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Ukraine: a Constitutional Court verdict ignites a political crisis

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During a closed session on 27 October, the Constitutional Court of Ukraine (CC) issued a ruling that has halted the functioning of the National Agency for the Prevention of Corruption (Ukr. *NAZK*). This body is one of the key institutions responsible for fighting corruption, which was created after the Revolution of Dignity. The court also found unconstitutional an article of the Criminal Code providing for a penalty of imprisonment for knowingly submitting a false declaration on property ownership, arguing that it was too severe. The CC's decision thus took into account the demands contained in a motion submitted on 4 August by 47 parliamentary deputies, representing a majority (44) of the pro-Russian Opposition Platform/For Life party (*OPZZh*) and representatives of the For the Future parliamentary group, which cooperates with the oligarch Ihor Kolomoyskiy.

The CC's decision has caused a political crisis in Ukraine; it has met widespread criticism from both civil society and the highest levels of the government. President Volodymyr Zelenskiy, calling the decision a threat to state security, convened an extraordinary meeting of the National Security and Defence Council (NSDC); this resulted in a government decision ordering the restoration of open access to the electronic register of tax returns, contrary to the CC's decision. At the president's request a draft law was drafted, at an express pace, revoking powers of attorney from the current court and restoring both the functionality of the *NAZK* and the criminal liability for submitting a false financial declaration (in line with the previous penal code). It is not yet known when the Ukrainian parliament will vote on this new bill. The procedure may be delayed by the COVID-19 pandemic (parliament did not sit at all during the month of October), and the president may also find it difficult to pull together the necessary votes (226 is the minimum) because of the opposition's unwillingness to support his initiative.

The most important elements of the CC's decision

The Court found unconstitutional Article 366 (1) of the Criminal Code, which provides for a term of imprisonment of up to two years, and the possibility of excluding those convicted from certain public functions for up to three years, for deliberately submitting a false declaration of property. The Court stressed that this punishment was disproportionate to the nature of the crime, which a majority of its members believed should be punished in a milder way. The remaining points of the ruling deem most of *NAZK*'s competences unconstitutional:

- the agency has been denied access to all registers of information about officials, including real-estate registers;
- the agency cannot issue administrative notifications when a violation of anti-corruption laws is detected;
- if irregularities are detected in declarations of property, the documents drawn up by *NAZK* officials should contain instructions on the manner and deadline by which the irregularities identified should be removed, which will delay the possible start of criminal procedures;
- the agency may not challenge laws and other legal acts adopted in violation of anti-corruption legislation. Likewise, it is not permitted to review property declarations, or assess whether they have been correctly filled in or contain the correct information. Nor can the agency apply to the Special Anti-Corruption Prosecutor's Office or the General Prosecutor's Office with requests to recognise questionable assets in property declarations as unjustified, or monitor the financial aspects of the lives of persons submitting declarations.

The CC's judgement *de facto* paralyses the functioning of *NAZK*, and means the closure of 110 cases involving submitting false declarations of property conducted by the National Anti-Corruption Bureau of Ukraine (NABU) into.

Uproar in Ukraine ...

The court's decision caused a storm among Ukraine's political elite. The decision was severely criticised by the president's representative to the Constitutional Court. President Zelenskiy urgently convened the NSDC, and the speaker of parliament insisted that the parliament would take all steps to avoid harmful consequences of the ruling. The head of the Foreign Ministry, Dmytro Kuleba, expressed the hope that the EU would not decide to exclude Ukrainian citizens from the visa-free regime. He emphasised that Ukraine's Western partners expect it to avert the negative effects of the CC's decision, and maintained that the government in Kyiv will take strategic measures to protect the current structure of the country's anti-corruption institutions. In his opinion, however, this will require a demonstration of political will by the Ukrainian elite.

On 29 October, after the meeting of the National Security and Defence Council, the president issued a strongly-worded statement in which he stated that "a group of people wants to destabilise the situation in the country", and insisted that any attempts to dismantle the anti-corruption institutions would not be supported by the Ukrainian people or the government. He also appealed to the law enforcement structures to investigate the circumstances which led to the CC's controversial ruling. At the same time, Zelenskiy ordered the immediate drafting of legal solutions which would enable the electronic tax return system to continue operating in its current form; this was reflected in the government's decision to restore the operation of the register, as well as in its draft law addressed to the parliament.

