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TEMPORARY SUSPENSION OF THE PUBLIC OFFICIALS BY THE PRESIDENT OF UKRAINE: THE ESTABLISHED PRACTICE AND NEW CHALLENGES

Abstract

This article analyzes the provisions of the Law of Ukraine On the Legal Regime of Martial Law, adopted after the Russian Federation's full-scale invasion of Ukraine's territory. The author proves that the second clause of Article 11 of the mentioned law, granting the President of Ukraine powers to suspend public officials during martial law, contradicts the Constitution of Ukraine, whereas the latter has not vested such powers with the President of Ukraine. The author compares the suspension and the dismissal of a public official from the office and proves that the newly adopted provision contradicts the very nature and purpose of martial law. In the article, the author analyses a list of public officials to whom the adopted provision applies and argues that the only purpose the latter was adopted is to allow the President of Ukraine to dismiss public officials from their offices without proper legal grounds and the approval of others state authorities as required by the Constitution.

Key Words

Constitution of Ukraine, President, Parliament, Martial Law, Suspension from Office, Dismissal from Office

Introduction

The constitution of state power in Ukraine assigns a unique place to the President of Ukraine (hereinafter - the President). According to the original text of the Constitution of Ukraine¹ (hereinafter - the Constitution) as of 1996, the President, although formally did not belong to the executive branch of power (at least according to the provisions of the Constitution), nevertheless, in fact, headed the executive. Even when the role of the President in the executive branch was considerably weakened with the constitutional amendments of 2004, he continued to exert a significant influence over it. Some elements of the executive remain under his full control even though, according to the Constitution, it is the Cabinet of Ministers of Ukraine (hereinafter - the Cabinet of Ministers) who is the highest body in the system of bodies of executive power.

While assigning such an essential role to the President in the constitution of state power, the Parliament, as the constituent authority, established a serious safeguard in the Constitution aimed at preventing the President from further strengthening his grip on power. In particular, in the first clause of Article 106 of the Constitution, where the powers of the President are listed, paragraph 31 clearly states that the President can exercise only the powers stated in the Constitution. Furthermore, the Constitutional Court of Ukraine (hereinafter - the Constitutional Court) since 2003² has established a firm legal standing, according to which the list of powers of the President is determined exclusively by the Constitution and cannot be expanded by law or any other legal act.³

Nevertheless, the Verkhovna Rada of Ukraine (hereinafter - the Verkhovna Rada), contrary to an explicit provision of the Constitution, repeatedly granted new powers to the President by adopting specific provisions in laws. Only in cases where the Constitutional Court recognized such provisions unconstitutional was the Parliament forced to reverse them. This has happened in cases of the National Commission for State Regulation in the Energy and Uti-

¹ Constitution of Ukraine. Adopted on June 28, 1996. *Vidomosti Verkhovnoi Rady Ukrainy* 30 (1996): 141. Accessed August 24, 2022, <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/ed20200101#Text>.

² Decision of the Constitutional Court of Ukraine of April 10, 2003, No. No7-pn/2003, accessed August 24, 2022, <https://zakon.rada.gov.ua/laws/show/v007p710-03/conv#Text>.

³ The last decision of the Constitutional Court in which it once again approved this legal stance is Decision of the Constitutional Court of Ukraine of August 28, 2020, No. 9-p/2020, accessed August 24, 2022, <https://zakon.rada.gov.ua/laws/show/v009p710-20#Text>.

lities Sectors⁴ and the Director of the National Anti-Corruption Bureau of Ukraine.⁵ At the same time, the repeated instructions of the Constitutional Court did not stop the President from initiating new legislation granting him unconstitutional powers, which the Parliament obediently adopted. Such actions bring imbalance into the already shaky system of checks and balances established by the Ukrainian Constitution. As a result, the President's role in the system is growing, while the tools to restrain him from arbitrary decisions remain weak.

The war of the Russian Federation against Ukraine, which began in 2014, created new challenges for Ukrainian democracy. With a full-scale military invasion in 2022, public demand for a stronger executive power has increased, which is natural in the face of constant security threats. At the same time, the recent opinion poll has recorded some worrying trends: almost 80% of surveyed Ukrainians consider it acceptable that during the war, the President may interfere in the sphere of competence of the Parliament and the cabinet of Ministers. More than half of the surveyed support the statement that a strong leader is more important than a democratic system.⁶ Without expressing my view on whether such questions are ethical (the latter clearly incline the interviewees to a specific answer by contrasting a strong leader with a democratic system), I should acknowledge that the given figures constitute a favorable ground for the establishment of authoritarian tendencies in Ukrainian society both during the war and after its end.

The concentration of power in the hands of the President is the most straightforward answer to the public demand for security. That is why relevant legislative initiatives immediately appeared in the Parliament, and some of them were adopted as laws. The purpose of this article is not to analyze all provisions of laws that, despite the provisions of the Constitution, grant the President additional powers. I will narrow the scope of this article only to the practice of suspending or dismissing public officials by the President conducted in a manner not established by the Constitution but legalized at the level of law and which has become a common practice in recent years. In each of the described cases, I will prove the unconstitutionality of such instruments.

⁴ Decision of the Constitutional Court of Ukraine of June 13, 2019, No 5-p/2019, accessed August 24, 2022, <https://zakon.rada.gov.ua/laws/show/v005p710-19/conv#Text>.

⁵ Decision of the Constitutional Court of Ukraine of September 16, 2020, No. 11-p/2020, accessed August 24, 2022, <https://zakon.rada.gov.ua/laws/show/v011p710-20/conv#Text>.

⁶ Kyiv International Institute of Sociology. "Demokratiia, prava i svobody hromadian ta mediaspozhyvannia v umovakh viyny - Lypen' 2022" [Democracy, rights and liberties of citizens and media consumption during war - July 2022], Kyiv International Institute of Sociology, August 8, 2022, accessed September 24, 2022, <https://www.kiis.com.ua/?lang=ukr&cat=reports&id=1132&page=1>.

