

Analysis of the CCU's decision of October 27 and possible solutions to the crisis it provoked

02.11.2020

On October 27, the Constitutional Court of Ukraine (hereinafter – CCU) declared unconstitutional the main provisions of Ukraine's anti-corruption reform on e-declaration system, which shocked Ukrainian society, the expert community and the authorities.

This decision repeals a number of provisions of anti-corruption legislation without any justification in the motivational part. In making this decision, the CCU went beyond the constitutional appeal in fact violated the Constitution of Ukraine. The constitutional review was initiated by pro-Russian and oligarchic forces and was considered in record time.

These factors give reason to believe that the decision of the CCU is part of a hybrid war against Ukraine and aims to change the Euro-Atlantic vector of Ukraine's development. After all, the abolished provisions of anti-corruption legislation have been Ukraine's greatest achievements in recent years, part of Ukraine's international obligations and practical tools in the fight against corruption. That is why after the publication of the decision of the CCU, the National Security and Defense Council of Ukraine, the key security coordination body of the country, held urgent meeting and proclaimed the consequences of this decision as a threat to national security.

Such a threat is growing exponentially, given that the CCU currently holds ongoing review of legislation in various spheres of the country's life, the abolishing of which can lead to financial, economic and political, and legal collapse in the country. It is especially dangerous that the CCU did not provide precise justification, and thus deprived the Parliament of the opportunity to eliminate specific shortcomings of the repealed legislation.

As a result, the country faces a serious challenge whereas society demands an immediate halt and reset of the CCU, and the Constitution does not provide for without the consent of the CCU itself. The President has already offered his vision of solving this crisis with implementation of the decision of the National Security and Defense Council which suggest revoking the decision of October 27 and dissolving the current composition of the CCU. Despite the fact that the option proposed by the President has provoked discussions, delays in eliminating this threat could have irreversible consequences. That is why we are convinced that given this difficult circumstance Ukraine must not only restore the repealed legislation and prevent further unreasonable decisions of the CCU, but also launch a radical reform of the CCU and entire judiciary. The most important requirement is to immediately conduct an open and transparent selection of CCU judges, taking into account the best international standards and practices.

Analysis of the CCU's decision

CCU declared unconstitutional **the following provision of the Law on corruption prevention and the Criminal Code:**

1. powers of the National Agency for Prevention of Corruption (NAPC) to oversee compliance with legislation on ethical conduct of public officials, prevention and settlement of conflicts of interest, control

and verification of declarations, storage and publication of such declarations, monitoring the lifestyle of public officials;

2. the right of the NAPC to receive the information necessary for the exercise of its powers, to access state registers, to monitor compliance with anti-corruption legislation, to proceed on administrative offenses related to corruption; to issue instructions on elimination of the legislation, to carry out related investigations, bringing of the offenders to the responsibility;

3. state registration of legal acts of the NAPC with the Ministry of Justice of Ukraine and the procedure for promulgation and entry into force of acts of the NAPC;

4. the rights of the authorized persons of the NAPC and the tasks of the authorized subdivisions (authorized persons) on the issues of prevention and detection of corruption;

5. settlement of conflict of interests in the activities of officials of the collegial bodies;

6. public access to the register of e-declarations;

7. control and verification of such declarations by the NAPC, including full verification and the procedure for establishing the timeliness of submission of declarations;

8. monitoring the lifestyle of the public officials;

9. the obligation to notify of a significant change in the property status of the public official;

10. liability for corruption or corruption-related offenses;

11. criminal liability for submission of knowingly false information in the declaration of a public official, or intentional failure to submit a declaration.

In essence, the content of **the decision is limited to legal positions that justify the need for independence of judges** and the separation of the judiciary from other branches of government, **but avoids any analysis of the content of repealed provisions and how these provisions really affect the independence of judges.**

The analysis of the decision indicates that the CCU violated the key principles of its work defined by Article 147 of the Constitution of Ukraine (**the principle of the rule of law, independence, transparency, and reasonableness**).

