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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**
**(VENICE COMMISSION)**

# UKRAINE

# DECISION NO. 13-r/2020 *

# OF THE CONSTITUTIONAL COURT OF UKRAINE OF 27 OCTOBER 2020, WITH DISSENTING OPINIONS *

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**IN THE NAME OF UKRAINE**

**DECISION**
**OF THE CONSTITUTIONAL COURT OF UKRAINE**

**in the case upon the constitutional petition of 47 People's Deputies of Ukraine on the conformity of specific provisions of the Law “On Prevention of Corruption”, the Criminal Code with the Constitution (constitutionality)**

the city of Kyiv Case No. 1-24/2020(393/20)
October 27, 2020
No. 13-r/2020

The Grand Chamber of the Constitutional Court of Ukraine composed of the judges:

Tupytskyi Oleksandr Mykolaiovych - the chairperson,
Holovaty Serhii Petrovych,
Horodovenko Viktor Valentynovych,
Zavhorodnia Iryna Mykolaivna,
Kasminin Oleksandr Volodymyrovych,
Kolisnyk Viktor Pavlovych,
Kryvenko Viktor Vasyliovych,
Lemak Vasyl Vasyliovych,
Lytvynov Oleksandr Mykolaiovych,
Moisyk Volodymyr Romanovych,
Pervomaiskyi Oleh Oleksiiovych,
Sas Serhii Volodymyrovych,
Slidenko Ihor Dmytrovych- judge-rapporteur,
Filiuk Mykola Todosiovych,
Yurovska Halyna Valentynivna,

at the plenary session considered the case upon the constitutional petition of 47 People's Deputies of Ukraine on the conformity of specific provisions of the Law “On Prevention of Corruption” dated October 14, 2014 No. 1700–VII as amended (Bulletin of the Verkhovna Rada of Ukraine, 2014, No.49, p.2056), the Criminal Code with the Constitution (constitutionality)

Having heard the judge-rapporteur Slidenko I.D. and having examined the case materials, the Constitutional Court of Ukraine

**f o u n d:**

1. The subject of the right to constitutional petition - 47 People's Deputies - appealed to the Constitutional Court to declare specific provisions of the Law “On Prevention of Corruption” dated October 14, 2014 No. 1700–VII as amended (hereinafter referred to as the Law No. 1700), the Criminal Code (hereinafter referred to as the Code) as such that do not comply with the Constitution (are unconstitutional).

People's Deputies of Ukraine request to declare the provisions of Articles 11.1.8, 12.1.2, $12.1.10^1$, 47.1.2, 47.1.3, 50.1, 50.3, 51, 52.2 and 65 of the Law No.1700, Article $366^1$ of the Code as such that do not comply with the Constitution of Ukraine (are unconstitutional).
The petitioners consider that the disputed provisions of Law No. 1700, Article $366^1$ of the Code do not comply with Articles 3.2, 6.2, 8.1, 8.2, 19.2, 21, 24.1, 24.2, 32.1, 32.2, 61.2, 62.1, 64.1, 68.1 of the Constitution of Ukraine.

2. The Constitutional Court of Ukraine, in resolving the issues raised in the constitutional petition, proceeds from the following.

According to the Constitution of Ukraine, the bodies of legislative, executive and judicial power exercise their authority within the limits established by the Constitution and in accordance with the laws of Ukraine (Article 6.2); the rule of law is recognised and effective in Ukraine; the Constitution of Ukraine has the highest legal force; laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and must comply with it (Article 8.1, Article 8.2); the independence and inviolability of a judge are guaranteed by the Constitution and laws of Ukraine; influence on a judge in any way is prohibited (Article 126.1, Article 126.2); the independence and inviolability of a judge of the Constitutional Court of Ukraine are guaranteed by the Constitution and laws of Ukraine; influence on a judge of the Constitutional Court of Ukraine is prohibited in any way (Article 149.1, Article 149.2).

According to Article 6.1 of the Constitution of Ukraine, state power in Ukraine is exercised on the basis of its division into legislative, executive and judicial.

The constitutional system of division of state power means that each of the branches of power has its own system (structure) of subjects, institutions, means, forms and methods of government (exercise of power), based solely on the ideas of freedom, rule of law, guarantee and observance of human and citizen's rights and freedoms and the restriction of arbitrary government. The fundamental principle of constitutionalism and the guarantee of good governance is the division of state power into independent branches of government with their own competence, defined by the constitution and laws adopted on its basis.