New powers of the President during martial law

A vivid example of “wartime legislation” is the Law of Ukraine On Amending Certain Laws of Ukraine Regarding the Functioning of the Civil Service and Local Self-Government Under Martial Law, adopted by the Parliament on May 12, 2022 (hereinafter - Law No. 2259-IX).⁷ As its name indicates, the subject of this law was supposed to be the functioning of local self-government and the civil service in wartime conditions. Moreover, the initial version of the draft law⁸ exclusively concerned issues of local self-government. The explanatory note to the draft law stated that its purpose is to “regulate the specifics of exercising powers by the local self-government bodies under martial law, to simplify the procedure for making personnel decisions regarding positions in local self-government bodies, positions of heads of the municipal enterprises.” And in fact, almost all provisions of Law No. 2259-IX concern the activities of local self-government bodies in wartime and their cooperation with military administrations. However, during the finalization of the text, a provision was added to it amending Article 11 of the Law of Ukraine On the Legal Regime of Martial Law (hereinafter - the Law on Martial Law).⁹

Before these amendments were made, Article 11 included general provisions regarding the exercise of powers by the President under martial law. First and foremost, it was aimed at ensuring the continuity of the functioning of this institution. In particular, the Article provided that in case the President’s term of office expires during martial law the latter should continue exercising his powers. Article 11 also listed the President’s main objectives as the Supreme Commander of the Armed Forces of Ukraine under martial law. The Law on Martial Law contains similar provisions for other state authorities, particularly the Verkhovna Rada, the Cabinet of Ministers, and courts (Articles 12, 12¹, and 12², respectively).

Law No. 2259-IX supplemented Article 11 with the second clause, which for the period of martial law granted the President the power to suspend from office any public official whose appointment and dismissal fall within his powers and to designate another official who will be

⁷ Law of Ukraine on Amending Certain Laws of Ukraine Regarding the Functioning of the Civil Service and Local Self-Government Under Martial Law, adopted on May 12, 2022, *Holos Ukrayiny* 107 (2022), accessed August 24, 2022, <https://zakon.rada.gov.ua/laws/show/2259-20#Text>.

⁸ Draft Law on Amending the Law of Ukraine on the Legal Regime of Martial Law on Functioning of Local Self-Government During the Martial Law No. 7269, registered April 9, 2022, accessed August 24, 2022, <https://itd.rada.gov.ua/billInfo/Bills/Card/39399>.

⁹ Law of Ukraine on the Legal Regime of Martial Law, adopted on May 12, 2015, *Vidomosti Verkhovnoi Rady Ukrainy* 28 (2015): 250, accessed August 24, 2022, <https://zakon.rada.gov.ua/laws/show/389-19#Text>.

performing his duties. In their remarks¹⁰ regarding the draft law, the experts of the Main Legal Department of the Secretariat of the Verkhovna Rada (*Holovne Yurydychne Upravlinnia Aparatu Verkhovnoi Rady Ukrainy*) pointed out the unconstitutionality of such provision. Their conclusion is clear: the Constitution does not grant the President any authority to suspend public officials from their offices, and according to the legal stance of the Constitutional Court, the President's powers cannot be expanded by law. Despite these remarks, Law No. 2259-IX was adopted with mentioned unconstitutional provision. Further in this article I will provide a detailed analysis of the provision and its possible implementation.

Contradiction with the legal nature of martial law

First of all, it should be noted that according to clause two of Article 11 of Law No. 2259-IX, the power to suspend public officials is granted to the President only for the time of martial law. One may speculate that such powers are justified during wartime by the need to adopt quick decisions and that they will cease after the end of martial law. However, this contradicts the very nature of martial law due to the following.

The well-known British lawyer and author of the concept of the rule of law, Albert Dicey, stated that martial law is the right of a state¹¹ to “repel force by force in the case of invasion, insurrection, riot, or generally of any violent resistance to the law.” Therefore, “every subject, whether a civilian or a soldier, whether what is called a “servant of the government,” ... or a person in no way connected with the administration, not only has the right, but is, as a matter of legal duty, bound to assist in putting down breaches of the peace.”¹² Consequently, martial law is about imposing certain obligations and restrictions on citizens that are designed to stop violations of the law and threats to the state. Contrary to the popular public perception of “wartime laws” [*zakony voiennoho chasu*] that exists in Ukraine and which is clearly illustrated by mentioned opinion poll, the martial law as a legal regime does not mean that the state or public officials can simply violate the law for the sake of repelling a threat to the state. On the contrary, martial law is designed to organize the public authorities in such a way as to maximize the state's ability to resist an external or internal threat. Therefore, martial law primarily affects people as it limits their rights and freedoms so that the laws and constitutional

¹⁰ Remarks of the the Main Legal Department of the Secretariat of the Verkhovna Rada (*Holovne Yurydychne Upravlinnia Aparatu Verkhovnoi Rady Ukrainy*) on the Draft Law on Amending the Law of Ukraine on the Legal Regime of Martial Law on Functioning of Local Self-Government During the Martial Law No. 7269, signed on May 2, 2022, accessed August 24, 2022, <https://itd.rada.gov.ua/billInfo/Bills/pubFile/1287044>

¹¹ Albert Dicey uses a term “Crown” here.

¹² Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund, 1982), 183.

order can be protected, rather than changed or violated.

This approach is confirmed by the provisions of the Constitution. Article 64 provides that under martial law, some, but not all, human rights and freedoms may be restricted, but only for a specific period. The mechanism of introducing such restrictions requires the consent of the Parliament as the only representative body. This is an excellent illustration that martial law not only does not cancel the separation of powers and the system of checks and balances but on the contrary, they are an essential guarantee against abuse of power under martial law. Moreover, the authors of the Constitution anticipated that there might be a temptation to use martial law as a pretext to change the constitutional order. Hence the second clause of Article 157 provides a safeguard against amending the Constitution during this period.

Consequently, the nature of martial law stipulates that human rights and freedoms are limited to preserve the state and its people. And that the state and its institutions continue to exist and function according to the model laid down in the Constitution. And that this model should not be changed under this regime, including by granting some extraordinary powers to one of the components. The amendments to the Law on Martial Law introduced by Law No. 2259-IX, in fact, created a separate legal regime within the legal regime of martial law, according to which the powers of the President are automatically expanded as soon as martial law is introduced. Therefore it contradicts the Constitution and the legal nature of martial law.

