of Ukraine, the option is to start with interrogating “two or three persons” and then close down the case “with the verdict “due to the absence of the matter of crime”. Meanwhile, it should be taken into account that the resolution to close down the case may also be challenged in court, Shyshkin said. The Office of Attorney General of Ukraine has already filed the protest to the Supreme Court of Ukraine, urging to dismiss the criminal case against the President of Ukraine, initiated by the judge of the Court of Appeal, as illegitimate. The Supreme Court, in its turn, filed a complaint with the Kyiv Court of Appeal that must prepare necessary documents and set the date of hearing of the complaint in the Supreme Court.

### *Likely Consequences*

The lawsuit, filed by the representatives of the opposition with the Court of Appeal may be seen as an image-building action in the context of forming a major original information opportunity that is likely to last at least as long as the case is being considered by the Office of Attorney General and the court. The lawsuit was a specific follow-up to the “People’s Tribunal” rally organized on October 12 and attended in Kyiv alone by almost 10 thousand people.

The case may develop through the court’s appeal to the parliament of Ukraine and the decision to send the materials of the case to relevant committees of the parliament, the establishment of a special investigation commission and the inaction of the law on the status of such a commission by President Kuchma – as member of Yulia Tymoshenko’s faction in the parliament, Anatoly Matvienko, put it (<http://for-ua.com>, October 15, 2002).

According to Article 111 of the Constitution (that specifies the procedure of removing of the head of the state from his position), “in order to conduct investigation, the Verkhovna Rada creates an ad hoc investigation commission that includes a special prosecutor and special investigators. According to Anatoly Matvienko, “the current constitutional norm allows to bring the case against the president to the logical end in the parliament” – first, the simple majority [226 MPs] should vote in favor of that, and then the dismissal of the president should be supported by the constitutional majority [300 MPs] and finally, three thirds of the [number of the] MPs should vote for that.

Noteworthy, the decision of Judge Vasylenko was announced at the time when the monitoring mission of the Parliamentary Assembly of the Council of Europe was in Kyiv to study the observance of human rights and media freedom. The reaction of Ukrainian TV channels and tricks with switching off microphones used by members of the parliament in the parliamentary sessions for announcing the information may also add to the findings of the monitoring mission. On October 15 the major national TV channels “noticed” the criminal case opened against the president of the state as almost the last piece of news of the day. The piece was shown seventh or eighth in the news programs of most of the channels, while some of the channels did not show it at all. It is likely that the issue will still catch attention of international organizations and the West. According to Taras Chornovil, MP, “in the USA, where a representative cohort of Kuchma’s opponents have gathered – from ex-bodyguard Melnychenko to ex-MP Yelyashkevych – some think about court action against the Ukrainian president <...> the American administration discusses a possibility to initiate a number of criminal cases against president Kuchma and his inner circle, freezing banking accounts of those persons and a possibility of pronouncing the Ukrainian president and some other top state officials of Ukraine as personae non grata in the USA and a number of other states” (<http://for-ua.com>, October 15, 2002). It is not unlikely that the court may judge that Kuchma is not guilty and dismiss all of the charges listed in Judge Vasylenko’s resolution – but that will be a matter of a different discussion and different conclusions.