This decision **lacks justification** and **violates the rule of law principle** for the following reasons:

(a) absolutely no legal arguments have been given to the repeal of a number of provisions (publication of declarations, certain powers and rights of the NAPC, rules on liability for corruption and corruption-related offenses);

(b) the CCU went beyond the constitutional appeal and apparently repealed a number of norms that were not even addressed by the appeal (NAPC powers to verify conflicts of interest of officials and prepare administrative protocols; the possibility of conducting special checks to appoint officials);

(c) by revoking certain control powers of the NAPC, the CCU justified this by the impossibility of exercising such control over judges, but in fact revoked such powers over all public officials;

(d) the CCU has not analyzed or knowingly admitted the negative consequences of the impact of repealed provisions (in particular, the decision actually suspended control of political party finances, suspended the possibility of appointing government officials when NAPC checks are required);

(e) the CCU justified abolishing criminal liability not on the ground of violation of the Constitution, but by the establishing insignificance of the act itself for criminalization. In fact, only the Parliament can determine which act should or should not be criminalized, so the CCU actually took over the Parliamentary function.

The decision was taken without holding any public hearings, without holding discussion of the merits of the case with representatives of the authorities, experts and civil society. This is at least contrary to the traditional practice of the CCU and **violates the principle of publicity**, which is an additional factor of distrust in the decision.

This decision can in no way be considered independent, as there is every reason to say that the judges of the CCU acted in their own interests, because of the fact of their own violation of the anti-corruption legislation which they repealed.

Given the above arguments, the decision of the Constitutional Court in this case is null and void and cannot be enforced due to the lack of clear legal arguments and requirements required by the Constitution of Ukraine.

Damage caused by the decision and the future risks

The decision of the CCU is national security threat, which caused both irreparable internal damage and external geopolitical consequences. The risks and damage caused by this decision are growing day by day, as the decision has also led to a rise in protest moods in society.

The most significant negative internal consequences:

- a) The abolition of public access to the asset declarations results in the loss of a powerful tool of public oversight over public officials;
- b) The abolition of NABU's oversight functions results in the loss of tools to verify declarations, blocks the appointment of officials, dismantles control over the financing of political parties, and eliminates the inadmissibility of officials' actions in conflict of interest;
- c) The abolition of criminal liability for false declarations results in the irreversible closure and acquittal of top officials in at least 110 NABU criminal cases and hundreds of police cases. The CCU's arguments prevent the resumption of criminal liability for this type of violation in general;
- d) The decision returns country to 2013 with non-existent compliance with anti-corruption legislation and no public control over the assets of public officials;
- e) The CCU's decision effectively preserves impunity and corporatism in the judiciary. The decision of the CCU can be used to avoid liability for any violations committed by judges, including corruption ones, even after the legislation is changed. It also effectively blocks envisaged judicial reform as it finds inadmissible any external actors in judiciary oversight;
- f) The court blocked a number of procedures that were not relevant to the merits of the case at all, for instance, special screening of persons before appointment, oversight over financing of political parties and checks on their reporting, etc.;
- g) With such an unreasonable decision and disregard for the Constitution, the CCU judges destroyed public confidence in both the CCU decisions and the CCU as an institution;

Imminent threats

The CCU is currently considering a number of other appeals on key reforms that may be repealed in the near future, which result in the liquidation of entire state institutions:

Other tools of anti-corruption reform:

- establishment of the High Anti-Corruption Court;
- criminal liability for illicit enrichment;
- civil confiscation of unjustified assets;
- special confiscation in criminal proceedings

Other reforms in various sectors:

- reform of banking legislation (the so-called “anti-Kolomoisky” law), legislation on the status and powers of the Deposit Guarantee Fund;
- land reform (lifting the moratorium to sell agriculture land);
- healthcare reform

Further repeal of this legislation could lead to political, legal, and financial collapse. At the same time, the precedent of the decision of October 27 was especially dangerous because during this review the CCU repealed the provisions, which were not subject of appeal and did not receive any justification.

The onset of these consequences is obviously the main goal of pro-Russian forces in Ukraine, especially in the Ukrainian Parliament, as the authors of most of these appeals are pro-Russian agents - representatives of the parliamentary faction “Opposition Platform for Life” and oligarchic forces like group “For the Future”. It should be noted that the pro-Russian forces have already increased their potential, as demonstrated by the results of the recent local elections, and have already announced the need for early parliamentary elections. This means that these forces see such an organized crisis as the best scenario for themselves to increase their presence in the government. The result could be a fierce confrontation with pro-Russian forces in the west and in the center of the country and an increase in the influence of these forces in the east, which could spread armed aggression to the entire territory of the country or push for a “peaceful settlement” with Russia.

Probable solutions

The Constitution stipulates that **the President of Ukraine is the guarantor of the Constitution of Ukraine and the guarantor of Ukraine’s European and Euro-Atlantic course**, so the initiative of the President of Ukraine is decisive for overcoming this constitutional crisis.