Legal nature of the suspension from office given the powers of the President

The second clause of Article 11 of the Law on Martial Law uses quite general wording. The first sentence should be quoted entirely as it names the new powers of the President: “During the martial law, the President of Ukraine may decide to suspend a public official whose appointment and dismissal fall under his authority, and to designate another official who will be performing his duties.”

First of all, the President’s powers under this provision should be analyzed. According to the text, the President can suspend an official and appoint another person who will perform his duties. As the Main Legal Department of the Secretariat of the Verkhovna Rada rightly noted, the President does not have the authority to suspend officials from office. The Constitution operates with the concept of “suspension” only in relation to judges. They can be suspended by the High Council of Justice, however, not from the office but from the administration of justice (paragraph 6 clause one of Article 131 of the Constitution). As for officials appointed and dismissed by the President, neither the Constitution nor the relevant laws contain such a concept as suspension from office. Officials appointed by the President can only be dismissed, not suspended.

Additionally, it should be noted that suspension from office is one of the measures to ensure criminal proceedings: the investigating judge can suspend from office an official suspected or accused of committing a crime (Article 154 of the Criminal Procedure Code of Ukraine, hereinafter - CPC).¹³ Clause three of Article 154 of the CPC also includes a separate mechanism for suspending officials appointed by the President, which I will cover later in this article. A prosecutor may be suspended from his office due to the disciplinary proceedings against him (paragraph 3 clause one of Article 64 of the Law of Ukraine on the Prosecutor's Office).¹⁴ Also, like other officials, he may be suspended from performing official duties in connection with a case on an administrative offense related to corruption (paragraph 3 clause five of Article 65-1 of the Law of Ukraine On Prevention of Corruption).¹⁵ A similar mechanism for the temporary suspension of judges from the administration of justice requires the consent of the High Council of Justice, as the latter must guarantee that such a measure does not violate the judiciary's independence.

All the mentioned cases prove that suspension from office or, in the case of a judge, from the administration of justice is aimed not at the dismissal of the official from the office but at preventing him from exercising powers for a specific period. Moreover, the such suspension is intended either to make it impossible for a person to exercise powers due to doubts about his impartiality or professionalism, or if his exercise of powers may influence disciplinary or criminal proceedings. None of those mentioned above cases allows for a suspension without reason, as in the case of clause two of Article 11 of the Law on Martial Law. Therefore, suspension provided for by this provision contradicts the purpose with which the suspension from office exists in all other cases. It allows suspension not until the completion of the criminal investigation and not until the completion of disciplinary proceedings or proceedings in case of an administrative offense. This brings me to the conclusion that this provision has a different purpose. Obviously, it is about allowing the President to prevent an official from exercising his powers and entrust them to another person. And that is exactly what a dismissal is about. However, in case of suspension, the President can, *per se*, dismiss a public official without sufficient legal grounds. While at the same time, dismissal often requires the consent or initiative of other state authorities.

¹³ Criminal Procedure Code of Ukraine, adopted on April 13, 2012, *Vidomosti Verkhovnoi Rady Ukrainy* 9-10, 11-12, 13 (2012): 88, accessed August 24, 2022, <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

¹⁴ Law of Ukraine on the Prosecutor's Office, adopted on October 14, 2014, *Vidomosti Verkhovnoi Rady Ukrainy* 2-3 (2014): 12, accessed August 24, 2022, <https://zakon.rada.gov.ua/laws/show/1697-18#Text>.

¹⁵ Law of Ukraine on Prevention of Corruption, adopted on October 14, 2014, *Vidomosti Verkhovnoi Rady Ukrainy* 49 (2014): 2056, accessed August 24, 2022, <https://zakon.rada.gov.ua/laws/show/1700-18#Text>.

Public officials that can be suspended by the President

It is necessary to separately consider the list of officials whose suspension from office is allowed by the second clause of Article 11 of the Law on Martial Law. The latter provides that the President can suspend an official whose *appointment and dismissal* are within his powers. Here the conjunction “and” is used, which means that under this provision, the President can use the power to suspend if both conditions laid down in the disposition of the provision are met: the official must be appointed by the President, and at the same time the President must have the authority to dismiss him. Therefore, judging by the text of the provision of the law, the President cannot suspend officials whom he appoints but has no authority to dismiss.

To make a list of such officials, I should, first of all, analyze the provisions of the Constitution, whereas, as I mentioned earlier, all the powers of the President are determined exclusively in it. In accordance with the Constitution, the President appoints and dismisses:

- 1) heads of diplomatic missions of Ukraine in other states and at international organizations (paragraph 5 clause one of Article 106);
- 2) the Prosecutor General with the consent of the Verkhovna Rada (paragraph 11 clause one of Article 106);
- 3) half of the members of the Council of the National Bank of Ukraine (paragraph 12 clause one of Article 106);
- 4) half of the members of the National Council of Ukraine on Television and Radio Broadcasting (para 13 clause one of Article 106);
- 5) high command of the Armed Forces of Ukraine, other military formations (paragraph 17 clause one of Article 106);
- 6) heads of local state administrations (hereinafter - LSA and LSAs) at the submission of the Cabinet of Ministers (clause four of Article 118).

Consequently, this is the list of the public officials to whom the second clause of Article 11 of the Law on Martial Law shall apply. It is evident that among the given list, there are officials whose appointment and dismissal are carried out by the President independently and those for whom the consent or submission of another body is needed. Let me consider these groups separately.

