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CONSTITUTIONAL COURT STRIKES ANTI-CORRUPTION SYSTEM IN UKRAINE*

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Summary: – 1. Introduction. – 2. Reasoning of the decision of the Constitutional Court. – 3. Circumstances of decision-making. – 4. Reaction of state bodies. – 5. Further necessary steps.

The publication is dedicated to the Constitutional Court of Ukraine's decision, which paralyzed the National Agency's critical activities for preventing corruption and declared unconstitutional criminal liability for knowingly false declarations. The decision caused a considerable resonance, as the declared reasons for its adoption were insufficient to admit that the crucial provisions of the Law 'On Prevention of Corruption' regarding electronic asset declaration, financial control, and lifestyle monitoring are entirely unconstitutional.

The decision's circumstances indicate that the judges ignored the apparent conflict of interest and made an unjustified departure from the previous case-law. Simultaneously, the reaction of crucial state bodies to this decision may cause a constitutional crisis rather than rectify the situation. As a way out, it is proposed to amend the legislation in a constitutional manner that would unblock the agency's activities and, at the same time, lead to greater accountability of the judiciary and the Constitutional Court.

Keywords: *prevention of corruption; unconstitutionality of the law; The Constitutional Court; asset declaration; arbitrary decision*

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1. INTRODUCTION: THE 'EXPLOSIVE' DECISION

On 27 October 2020, the Constitutional Court of Ukraine declared unconstitutional a significant part of the Law 'On Prevention of Corruption' and the Article 366-1 of Ukraine's Criminal Code.¹ As a result of the decision of the Constitutional Court, the following provisions have lost their force:

- implementation by the National Agency for the Prevention of Corruption (hereinafter NAPC) of monitoring and control over the implementation of anti-corruption legislation, verification of asset declarations of declarants, storage, and publication of such declarations, monitoring of the way of life of declarants;
- the right of the NAPC to obtain the necessary information, to have access to the registers, to apply to the court with claims for the illegality of acts violating anti-corruption requirements, and protocols on administrative offenses related to corruption; to make instructions on the elimination of violations, carrying out of the official investigation, bringing the guilty person to justice;
- state registration of NAPC regulations in the Ministry of Justice and the procedure for promulgation and entry of NAPC acts into force;
- rights of NAPC authorized persons and tasks of authorized subdivisions (authorized persons) to detect and prevent corruption;
- settlement of conflicts of interest in the activities of officials of the collegial body;
- the openness of the Unified State Register of declarations of persons authorized to perform the functions of the state or local self-government;
- control and verification of such declarations by the NAPC, including full verification;
- the procedure for establishing the timeliness of submission of declarations;
- monitoring the lifestyle of the subjects of the declaration;
- the obligation to notify of a significant change in the property status of the subject of the declaration;
- liability for corruption or corruption-related offenses;
- criminal liability for submitting knowingly false information in the asset declaration of a person authorized to perform state or local self-government functions or his/her intentional failure to submit the declaration.

This decision virtually paralyzed the key activities of the NAPC, retaining its authority to develop anti-corruption policies, state control over compliance with statutory restrictions on the financing of political parties, and work with whistleblowers. It is worth noting that before the 'reset' of this body in 2019, the NAPC had been a 'toothless' body and itself had been involved in numerous corruption scandals, but from the beginning of 2020 after the appointment of a new head began to show impressive activity in the exercise of its powers.

With the Constitutional Court decision, hundreds of criminal proceedings for knowingly false declaration or non-declaration lost their perspective to be brought to

¹ The decision of the Constitutional Court of Ukraine No 13-p/2020 of 27 October 2020, by the constitutional submissions of 47 people's deputies of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of the provisions of the Law of Ukraine 'On the Prevention of Corruption', Criminal Code of Ukraine <<http://www.ccu.gov.ua/dokument/13-r2020>> accessed 10 November 2020.

the court, 110 of them were investigated by the National Anti-Corruption Bureau of Ukraine (NABU) against high- ranking officials.