… and criticism from the West

The court's decision met with critical reactions from EU and US representatives. A*fter meeting the chairman of the CC on 27 October, the h*ead of the EU representation in Kyiv, *Matti Maasikas, stated that it is important for Ukraine to maintain transparency in the work of*

the courts and to defend the reforms adopted after the 'Revolution of Dignity'. There was also a warning that the fate of the anti-corruption institutions may affect further financial aid for Ukraine and threaten the maintenance of visa-free travel with the EU. A statement was also issued by the ambassadors of the G7 group, in which they expressed their concern about the possibility that the previous effects of reforms related to the fight against corruption would be wasted, and stated that Ukraine should not return to the past.

Commentary

- The CC's decision is paralysing the work of *NAZK*, which has been proving an effective tool for blocking the fight against corruption in Ukraine because its key activities include collecting and verifying the declarations of assets made by state officials. Since the launch in August 2016 of the publicly accessible Unified State Register of Property Declarations, the agency's activities have often been severely criticised by people whose declarations were dubious and have been investigated by civic anti-corruption organisations. *NAZK* is equipped with coordination and anti-corruption functions. Its creation was one of the first decisions confirming that the Ukrainian authorities were ready to make radical, systemic changes after the Revolution of Dignity; it was also one of the European Union's requirements of Ukraine on the path to its obtaining visa-free EU travel.
- The ruling of the Constitutional Court is in line with the coordinated action being taken by pro-Russian politicians and a group of deputies serving the interests of Ukrainian oligarchs which has been going on for several months, and is aimed at undermining and paralysing the system of anti-corruption institutions by means of the CC's work. In Ukrainian political practice so far, the CC has generally taken the interests of the head of state into account. However, once again – after the decisions taken on 28 August, when the appointment of *NABU*'s director by previous president Petro Poroshenko was declared unconstitutional, and on 16 September, when certain provisions of the *NABU* Act were declared unconstitutional – the motion put forward by a small group of deputies associated with the pro-Russian politician Viktor Medvedchuk and the oligarch Ihor Kolomoyskiy has been supported by a ruling from the Constitutional Court that was favourable to the applicants. This decision can be considered biased, and clearly shows a lack of any reflection on its consequences for the stability of the state. This is because pro-Russian and oligarchic forces in Ukraine want to destabilise the internal situation by triggering a deep political crisis, as well as to seriously complicate Kyiv's relations with the West, whose political and financial support is largely conditional on the country making real progress in its fight against corruption. Other laws critical for the development of the state and its relations with the West are pending before the CC, such as the establishment of a Higher Anticorruption Court and the introduction of an agricultural land market.
- The reaction from President Zelenskiy was unprecedented; for the first time in his term of office, he took a firm stand on the effects of the Constitutional Court's actions and the attempts by pro-Russian opposition politicians to weaken Ukraine's anti-corruption institutions. Describing the CC's ruling as "one part of a coordinated action to destabilise

the situation in Ukraine," the president also decided to take steps to prevent its decision from being implemented, and thus prevent the attack on anti-corruption institutions from continuing. This is connected with the need to introduce rapid legislative changes, which would ensure that these institutions were able to function efficiently. However, the president's move does not rule out further requests to the CC challenging the constitutionality of any more legal solutions; nevertheless it gives time, for example, for any vacancies on the Court to be filled with people with cleaner reputations.

- The future development of the internal crisis in Ukraine will depend on the skill of President Zelenskiy. At present he can count on about 200 deputies from his own Servant of the People faction (which numbers 246 in total), so he will probably have to find allies to build a majority to pass the proposed reform bill. The pro-Western opposition parties, Voice and European Solidarity, would seem to be just such natural allies. However, the comments which their representatives have made so far show that they will be rather reluctant to endorse Zelenskiy's controversial initiatives; they have adopted the position that the CC's ruling is final according to the constitution, and cannot be changed or undermined by either a government decision or a bill in parliament. If the president's actions to protect the achievements to date in reforming the state end in failure, his position will be weakened and will further erode his political camp. Thus, the solution he proposes, although it shows political determination and concern for the state, violates the principles of the existing legal order, and its opponents will regard it as unconstitutional.
- Some of the CC's judges who took this most recent decision were themselves in violation of the legal requirements regarding declarations of property, which makes the allegations of bias on their part more likely. Two of them failed to disclose their financial income from the past two years, and the CC's current chairman is suspected of concealing his purchase of real estate in Crimea in 2018. This suggests that they also took this decision for their own benefit. The composition of the Constitutional Court, which is currently made up of 15 people (three positions are vacant), took shape over many years. The current group includes three judges elected during the presidency of Viktor Yanukovych, ten from Poroshenko's period, and only two nominated during Zelenskiy's rule, having been nominated by the Supreme Judicial Council. The pro-presidential Servant of the People party has failed to nominate the two candidates to the CC put forward by parliament for a year now.