There are several likely scenarios that may resolve the crisis, but none of them is in full compliance with existing legislation or fully probable under existing political conditions. There are no absolutely constitutional and at the same time quick solutions that could ensure the restoration of the provisions and the elimination of threats in the near future, even if several of the below solutions are applied simultaneously.

Also, in the recent history of Ukraine there have been cases of political decisions that did not actually comply with the Constitution, but due to the great support of society were recognized as legitimate. For example, in 2014 there were decisions of the Parliament of Ukraine, which removed ex-President Viktor Yanukovich and restored the previous version of the Constitution.

Given the high threat to national security, with the will of Parliament, the already demonstrated will of the President, and with the support of society, such a decision can be made in this case.

- **Parliament adopts amendments to the Law on Constitutional Court, which provide for the**

decisions of the CCU to be adopted only with full majority of votes (by 18 out 18 judges envisaged by the Constitution or 15 out of 15 judges currently appointed to court)

Pros	Cons	Probability
If adopted immediately, prevents any further damage from the future unreasonable CCU's decisions	<p>It doesn't actually resolves the problem, but delays it.</p> <p>Judges of the CCU may declare this law unconstitutional and they will consider it an interference in their work and will not recognize this law and will not implement it.</p> <p>At the same time, if the law on such amendments is adopted, the CCU's decisions will not be legitimate.</p> <p>However, judges will be able to ignore these changes.</p> <p>This may deepen the crisis.</p> <p>It does not restore the damage of decision of October 27.</p> <p>International cooperation still suspended.</p>	Medium (several parliamentary factions may agree for this as compromise option)
	<p>It will give a temporary illusion of solving the problem, which destroys the existing window of opportunity for adoption real solution.</p> <p>This decision is temporary and cannot remain forever. So when to cancel it? If we wait until 2023, Ukraine will have non-functioning Constitutional Court. Judges will be appointed but not performing duties. This is an incredible threat, in the situation, whereas, for instance, MPS under Russian pressure adopt some sort of "Minsk agreements" and Ukraine doesn't have the CCU to protect its Constitution and sovereignty.</p> <p>How should government explain to the society that the judges who dismantled anti-corruption reform, will receive 200 thousand UAH a month for not doing any job?</p>	

• At least 12 judges of the CCU should simultaneously resign

Pros	Cons	Probability
This is the most legal way to relaunch the CCU, no direct intervention of the Parliament is required.	<p>It depends entirely on the good will of the CCU judges.</p> <p>Following their recent public rhetoric, they are reluctant to do so.</p>	Very low
	<p>After resignation, the judges can then appeal the resignation and demand reinstatement through other courts because they have been pressured.</p> <p>The Constitution and legislation does not provide for any regulation of simultaneous resignation of the CCU judges, additional legislative amendments may be required to facilitate transitional period.</p>	

• Some of the CCU judges (for instance, 4 judges that did not vote for the decision of October 27) to block the work of the CCU by abstaining from the quorum.

Pros	Cons	Probability
This is a temporary solution that may block the work of the court due to lack of quorum and block further adoption of necessary harmful decisions.	<p>This kind of request to judges to abstain from the CCU hearings will be considered a pressure on them.</p>	Low. (The sustainable outcome cannot be guaranteed)
	<p>Thus, the further fate of the court will depend on 4 judges who may not withstand the pressure and act completely unpredictably</p> <p>The problem with the repealed provisions of the law on prevention of corruption is not solved.</p>	

• **Amending the Law on corruption prevention so that it complies with the CCU’s decision**

Pros	Cons	Probability
The anti-corruption legislation is restored, seemingly constitutional approach	The CCU can always declare a law unconstitutional, as the CCU decision did not justify the abolishing of most of the provisions. The Parliament may significantly weaken the anti-corruption legislation when preparing and voting on the new law. Such a law will not operate retrospectively. Therefore, it will not be possible to bring anyone to justice for violations committed prior the decision of the CCU.	
	It will not be possible to overturn the decisions of the authorities made under a conflict of interest.	
	All public officials who were in the public register, all those who were inspected by the NAPC will be able to demand compensation from the state for unconstitutional actions through the courts (the Constitution directly provides for compensation for damage caused to citizens by unconstitutional laws).	
	This option is quite time-consuming. Whichever option is chosen, whether it is the creation of a separate control mechanism for judges, or the transformation of the NAPC into an independent body and its removal from the executive branch (and this can only be done by amending the Constitution and transforming the NAPC into a constitutional body) – they need considerable time.	Medium
	It is no longer possible to criminalize false declarations, as the CCU has taken over the functions of the Parliament whether the public danger of an act is sufficient to criminalize it. Other types of legal liability for such an offence do not provide a sufficient deterrent effect and significantly complicate the proof of the offense and guilt of the person.	
	Such a law will not restore the damage caused by the decision of the CCU.	
	It will give a temporary illusion of solving the problem, which destroys the existing window of opportunity for adoption real solution.	