The list of public officials whose appointment and dismissal by the President do not require the consent of other bodies includes the heads of diplomatic missions, members of the

National Council of Ukraine on Television and Radio Broadcasting and the high command of the Armed Forces of Ukraine and other military formations. The analysis of this list raises a reasonable question: for what reason does the President need the power to suspend these officials from office and appoint temporary acting substitutes if he can dismiss them and appoint other officials by himself? This question can, to some extent, be answered after the analysis of the specific laws regulating the appointment and dismissal of these officials. Some of the laws provide that the President should have a legal ground for the dismissal of such officials, be it a resignation letter, termination of Ukrainian citizenship or acquisition of citizenship of another state, incompatibility with the public office, non-participation in meetings or non- fulfillment of duties for members of the Council of the National Bank of Ukraine, the National Council of Ukraine on Television and Radio Broadcasting (clause eleven of Article 10 of the Law of Ukraine on the National Bank of Ukraine¹⁶ and clause one of Article 8 of the Law of Ukraine on the National Council of Ukraine on Television and Radio Broadcasting,¹⁷ respectively), or a submission by the Minister of Foreign Affairs of Ukraine for the head of a diplomatic mission (clause 3 of Article 14 of the Law of Ukraine on Diplomatic Service¹⁸). To dismiss members of the high command of military formations, the President needs no specific requirements.

One can speculate that with regard to public officials whose dismissal by the President requires some legal grounds, the provision of clause two of Article 11 of the Law on Martial Law could be justified by the fact that during martial law, the President may need to adopt swift decisions on dismissal of these officials. However, if this were the real motivation for adopting the provision, then wouldn't it be more reasonable to mention this very thing in law? That the President can dismiss such and such officials from their offices without legal reasons defined by law. Alternatively, if the Parliament deemed it necessary, to introduce specific amendments to relevant laws. Apparently, the Parliament pursued some other goals when adopting this provision.

The second group of public officials who, by the second clause of Article 11 of the Law Martial Law, can be suspended by the President are the heads of the LSAs and the Prosecutor General. As I mentioned above, to dismiss these officials, the President needs the consent of other state bodies - the Verkhovna Rada in the case of the Prosecutor General and the Cabinet

¹⁶ Law of Ukraine on the National Bank of Ukraine, adopted on May 20, 1999, *Vidomosti Verkhovnoi Rady Ukrainy* 29 (1999): 238, accessed September 15, 2022, <https://zakon.rada.gov.ua/laws/show/679-14#Text>.

¹⁷ Law of Ukraine on the National Council of Ukraine on Television and Radio Broadcasting, adopted on September 23, 1997, *Vidomosti Verkhovnoi Rady Ukrainy* 48 (1997): 296, accessed September 15, 2022, <https://zakon.rada.gov.ua/laws/show/538/97-%D0%B2%D1%80#Text>.

¹⁸ Law of Ukraine on Diplomatic Service, adopted on June 7, 2018, *Vidomosti Verkhovnoi Rady Ukrainy* 26 (2018): 219, accessed September 15, 2022, <https://zakon.rada.gov.ua/laws/show/2449-19#Text>.

of Ministers in the case of the heads of the LSAs. Moreover, while according to the Constitution, the President himself can initiate the dismissal of the Prosecutor General, he cannot initiate the dismissal of the head of the LSA as he requires the submission of the Cabinet of Ministers or a vote of no confidence by regional (*oblast*) or district (*raion*) council.¹⁹

Therefore, it seems that the provision of clause two of Article 11 was intended to allow the President to dismiss the Prosecutor General and heads of the LSAs without the consent of the Parliament and the Cabinet of Ministers. At least in this case, in contrast to the officials for whose dismissal the President does not need any consent, the suspension from office makes sense as it significantly simplifies the decision-making process. The fact that this is a genuine reason for the adoption new provision became clear not only to lawyers who know the Constitution well but also to the media.²⁰

Earlier in this article I mentioned the position of the Main Legal Department of the Secretariat of the Verkhovna Rada. Its experts insist that the President, in principle, has no authority to suspend any official from office, with which I cannot disagree. However, theoretically speaking, even if the President had the power to suspend officials from office, such suspension would certainly not be permissible without the participation of those bodies whose consent, according to the Constitution, is required for the dismissal of such officials. Particularly, without the Verkhovna Rada in the case of the Prosecutor General and the Cabinet of Ministers in the case of heads of LSAs. Proponents of the new provision of Article 11 of the Law on Martial Law may claim that dismissal and suspension from office are different institutions of law. Therefore in the case of suspension, the consent of the relevant authorities is not necessary. Still, I insist that clause two Article 11 of the Law on Martial Law allows for the *de facto* dismissal of the official, whereas it prevents the latter from exercising his powers. In order to refute the argument that the suspension does not require the consent of another body, I will analyze why the Constitution provides for the participation of the Parliament and the Cabinet of Ministers in the dismissal of the Prosecutor General and the heads of the LSAs respectively.

Suspension of the Prosecutor General

The Prosecutor General heads the system of public prosecution in Ukraine. In 2016, the latter

¹⁹ Despite the fact that in case of the no confidence vote of the regional or district councils the President adopts the decision on the *resignation* of the head of the LSA, not his *dismissal*, this decision has the same legal effect.

²⁰ Rada dozvolyla Zelenskomu na chas viyny vidstoronyaty vid posady henprokurora ta holiv ODA [Rada approved that Zelekskyi during war can suspend from office Prosecutor General and heads of LSA]. *Sudovo-Yurydychna Hazeta (Judicial-Legal Newspaper)*, May 16, 2022, <https://sud.ua/ru/news/publication/237903-rada-dozvolila-zelenskomu-na-chas-viyni-vidstoronyati-vid-posadi-genprokurora-ta-goliv-oda>.