This is not the first decision in recent years that has damaged the state's anti-corruption measures. In particular, the Constitutional Court previously declared unconstitutional the Criminal Code provisions on liability for illicit enrichment² (later the legislator corrected these provisions,³but all previous criminal proceedings were terminated), the adoption of knowingly unjust court decisions⁴ and provisions on the right of NABU to sue.⁵

However, the justification and circumstances of adopting the Constitutional Court's above- mentioned decision left no doubt that the Constitutional Court judges were guided by their interests and not by the interests of the Constitution's observance.

2. REASONING OF THE DECISION OF THE CONSTITUTIONAL COURT

In the motivating part of the decision, the Constitutional Court concluded that the provisions of the Law 'On Prevention of Corruption' '*concerning the powers of the National Agency for Prevention of Corruption in terms of control functions (control) of the executive over the judiciary*' are unconstitutional. However, in the resolution of the decision, it recognized a number of the Law's provisions as unconstitutional in general, thus depriving the NAPC of the relevant powers and rights concerning all subjects, not only judges.

To declare the provisions of the Law 'On Prevention of Corruption' unconstitutional, the Constitutional Court referred to the constitutional principles of separation of state power and independence of the judiciary, the body of constitutional control, and the inadmissibility of interference in their activities. The Constitutional Court stated that:

- 'the main direction of ensuring the independence of the judiciary is the creation of special institutions, the purpose of which is to remove the judiciary from the field of administrative control and effective management of the executive and legislative branches';
- 'any forms and methods of control in the form of inspections, and monitoring of the functioning and activities of courts and judges should be implemented only

2 The decision of the Constitutional Court of Ukraine No 1-p/2019 of 26 February 2019 in case by the constitutional submissions of 59 people's deputies of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of Article 368-2 of the Criminal Code of Ukraine <<http://www.ccu.gov.ua/docs/2627>> accessed 10 November 2020.

3 The Law of Ukraine 'On the introduction of amendments to certain legislative acts of Ukraine concerning the confiscation of illegal assets of individuals authorised to perform the functions of the state or local self- government, and punishing for the acquisition of such assets' of 31 October 2019 <<https://zakon.rada.gov.ua/laws/show/263-20#Text>> accessed 10 November 2020.

4 The Decision of the Constitutional Court of Ukraine No 7-p/2020 of 11 June 2020 in the case by the constitutional submission of 55 people's deputies of Ukraine on compliance with the Constitution of Ukraine (constitutionality) of Article 375 of the Criminal Code of Ukraine <<http://www.ccu.gov.ua/docs/3127>> accessed 10 November 2020.

5 The Decision of the Constitutional Court of Ukraine No 4-p(II)/2019 of 6 June 2019 in the case by the constitutional complaint of the joint-stock company 'Zaporizhzhya Ferroalloy Plant' regarding the compliance with the Constitution of Ukraine (constitutionality) of the provision of paragraph 13 of the first part of Article 17 of the Law of Ukraine 'On the National Anti-Corruption Bureau of Ukraine' <<http://www.ccu.gov.ua/docs/2748>> accessed 10 November 2020.

by the judiciary and exclude the establishment of such bodies in the system of both executive and legislative powers’;

- ‘different declaration rules need to be provided, particularly higher judicial bodies have the right to require special acts to regulate this issue, and judges’ declarations can be handled by a special judicial body,’ while the NAPC is an executive body.

Virtually, the Constitutional Court used arguments to destroy the judiciary’s accountability and create conditions for judges’ impunity. In the case of the NAPC, the Constitutional Court ignored the fact that this body only prepares the necessary materials and has no authority to punish judges (in disciplinary, administrative, criminal proceedings) due to exercising adjudicating powers is the prerogative of the judiciary.

The judiciary and judges enjoy the most significant guarantees of independence and protection, including constitutional ones. No one may remove a judge from office or bring him or her to any kind of legal responsibility, except for judicial bodies that are not subordinated to the legislature or the executive (except for minor administrative offenses). Judges enjoy immunity from detention. They have the highest salaries compared to other branches of government. It does not make sense to list these guarantees further because there are many. All this applies even more to the judges of the Constitutional Court.