3. A fundamental and integral element of such a system is the independent bodies of judiciary and constitutional review, defining functions of which are to protect human and citizen's rights and freedoms, the interests of legal entities, and to guarantee the system of division of state power in general.

The purpose of the functional division of state power into legislative, executive and judicial (Article 6 of the Constitution of Ukraine) is the division of powers between different bodies of state power and prevention of the appropriation of state power by one of the branches of government, which means independent performance of their functions in pursuance with the Constitution and Laws of Ukraine (subparagraph 1 of paragraph 2.1 of clause 2 of the motivating part of the Decision of the Constitutional Court of Ukraine of June 24, 1999 No. 6-rp/99; paragraph 2.2. of clause 2 of the motivating part of the Decision of the Constitutional Court of Ukraine of July 8, 2016 No.5-rp / 2016).

The exercise of state power in accordance with these constitutional requirements, in particular on the basis of its division into legislative, executive and judicial, due to the system of checks and balances established by the Basic Law of Ukraine ensures the stability of the constitutional order, prevents usurpation of state power and usurpation of the exclusive right Ukraine (subparagraph 6 of paragraph 3.1 of clause 3 of the motivating part of the Decision of the Constitutional Court of Ukraine of June 13, 2019 No. 5-r / 2019).

These are the bodies of the judiciary and constitutional review that perform, in particular, the main functions of proper legal restraint of the legislative and executive branches, as well as control over the activities of these branches of power in order to prevent them from going beyond their powers.

The activity of the judiciary is to control the observance of the legality, and that of the constitutional review - the constitutionality of the activity of the bodies of legislative and executive power. The judiciary and constitutional review bodies are a counterweight to the legislative and the executive

powers, as they can review acts of these branches of state power regarding legality or constitutionality.
The Constitutional Court emphasises that the exclusivity of the judiciary and especially constitutional review bodies, among other things, is in the special procedure for the formation of the judicial corps, including internal exclusively judicial bodies in terms of bringing judges to liability.

4. The Constitutional Court proceeds from the fact that the judiciary, given the essence of its functions, is the least dangerous for democratic governance and other branches of state power, as well as for the natural human rights defined by the Constitution of Ukraine, as it has the least opportunity to violate or adversely affect them. In view of this, one of the main tasks of the Constitutional Court is to ensure the proper implementation of the principle of division of state power, the system of balance of power in order to prevent disproportionate strengthening or inadequate influence of one branch of state power on another. Objective application and proper interpretation without any advantages are possible only if the independence of the Constitutional Court and the judiciary in general and the absence of negative influence and pressure on the part of the legislative and executive power, guided not so much by the interests of law as by political interests and party preferences.

5. In Ukraine, the principle of independence of judges and courts is enshrined at the constitutional level (Articles 126, 127, 129 of the Constitution of Ukraine) and legally regulated (Articles 6, 48, 126 of the Law of Ukraine “On the Judiciary and the Status of Judges”). The independence and inviolability of judges of the Constitutional Court of Ukraine are guaranteed by the Constitution of Ukraine (Article 149) and the Law of Ukraine “On the Constitutional Court of Ukraine” (Articles 2, 24).

Effective performance of its functions by the judiciary is possible only if it is independent, which is a characteristic feature of exactly the judiciary. The courts must be completely independent from the legislative and the executive power. The independence of the judiciary is ensured by its separation in the system of division of state power, the impossibility of other branches of state power to influence court decisions, as well as guarantees of the independence of judges. The same applies to bringing judges to liability, the procedure of which is closely related to guaranteeing the independence of judges, since the purpose of the judiciary is primarily to protect human and citizen’s rights and freedoms and is directly referred to the constitutional right to judicial protection.

Judges administer justice by exercising judicial power within the powers vested in them under the Basic Law and the Law on the Judiciary and the Status of Judges. Judges of the judiciary and judges of the Constitutional Court of Ukraine perform their duties on a professional basis, have the same legal status, based on common elements, regardless of the court's place in the judiciary or the administrative position held by a judge in court. The equality of legal status of all judges is due, in particular, to the existence of a single procedure for acquiring the status of a judge, a set of rights and responsibilities of a judge, unity of legal guarantees that allow judges to be impartial, objective, unbiased and independent. Acquisition of the status of a judge is also related to the acquisition of the guarantees of independence provided by the Constitution and laws of Ukraine, which the Constitutional Court of Ukraine has repeatedly emphasised in its decisions.