became part of the justice system when the provisions on public prosecution were transferred to the corresponding section of the Constitution. Until then, public prosecution, although formally not related to the executive power, nevertheless, due to the inertia of the Soviet “tradition,” was subordinated to it. The fact that from the legal point of view, public prosecution became a part of the justice system means that it should be independent of the executive power. This independence should be reflected in the procedure for appointing the Prosecutor General as a public officer heading the system. The Venice Commission, in its Report on European Standards as regards the Independence of the Judicial System CDL-AD(2010)040 as of January 3, 2011,²¹ emphasized that the procedure for appointing and dismissing the head of the public prosecution should not be politicized and depend solely on a single political decision. This approach was supposed to be reflected in the amendments to the Constitution regarding the appointment and dismissal of the Prosecutor General. Unfortunately, in 2016, the idea of eliminating the participation of political bodies in the appointment and dismissal of the head of the Prosecutor General was not supported by the political stakeholders. The President still initiates appointments or dismissals, which must, however, be approved by Parliament. The latter also retained a right to vote no confidence in the Prosecutor General, although this provision was supposed to be removed from the Constitutions in the initial version of the constitutional amendments. Keeping this provision intact was justified by the argument that the procedure for appointing and dismissing the Prosecutor General remained under the significant influence of the President. Therefore the Parliament should retain the ability to independently dismiss the Prosecutor General in case there is a need to restrain the latter from making arbitrary or unlawful decisions dictated by the head of state. It also should be noted that the Constitution was supplemented with a new but extremely important provision according to which the early dismissal of the Prosecutor General was possible only in cases and on the grounds specified by the Constitution and the law. This new safeguard was supposed to guarantee that the politicized procedure could not be used to pressure the Prosecutor General, neither by the President nor the Parliament. The analysis of the implementation of this provision at the level of the law requires separate research. However, the practice of the recent appointments and dismissals of the Prosecutor General clearly illustrates that this procedure remains highly politicized.

It is obvious that the current procedure for appointing and dismissing the Prosecutor General does not comply with the principle of independence of the public prosecution. Although the law provides an exhausted list of grounds for initiating the dismissal of the Prosecutor General, since the constitutional amendments entered into force not a single Prosecutor General has been reasonably dismissed based on these grounds. After political expediency made it possible for a person without legal education to become the Prosecutor

²¹ “Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service”, European Commission for Democracy through Law (Venice Commission), para 34-40, accessed August 30, 2022, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)040-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)040-e).

General, there is simply no room for arguing that the public prosecution is independent of the executive power. The only factor that may soften this dependence is that the Parliament has a veto right for the appointment or dismissal of the head of the public prosecution. This provides the Prosecutor General with an additional tool to balance the influence of the President. The elimination of the Parliament from the procedure of the appointment or dismissal of the Prosecutor General means the loss of this last safeguard. The provision of clause two of Article 11 of the Law on Martial Law does precisely this. It allows a *de facto* dismissal (although called the suspension) of the Prosecutor General and the appointment of a person who will perform his duties without the consent of the Parliament. This contradicts the guarantee of restraining the President from complete individual control over the Prosecutor General, which is provided by the Constitution. That is why the Prosecutor General became the first public official to whom the President applied the new provision on suspension.

It did not take too long for the President to apply the new provision of the Law on Martial Law. Less than two months after its entry into force, on July 17, 2022, the President issued a decree on the suspension of Iryna Venediktova from the position of Prosecutor General²² and immediately, in a separate decree, designated her acting deputy to temporarily exercise her duties.²³ The Parliament was completely eliminated from making this decision, and the President suspended the Prosecutor General from his office without the consent of the Verkhovna Rada.

However, President's plan did not go as smoothly as he expected. The Prosecutor General publicly stated that she does not recognize this decision of the President, whereas "the procedure for the dismissal of the Prosecutor General is well known to everyone, there is no other, the other is not provided for by law."²⁴ It should be emphasized that when commenting on this decision of the President, she used the word "dismissal," which once again confirms that, in essence, the suspension allowed by clause two of Article 11 of the Law on Martial Law is nothing but dismissal. Despite the President's decision to suspend the Prosecutor General, she continued to perform her duties, while the acting deputy was unable

²² Decree of the President of Ukraine on the Suspension of the Prosecutor General from Office, adopted on July 17, 2022, *Ofitsiyni Visnyk Prezydenta Ukrainy* 6 (2022): 206, accessed September 15, 2022, <https://zakon.rada.gov.ua/laws/show/500/2022#Text>.

²³ Decree of the President of Ukraine on Exercising of Duties of the Prosecutor General from Office, adopted on July 17, 2022, *Ofitsiyni Visnyk Prezydenta Ukrainy* 6 (2022): 207, accessed September 15, 2022, <https://zakon.rada.gov.ua/laws/show/501/2022#Text>.

²⁴ Venediktova ne pohodzhuietsia zi svoiim vidstoronenniam - dzhherela [Venediktova doesn't agree with her suspension - sources]. *Ukrainska Pravda (Ukrainian Truth)*, July 18, 2022, <https://www.pravda.com.ua/news/2022/07/18/7358802/>.

to start his work. Therefore, the President was forced to apply the procedure provided by the Constitution. On July 19, 2022, he submitted to the Parliament a motion for consent for the dismissal of the Prosecutor General, and on the same day, the Parliament granted its approval.²⁵

It should be noted that 264 members of Parliament supported the President's motion, which exceeded the minimum number of votes required by more than three dozen. The new Prosecutor General, proposed by the President, was supported by almost two-thirds of the Parliament. These numbers illustrate that the President's initiative to dismiss the Prosecutor General and appoint a new one had more than enough support in the Parliament. The reason why the President then needed to apply the unconstitutional provision on suspension remains a mystery. The only logical explanation could be that the application of this provision was aimed at creating a precedent that can be used in the future when the President will no longer have such support for his decisions in the Parliament.

Suspension of the heads of local state administrations

Unlike the Prosecutor General, heads of the LSAs are part of the executive and, therefore, cannot be independent. They are part of the hierarchy of executive power and implement the decisions and policies adopted by its leader. The Constitution acknowledges that the Cabinet of Ministers is the highest body in the system of bodies of executive power. Therefore, the heads of executive bodies in the regions must comply with it. However, according to the Constitution, the President, not the Cabinet of Ministers, appoints and dismisses the heads of the LSAs. This model was laid down by the Constitution of 1996, according to which the President had so much influence in the executive power that he, in fact, was the leader of the executive power, however not recognized formally by the Constitution. He appointed the Prime Minister with the consent of the Parliament and appointed ministers, heads of central executive bodies, and heads of LSAs upon the Premier's submission. The President could dismiss any of these officials at any time. Despite being formally the leader of the executive, the Cabinet of Ministers was, in fact, merely the executor of the President's policies and decisions. In such conditions, the appointment and dismissal of heads of the LSAs by the President made sense as it complied with the model of the organization of executive power.