Thus, the judiciary may have autonomy in matters of disciplinary liability. However, it is impossible to create separate tax services, patrol police, customs, NAPC, and Accounting Chamber for courts and judges within the judiciary. These are the functions of the executive and parliamentary control. The judiciary cannot perform these functions through ‘outstanding institutions’; otherwise, it will become a parallel judicial state within the state, with its executive power.

The interpretation of the judiciary’s independence formulated by the Constitutional Court, which consists of its exclusivity and the need to create separate control bodies for judges, also contradicts one of the constitutional principles: equality of all before the law.

Recognition of the unconstitutionality of the article of the Criminal Code was reasoned by the Constitutional Court in particular that ‘*the establishment of criminal liability for declaring knowingly false information in the declaration, as well as intentional*

intentional non-submission of declaration by a declarant is excessive punishment for these offenses,’ this has to be ‘grounds for other types of legal liability.’ Such motivation is also unconvincing.

According to Article 92 of the Ukraine Constitution, only laws define acts that are crimes and responsibility for them. That is, the criminalization or decriminalization of individual acts is the discretion of the legislature. Of course, this does not mean that such laws cannot be assessed for constitutionality. However, the Constitutional Court should refrain from substituting itself for the legislator and interfering in its discretion unless the legislator allows apparent arbitrariness.

Simultaneously, criminalizing the deliberate misrepresentation of one’s property by the subjects of declaring or knowingly ignoring the obligation to file such a declaration

is not arbitrary. Such actions contribute to impunity for corruption, which is one of the biggest problems of Ukrainian society. By determining soft punishments for such a crime, the legislator allowed the courts to apply appropriate sanctions on the principle of proportionality.

Four judges of this Court also drew attention to the shortcomings of the reasoning of the Constitutional Court's decision and expressed their dissenting opinions.

3. CIRCUMSTANCES OF DECISION-MAKING

Ultimately, the Constitutional Court's decision is perceived as abnormal not only because of the 'quality' of the arguments but also because of the circumstances of its adoption, which differ significantly from its usual practice.

Thus, the Constitutional Court has gone far beyond the requests of a constitutional submission. In this case, among the provisions of the Law 'On Prevention of Corruption', which were declared unconstitutional, approximately 3/4 of the provisions had not been challenged at all. Moreover, the Constitutional Court's argumentation was in no way related to the applicant's arguments, which had not been assessed at all. The current Law 'On the Constitutional Court of Ukraine' of 2017 does not provide for the Constitutional Court's right to declare unconstitutional other provisions of legal acts that the applicant does not question. Since the adoption of this law, the Constitutional Court has not gone beyond requests of constitutional petitions.

The Constitutional Court's ruling goes beyond its reasoning: the unconstitutionality of specific provisions of the Law 'On Prevention of Corruption' is justified only by the inadmissibility of the NAPC's oversight of judges and the Constitutional Court judges. However, vital anti-corruption provisions were recognized unconstitutional in general, even though the court could have recognized them unconstitutional only so far as it concerns judges. Moreover, the Constitutional Court declared many provisions of the Law unconstitutional without any reasons, particularly about NAPC acts, declarant's obligation to report significant property status changes, and openness of the register of asset declarations.

In this case, the Constitutional Court did not postpone losing the force of the relevant provisions, which were declared unconstitutional, neither it gave the Verkhovna Rada of Ukraine time to bring these provisions into line with the Constitution of Ukraine, deliberately creating severe problems for all NAPC functions concerning all subjects susceptible to Law 'On Prevention of Corruption.' This is also not typical of such cases and is probably the result of the bias of the Constitutional Court judges.

The most apparent violation was the consideration of the case by the Constitutional Court judges in a conflict of interest when the beneficiaries of the decision were the Constitutional Court judges, both individual (for which there were proceedings for violation of anti-corruption legislation) and all in general.