• **Adoption of the draft law No.4288 suggested by President Zelenkyi**

The draft law provides for:

- 1) *declaring of the CCU’s decision of October 27 null and void;*
- 2) *automatic restoring all abolished legislation, including provisions on criminal liability;*
- 3) *dissolve the current composition of the CCU;*
- 4) *new selection of the CCU judges by appointing authorities*

Pros	Cons	Probability
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Political solution to prevent the implementation of the plan of pro-Russian agents to push the country to pro-Russian revenge by the judges of the CCU. Rapid dissolution of the CCU and elimination of future risks arising from this composition of the CCU. Prevention of rapid dismantling of the key reforms and institutions. Provides for full repair of the damage caused by the decision of October 27. Opportunity to establish a new competitive procedure for the selection of new CCU judges with the maximum involvement of international partners, which could guarantee the impartiality and apolitical nature of the competition. !!!It is important that the proposed draft law does not yet have such a procedure!

The law is unconstitutional that may be considered as constitutional coup. The law may be abolished by the CCU. The risk of usurpation of power by the president or those behind him. Zelensky's draft law is especially risky without a prescribed procedure for the competitive selection of new judges. A dangerous precedent for the future - it can be used for real usurpation of power in the future. If parliament does not vote, the president can dissolve it and pro-Russian forces will seize the moment of re-election.

High (this is President's initiative supported by his party)

AntAC's position: this solution is only possible if the draft law includes provisions on the depoliticized and independent selection of new CCU judges.

• The CCU judges to be dismissed by appointing authorities

Pros	Cons	Probability
The further damage of this composition of the CCU is mitigated	This is unconstitutional. Doesn't resolve the damage made with the decision of October 27.	Very low. (the appointing authorities very unlikely to proceed with the dismissal, Parliament needs to give 226 votes, Congress of judges won't proceed with it, the President will only proceed if he is certain that his law is adopted)

• Dissolve the CCU and select new members through amendments to Constitution

Pros	Cons	Probability
Constitutional approach	Very time consuming process, which may take up to a few years. The CCU may block the amendments as this approach requires the CCU's approval of draft law. During the adoption period the CCU will dismantle the key reforms and institutions.	Low (requires 300 votes in Parliament and the CCU's approval)

• Criminal prosecution of the CCU judges

Pros	Cons	Probability
This is a legal ground to terminate powers of the CCU's judge	Early this year, the CCU abolished criminal liability for knowingly unjust decision. Other criminal offences are hard to investigate post factum and the process may take years. The judges will consider the investigation a pressure.	Low

• The CCU will give the clarification of its decision (the clarification may be requested by MPs who initiated the appeal, President or other state agencies, parties to the case)

Pros	Cons	Probability
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Constitutional way

It is hard to predict content of the clarification.
This may either improve or worsen the situation.
If the clarification improves the content of the decision, it will help to temporarily relieve tensions in the country and soothe attention until further decisions.
Clarification cannot correct the consequences of in regards to liability of public officials (it is still irrevocable).
It does not prevent new destructive decisions of the CCU, in particular regarding HAAC, land and banking reforms.

High (the CCU judges already publicly confirmed that they are eager to give some sort of a clarification)

In particular, examples of complete and partial changes of judges of the Constitutional Court have taken place in various post-Soviet countries with imperfect and prone to corruption judicial systems. The recent examples are Moldova and Armenia.

New model of Constitutional Court selection

In any case, it is evident that Ukraine necessitates a new transparent and unprecedented system of selection of judges of the Constitutional Court.

The civil society will vigorously advocate for a single open competition for candidates in order to form a pool of people who meet the criteria of a CCU judge. Respective appointing authorities (President, Parliament and Congress of Judges of Ukraine) should select their candidates only from this pool.

Therefore, Zelenskyi's draft law should be supplemented with provisions amending the Law of Ukraine on the Constitutional Court, which provide for a single competition commission for the selection of candidates for judges of the CCU for appointment by the President, Parliament, Congress of Judges.

At the same time, it is necessary to provide an effective mechanism for dismissal of a judge of the Constitutional Court in case a judge commits unworthy conduct.