In 2004 the Constitution was amended, making the Cabinet of Ministers independent from the President. The latter could not independently dissolve the government or dismiss a minister. Nevertheless, many provisions were kept that preserved the President's significant

²⁵ Decision of the Verkhovna Rada On Granting the Approval for the Dismissal of I.V. Venediktova from the Office of the Prosecutor General, adopted on July 19, 2022, *Vidomosti Verkhovnoi Rady Ukrainy* 59 (2022): 3544, accessed September 15, 2022, <https://zakon.rada.gov.ua/laws/show/2433-IX#Text>.

influence over the executive power. It is obvious that this was done deliberately so that the President, having lost control over the government, could retain influence over it indirectly. The participation of the President in the appointment of the heads of the LASs is one of such powers. However, if earlier the President could dismiss the head of the LSA on his own, now he only possesses a kind of veto right on the appointment and dismissal of these officials. He cannot appoint or dismiss the head of the LSA without the submission of the Cabinet of Ministers. However, Presidents have repeatedly tried to bypass the requirements of the Constitution regarding the Cabinet's submission in order to dismiss heads of the LASs independently. Here are just a few examples.

Over the past ten years, the President suspended three heads of District State Administrations (hereinafter - DSA and DSAs). In 2015, the President suspended the heads of Hola Prystan DSA of the Kherson region²⁶ and Bobrovytsia DSA of the Chernihiv Region,²⁷ and in 2019 he suspended the head of the Vynohradiv DSA of the Zakarpattia region.²⁸ In each of these cases, the heads of the DSAs were suspected of committing crimes, and the President used the provision of clause three of Article 154 of the CPC. The latter allowed the President to suspend an official from office if he or she is suspected or accused of committing crimes. This provision is as unconstitutional as the second clause of Article 11 of the Law on Martial Law, whereas, as I have proved a number of times, under the Constitution, the President does not have powers to suspend officials. I will provide a detailed analysis of this provision in the next section of this article, which will illustrate its application for the suspension of other public officials. In the abovementioned cases, the heads of the DSAs were eventually dismissed from their offices in accordance with the procedure established by the Constitution, i.e. the dismissal upon the submission of the Cabinet of Ministers.

The case of the head of Odesa Regional State Administration (hereinafter - the RSA) in 2019 adds a political context. The President issued a decree on his suspension without any re-

²⁶ Order of the President of Ukraine on the Suspension of O. Bohunenko from the Office of the Head of the Hola Prystan District State Administration of Kherson Region, adopted on August 13, 2015, *Ofitsiynyi Visnyk Prezydenta Ukrainy* 19 (2015): 1170, accessed September 15, 2022, <https://zakon.rada.gov.ua/laws/card/656/2015-%D1%80%D0%BF>.

²⁷ Order of the President of Ukraine on the Suspension of M. Suprun from the Office of the Head of the Bobrovytsia District State Administration of Chernihiv Region, adopted on August 13, 2015, *Ofitsiynyi Visnyk Prezydenta Ukrainy* 19 (2015): 1169, accessed September 15, 2022, <https://zakon.rada.gov.ua/laws/show/655/2015-%D1%80%D0%BF#Text>.

²⁸ Order of the President of Ukraine on the Suspension of M. Rusaniuk from the Office of the Head of the Vynohradiv District State Administration of Zakarpattia Region, adopted on January 29, 2019, *Ofitsiynyi Visnyk Prezydenta Ukrainy* 2 (2019): 27, accessed September 15, 2022, <https://zakon.rada.gov.ua/laws/show/6/2019-%D1%80%D0%BF#Text>.

ference to any law, including Article 154 of the CPC.²⁹ The reason for suspending this official was not him being suspected or accused of committing crimes, but rather a political one. As the media reported, the head of Odesa RSA was suspended due to the weak results of the then President during the first round of the presidential elections in the Odesa region, so the latter decided to “punish” the former.³⁰ According to the media, the head of the RSA himself publicly stated that the President first demanded his resignation. When he refused to do so, the President issued a decree on suspension without submission of the Cabinet of Ministers. The head of the RSA refused to accept the President’s decree arguing that the President did not have the authority to suspend him from office. After four days, the President was forced to revoke the decree on suspension³¹ and, after receiving a submission from the Cabinet of Ministers, dismiss the head of Odesa RSA under the procedure established by the Constitution.

The given examples illustrate that the President’s desire to dismiss the heads of the LSAs is not new. The President repeatedly used an unconstitutional provision of the CPC, as its constitutionality was never questioned. At the same time, when the President tried to do the same without referring to any legal provision, even to the unconstitutional Article of the CPC, he had to admit the violation of the Constitution and resort to the only legal procedure. The given examples further convince me that the provision of clause two of Article 11 of the Law on Martial Law is primarily aimed at creating a legal basis for the President to dismiss the heads of the LSAs during martial law without the consent of the Cabinet of Ministers. The adopted provisions continue a trend allowing the President to remove various constitutional obstacles for more independent decision-making. In the current political environment, when political power is so consolidated in the hands of the President when he has his majority in Parliament, and a one-party government, the President’s attempt to remove from decision-making bodies that are completely politically loyal to him appears to be rather irrational. However, the political climate in Ukraine is never stable. Thus it is natural for the President to desire to consolidate his power, especially in times of war, in order to create “backup” provisions that can be used when the political loyalty of his government and the Parliament will no longer be that strong. In this case, the Parliament, alas, will no longer be able to eliminate such an uncon-

²⁹ Decree of the President of Ukraine on the Suspension of M. Stepanov from the Office of the Head of the Odesa Regional State Administration, adopted on June 6, 2019, *Ofitsiynyi Visnyk Prezydenta Ukrainy* 7 (2019): 137, accessed September 15, 2022, <https://zakon.rada.gov.ua/laws/card/107/2019>.