Among other signs of 'anomaly' of the decision is that the case was considered in written proceedings (despite the parties' request for an oral public hearing) and its extremely rapid adoption from the moment of opening.

4. REACTION OF STATE BODIES

This decision outraged Ukrainian society, Ukraine's international partners, as it destroys many anti-corruption achievements. This is the most robust response of the corrupt system to the measures implemented in recent years. As a result of this decision, the Constitutional Court came to be perceived as a threat to reform rather than a critical arbiter between state power branches. This decision was made in the face of an apparent conflict of interest and confronted the political authorities with a difficult choice of dealing with the situation. In just two weeks after the decision was made, more than twenty draft laws on the subject were submitted to parliament.

On 29 October, President Volodymyr Zelensky submitted to the Parliament a draft law,⁶ proposing to declare void the Constitutional Court's decision, to restore the force of the provisions of the Law 'On Prevention of Corruption' and the Criminal Code that had been declared unconstitutional, and to terminate the powers of all Constitutional Court judges. On 2 November, the Chairman of the Verkhovna Rada, Dmytro Razumkov, introduced a similar legislative initiative,⁷ but without declaring the Constitutional Court's decision null and void and terminating the powers of judges of the Constitutional Court. There were also proposals to block the Constitutional Court's work by increasing the quorum from 12 to 17 judges⁸ (although the Court currently has 15 judges out of 18) or suspending funding.⁹ As a result of such unconstitutional initiatives, there is an obvious risk that one arbitrary decision of the Constitutional Court by the effect of dominoes may lead to other arbitrary decisions.

Judges of the Constitutional Court began to talk about pressure on them.¹⁰ In this case, Judge rapporteur, Ihor Slidenko, said that he had been pressured by representatives of the President's Office even earlier.¹¹ Soon another Constitutional Court judge, Serhiy Sas, a rapporteur in the ongoing case on the interpretation of the Constitution's provisions on land ownership, published his proposed draft decision of the Constitutional Court,¹²

6 Draft Law 'On Restoration of Public Confidence in Constitutional Judiciary' No 4288 of 29 October 2020 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70282> accessed 10 November 2020.

7 Draft Law 'On Restoration of Certain Provisions of the Law of Ukraine "On Prevention of Corruption" and the Criminal Code of Ukraine' No 4304 of 2 November 2020 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70306> accessed 10 November 2020.

8 Draft Law 'On Amendments to Article 10 of the Law of Ukraine "On the Constitutional Court of Ukraine"' No 4311 of 3 November 2020 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70312> accessed 10 November 2020.

9 Draft Law 'On Amendments to the Law of Ukraine "On the State Budget of Ukraine for 2020" (on the transfer of budget funding from the Constitutional Court of Ukraine to the development of educational programs)' No 4308 of 3 November 2020 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70303> accessed 10 November 2020.

10 Statement of the Meeting of Judges of the Constitutional Court of Ukraine to the President of Ukraine V.O. Zelensky, Chairman of the Verkhovna Rada of Ukraine D.O. Razumkov, Prime Minister of Ukraine D.A. Shmygal <www.ccu.gov.ua/novyna/zayava-zboriv-suddiv-konstytucijnogo-sudu-ukrayinyi-doprezydenta-ukrayinyi-zelenskogo-v-o> accessed 10 November 2020.

11 Judge of the Constitutional Court Ihor Slidenko claimed to have been pressured by the PO <<https://www.youtube.com/watch?v=RipJxPu5ack>> accessed 10 November 2020.

12 'Judge of the CCU addressed Ukrainians and showed a draft decision on the interpretation of land articles of the Constitution' (ZN.UA, 4 November 2020) <<https://zn.ua/ukr/UKRAINE/zemelna-reforma-suddja-ksu-zvernuvsja-do-ukrajintiv-ta-pokazav-proekt-rishennja-shchodo-tlumachennja-statej-konstitutsiji.html>> accessed 10 November 2020.

which calls land reform into question. According to media reports,¹³ four judges who expressed dissenting opinions on the №13-p/2020 decision refused to participate in the Constitutional Court's sittings after the publication of the draft decision until the constitutional crisis was resolved legitimately, rendering it impossible to hold plenary sessions of this court because there is no quorum.

Many civil society organizations, condemning the Constitutional Court's decision, called on the Constitutional Court judges to resign voluntarily¹⁴ and warned the parliament against unconstitutional decisions.¹⁵

5. FURTHER NECESSARY STEPS

It is impossible to prevent all the negative consequences of the Constitutional Court's decision, but efforts must be made to reduce this negative impact.

The least painful decision for the constitutional order would be the voluntary early termination of the Constitutional Court judges' powers, who voted for this decision on their initiative. According to the Constitution, only the Constitutional Court itself can dismiss a judge of this court. Any international partners' cooperation, civil society organizations with the Constitutional Court should be postponed before such a step.

Future judges of the Constitutional Court must pass competitive selection with a meticulous integrity examination, requiring immediate amendments to the Law 'On the Constitutional Court of Ukraine' and related laws.

The legal solution to the problem will be to update the provisions of the Law 'On Prevention of Corruption' by adopting a law that will return the powers of the NAPC and at the same time provide a separate, preferably more effective, procedure for verifying declarations and monitoring the lifestyle of judges. Responsibility for a knowingly false declaration (non- declaration) should be transferred from the Criminal Code to the Code of Administrative Offenses. Unfortunately, this will no longer bring to justice those who committed such violations before because the new law on liability can only be applied for the future.

It is vital to set out more apparent crime features as adopting knowingly unjust court decisions in the Criminal Code by 11 December this year. This legislation made it possible to prosecute the judges who made these decisions, as these acts were and still are susceptible to punishment. We remind that the current version of the article was

13 'CCU judges, who voted against the repeal of anti-corruption laws, refused to participate in its work' (NV, 5 November 2020) <https://nv.ua/ukr/ukraine/politics/suddi-ksu-vidmovilysya-vid-uchasti-v-yogo-roboti-novini-ukrajini-50122255.html?utm_content=set_lang> accessed 12 November 2020.

14 'Judges of the Constitutional Court of Ukraine must leave' (Transparency International Ukraine, 4 November 2020) <<https://ti-ukraine.org/news/suddi-konstytutsijnogo-sudu-ukrayiny-mayut-pity>> accessed 10 November 2020.

15 'RPR Coalitions' Position on the Situation that has Developed as a Result of the Constitutional Court's Decision to Declare the Provisions of the Anti-corruption Law And Criminal Liability for Knowingly False Declarations as Unconstitutional' (*Reanimation Package of Reforms*, 4 November 2020) <<https://rpr.org.ua/news/pozytsiia-koalitsii-rpr-shchodo-sytuatsii-iaka-sklalasia-pislia-rishennia-ksu-provyznannia-nekonstytutsiynomy-polozhen-antykorpustsijnoho-zakonu-ta-kryminal-noi-vidpovidalnosti-za-zavidomo-nedostovir>> accessed 10 November 2020.

declared unconstitutional in the summer but will be repealed by the Constitutional Court's decision on December 11 this year. If the new law does not enter into force by December 11, then the punishment will be removed by the parliament's fault, and later the adoption of such a law will not have a retroactive effect.

It is essential to fulfilling Ukraine's international obligations to strengthen the High Council of Justice's integrity by verifying candidates' integrity for this body and its members by an independent commission with international experts' participation. Similarly, it is necessary to form a new composition of the High Qualification Commission of Judges. Only this will be able to ensure greater accountability in the judiciary.

In the further legislative activity, not all the Constitutional Court's arguments given in the decision №13-p/2020 can be taken into account (for example, regarding the need to create parallel control bodies in the judiciary). This may result in new appeals to the Constitutional Court, but if its composition is renewed, it will likely depart from this decision.

Amending the legislation, and if necessary, the provisions of the Constitution should lead to the judiciary and the Constitutional Court's accountability because the real independence of judges is impossible without integrity.