³⁰ Zvlnennia Holovy Odeskoi ODA. Shcho zrobyv Stepanov v Odesi ta oblasti [The dismissal of the head of Odesa RSA. What did Stepanov do in Odesa and the region]. *Radio Svoboda (Radio Liberty)*, April 8, 2019, <https://www.radiosvoboda.org/a/29868829.html>.

³¹ Decree of the President of Ukraine on Revoking of Certain Decrees of the president of Ukraine, adopted on April 10, 2019, *Ofitsiynyi Visnyk Prezydenta Ukrainy* 7 (2019): 235, accessed September 15, 2022, <https://zakon.rada.gov.ua/laws/card/118/2019>.

stitutional provision against President's will as any legislative change would require his signature. The only body that could restrain the President from making arbitrary and unconstitutional decisions is the Constitutional Court. However, as I will illustrate in the next section, the President can effectively, although also unconstitutionally, influence this body.

Other ways of illegal suspension of public officials by the President: the practice of application

In the previous sections, I analyzed the list of officials to whom the provision of the second clause of Article 11 of the Law on Martial Law primarily applies. Namely, heads of diplomatic missions, higher command of military formations, members of the Council of the National Bank of Ukraine, and members of the National Council of Ukraine on Television and Radio Broadcasting. Separately, I focused on the possibility of suspending the Prosecutor General and heads of the LSAs. In their cases, this provision has a special meaning, as it gives the President the opportunity to make these decisions independently, which the dismissal procedure set forth in the Constitution does not provide.

Since the provision of clause two of Article 11 of Law on Martial Law applies to a relatively small range of officials, a reasonable question arises: why did the Parliament not specify this list of officials in the law but instead used a rather broad wording? I argue this was done to allow a broader interpretation of the provision, thus expanding the list of officials to whom it applies. By this, I mean not only officials who are "appointed and dismissed" by the President but also those whom he only appoints. My opponents may say this doesn't make sense, as the provision clearly uses "appoints and dismisses." However, the Constitution does not authorize the President to suspend public officials, nevertheless, this is just what he does. Thus, it should not be a surprise when the President adopts a decision to suspend an official whom, according to the Constitution, he has the power to appoint but not dismiss. After all, as I have illustrated earlier, the President, regardless of his surname, does not shy away from arbitrary decisions that contradict the Constitution.

I have already mentioned the third clause of Article 154 of the CPC, which allows the President to suspend officials who are suspected of committing a crime. In the previous section, I gave an example of when the President applied this rule to the heads of the LSAs. However, they are not the only officials to whom this provision was applied.

In the first section, I explained why the institution of suspension from office exists and how it differs from dismissal. However, I will now separately focus on why there is a separate suspension mechanism for officials appointed by the President instead of the one that exists for all other officials. Article 154 of the CPC, as a general rule, provides that an official is suspended from office by an investigating judge or a court decision. However, the latter two cannot suspend an official appointed by the President, as according to clause three Article 154

of the CPC, only the President can do this “based on the prosecutor’s submission”. The first edition of the CPC also provided a separate procedure for suspending a judge, as judges have an immunity guaranteed by the Constitution. But why did the code create a mechanism for special protection against suspension by the court of officials appointed by the President? Such special protection would make some sense if it concerned all officials appointed by political bodies. But the code did not propose a similar mechanism for officials appointed by the Parliament or the Cabinet of Ministers.³² Obviously, such a mechanism was included in the code for political reasons, as it was adopted during the presidency of the future fugitive and Russian collaborator Viktor Yanukovich when the usurpation of power was carried out by use of many of such unconstitutional provisions.

Article 154 of the CPC provides that a court can suspend any official, except for those appointed by the President, which he suspends. That includes the officials whom the President appoints and dismisses and thus may suspend according to clause two of Article 11 of the Law on Martial Law. But also six judges of the Constitutional Court and two members of the High Council of Justice. Professional judges whom the President also appoints do not fall under Article 154, whereas a separate procedure applies to them. Nevertheless, a question arises, whether under Article 154 of CPC the President can suspend a judge of the Constitutional Court or a member of the High Council of Justice appointed by him. From the text of the provisions, it may be concluded that this is possible. At least this is what the President did when he passed a decree on the suspension of judge Oleksandr Tupytskyi from the office of judge of the Constitutional Court, first in December 2020³³ and then in February 2021.³⁴ This Constitutional Court judge was indeed suspected of committing a crime, but the President’s decision was a genuine surprise for many. If the President can suspend a judge of the Constitutional Court, how does then this comply with the principle of independence of the Constitutional Court? Does it not violate the equal status of the Constitutional Court judges, as those appointed by the President can be suspended, while others, appointed by the Verkhovna Rada and the Congress of Judges of Ukraine, cannot?

³² In 2014 Article 154 was amended to provide a separate suspension procedure for the Director of the National Anti-Corruption Bureau of Ukraine. He is suspended by the investigative judge upon a submission of the Prosecutor General.

³³ Decree of the President of Ukraine on the Suspension from the Office of the Judge of the Constitutional Court of Ukraine, adopted on December 29, 2020, *Ofitsiynyi Visnyk Prezydenta Ukrainy* 26 (2020): 1188, accessed September 15, 2022, <https://zakon.rada.gov.ua/laws/show/607/2020#Text>.

³⁴ Decree of the President of Ukraine on the Suspension from the Office of the Judge of the Constitutional Court of Ukraine, adopted on February 26, 2021, *Ofitsiynyi Visnyk Prezydenta Ukrainy* 19 (2021): 736, accessed September 15, 2022, <https://zakon.rada.gov.ua/laws/show/79/2021#Text>.

The answer is obvious: clause three of Article 154 of the CPC contradicts the Constitution. First of all, because the President does not have the authority to suspend public officials. And secondly, if applied to judges of the Constitutional Court or members of the High Council of Justice, it violates the guarantees of independence of these authorities established in the Constitution.

According to Article 131 of the Constitution, only the High Council of Justice can temporarily suspend a judge and dismiss him from office. This provision is a guarantee of the independence of the judiciary. The same kind of guarantee is applied to the judges of the Constitutional Court, as they can be dismissed only by two-thirds of their peers (clause three Article 149-1 of the Constitution). It is also a guarantee of the independence of the Constitutional Court. The Constitution does not mention a possibility of a Constitutional Court judge being suspended. This does not mean that the Constitution prohibits it, however, the procedure for such suspension should ensure the independence of the judge from illegal influence at least at the same level as is provided by the procedure for his dismissal. If the President can by himself suspend a judge of the Constitutional Court, then what kind of independence does this body hold?

According to the Constitution, the judge of the Constitutional Court has the same, and in some cases even more significant, guarantees of independence compared to a professional judge. Clause two Article 126 of the Constitution establishes that influencing judges in any way is prohibited. A similar prohibition exists concerning judges of the Constitutional Court - clause two Article 149. The authors of the Constitution would be highly inconsistent if they allowed for a judge of the Constitutional Court to be suspended from office more easily than a judge of general jurisdiction. If the Constitution would allow this, it should have been clearly stated in it. Therefore, I come to the conclusion that in relation to judges of the Constitutional Court, clause three of Article 154 of the CPC cannot be applied as it violates the independence of the Constitutional Court. The same applies to the members of the High Council of Justice, whereas its independence is key to ensuring the independence of the whole judiciary, guaranteed by the first clause of Article 126 of the Constitution.

The example of the suspension of judge Tupytskyi proves that a broadly formulated provision allows for the President to intervene in areas outside of his scope of competence and thereby violates the principle of separation of powers and the system of checks and balances. In my opinion, the sad example of the application of clause three of Article 154 of the CPC proves that the second clause of Article 11 of the Law on Martial Law can also be used by the President to suspend officials whose independence is guaranteed by the Constitution. In particular, judges of the Constitutional Court and members of the High Council of Justice.

Conclusion

The provision of the second clause of Article 11 of the Law on Martial Law contradicts the Constitution. The latter provides that the President does not have the power to suspend from office the officials he appoints and dismisses, as the Constitution did not grant him such authority. Moreover, granting the President additional powers by law contradicts the established legal stance of the Constitutional Court.

The second clause of Article 11 of the Law on Martial Law contradicts the nature of the suspension from office, which exists in other laws, as it is not conditioned by the need to prevent the official from exercising his powers due to suspicion of committing a crime or an administrative offense, nor it is justified by the need to carry out disciplinary proceedings. Instead, this provision, in its essence, is equivalent to dismissal. That is why the purpose of adopting provisions is to allow the President to dismiss officials without the necessary legal grounds required by the Constitution and laws.

The list of officials subject to the second clause of Article 11 of the Law on Martial Law includes the heads of diplomatic missions of Ukraine, members of the Council of the National Bank of Ukraine and the National Council of Ukraine on Television and Radio Broadcasting, appointed by the President, high command of the Armed Forces of Ukraine and other military formations, as well as the Prosecutor General and heads of LSAs. For the dismissal of the last two, the provision allows to avoid obtaining the consent of the Verkhovna Rada and the Cabinet of Ministers, respectively. At the same time, the practice of applying a similar provision, that is, clause three of Article 154 of the CPC, shows that the President can use this authority to suspend officials that are part of the judiciary, namely judges of the Constitutional Court and members of the High Council of Justice. Therefore, granting the President additional powers which go far beyond his competence defined by the Constitution poses a threat to the principle of separation of powers and, as a result, democracy and the constitutional order established by the Constitution.

This article does not explore all the threats associated with applying the studied provision. In particular, the question of the legal consequences of the termination of the legal regime of martial law for the President's decisions on the suspension of public officials requires a separate analysis. The unanswered question remains whether suspended officials will automatically be reinstated after martial law ends.

The practice of arbitrary decisions of the President, based on unconstitutional provisions of the law, is quite widespread, regardless of who exactly holds the position of the President. The ability of the President to apply unconstitutional provisions is, as a rule, limited only by his will. In a democratic society, cases of violation of the Constitution by any official, including the President, result in him being held accountable. However, for this to happen, the

re must be an independent court ready to declare void unlawful decisions of the President. And the Parliament, which is aware of the threats posed by the usurpation of power. The Parliament should be ready and able to dismiss the President who violates the Constitution. Unfortunately, these prerequisites still do not exist in Ukraine, and the state of war in which the Ukrainian society and the state have found themselves does not provide for their existence.

Nevertheless, the examples presented in this article prove that the President remains a highly influential subject in the system of state authorities. This allows him to make arbitrary and unconstitutional decisions and to persuade Parliament to create new legal grounds for unconstitutionally increasing his powers. Unfortunately, the current model allows the President to usurp power, especially if the Parliament is politically loyal to him. Therefore the place of the President in the system of state authorities should be revised, especially his role in the executive power, and more effective tools should be established to prevent him from violating the Constitution.

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**ТИМЧАСОВЕ ВІДСТРОНЕННЯ ДЕРЖАВНИХ СЛУЖБОВЦІВ
ПРЕЗИДЕНТОМ УКРАЇНИ: ВСТАНОВЛЕНА ПРАКТИКА ТА НОВІ
ВИКЛИКИ**

У цій статті аналізуються положення Закону України «Про правовий режим воєнного стану», прийнятий після повномасштабного вторгнення Російської Федерації на територію України. Автор доводить, що частина друга статті 11 вищезазначеного закону, яка надає Президенту України повноваження звільняти державних службовців в умовах воєнного стану, суперечить Конституції України, в той час як остання не наділила Президента України такими повноваженнями. Автор порівнює відсторонення та звільнення державного службовця зі служби та доводить, що нове положення суперечить самій природі та меті законодавства про воєнний стан. У статті автор аналізує список державних службовців, яких стосується прийняте положення та проводить думку про те, що єдиною метою останнього було надати Президенту України право звільняти державних службовців без належного юридичного обґрунтування та погодження з іншими державними посадовцями, як того вимагає Конституція.

Ключові слова

Конституція України, Президент, парламент, воєнний стан, відсторонення від посади, звільнення з посади