The Constitutional Court of Ukraine noted that the reduction of the level of guarantees of the independence of judges may indirectly lead to a restriction of the opportunities to exercise the right to judicial protection; it is not allowed to reduce the level of guarantees of independence and inviolability of judges in case of adoption of new laws or amendments to existing laws (sentence 3 of subparagraph 5 of paragraph 4.3 of clause 4 of the motivating part; paragraph 2 of subparagraph 1.3 of clause 1 of the operative part of the Decision of 1 December 2004-rp/2004).
The Constitutional Court of Ukraine stated that the provision of Article 126.2 of the Constitution of Ukraine “influence on judges is prohibited in any way” should be understood as ensuring the independence of judges in the administration of justice, as well as prohibition of any action against

judges irrespective of any form of manifestation by state bodies, institutions and organizations, local self-governments, their officials and servants, individuals and legal entities in order to prevent judges from performing their professional duties or persuade them to deliver an unjust decision, etc. (clause 2 of the operative part of the Decision of December 1, 2004 No.19-rp/2004). Provisions of the Constitution of Ukraine on the independence of judges, which is an integral part of the status of judges and their professional activities, are related to the principle of division of powers and the need to ensure the foundations of the constitutional order, human rights, guarantee autonomy and independence of the judiciary (subparagraph 2 of paragraph 2 of clause 2 of the motivating part of the Decision of the Constitutional Court of Ukraine of June 3, 2013 No. 3-rp/2013).

The constitutional principle of independence of judges ensures the important role of the judiciary in the mechanism of protection of the rights and freedoms of citizens and is a guarantee of the right to judicial protection provided by Article 55 of the Basic Law of Ukraine; any reduction in the level of guarantees of the independence of judges contradicts the constitutional requirement of strict provision of independent justice and the right of citizens to protection of rights and freedoms by an independent court, since it restricts the exercise of this constitutional right and therefore does not comply with Article 55 of the Constitution (subparagraph 2 of clause 3 of the motivating part of the Decision of the Constitutional Court of Ukraine of June 3, 2013 No. 3-rp/2013).

The Constitution of Ukraine defines the basic approaches to ensuring the independence and inviolability of judges, and therefore puts them at the highest level of protection - the constitutional level; the laws of Ukraine may expand the scope of guarantees of independence and inviolability of judges, which must be sufficient for them to carry out their activities impartially, objectively, autonomously and independently; enshrining at the constitutional level the provision according to which justice in Ukraine is administered exclusively by courts, and the provision on the independence of judges establishes the most important guarantee of respect for the constitutional human and citizen’s rights and freedoms; such consolidation is aimed at creating an effective mechanism for fulfilling the tasks assigned to the judiciary, which consist, first of all, in the protection of human and citizen’s rights and freedoms, ensuring the rule of law and the constitutional order in the state; therefore, the protection of judges at the level of the Constitution of Ukraine is the most important guarantee of the independence of the judiciary, impartial, objective, autonomous and independent performance of judges' duties to protect human and citizen’s rights and freedoms, ensuring the rule of law and constitutional order in the state (subparagraphs 3, 4, 6 of paragraph 3.1 of clause 3 of the motivating part of the Decision of the Constitutional Court of Ukraine of December 4, 2018 No.11-r/2018).

The Constitutional Court of Ukraine emphasises that any pressure of the representatives of the legislative and the executive power on the judiciary is impossible, including during the consideration of cases, and interference in its activities is not allowed in order to make them deliver certain decisions. The independence of the judiciary is one of the main principles of its effective operation, ie any influence of the legislative and the executive power is completely excluded.

Thus, the independence of judges is an integral part of their status, and the constitutional principle of the independence of judges ensures the important role of the judiciary in the mechanism of protection of citizens’ rights and freedoms and is a guarantee of the right to judicial protection.
The independence of judges is a basic prerequisite for the functioning of an independent and authoritative judiciary capable of ensuring objective and impartial justice and effectively protecting human and citizen’s rights and freedoms. The principle of independence of judges means procedural activity in the administration of justice in conditions that exclude outside influence on judges. Guarantees of the independence of judges are provided appropriate means of minimising and eliminating negative influences on judges during the administration of justice, aimed at delivering a lawful and reasonable decision.

The autonomy and independence of the judiciary and constitutional review means that they perform their functions without any interference in their activities, do not depend on the legislative and executive power, thus, any influence on the judiciary should cease at the stage of appointment of judges.
The Constitutional Court notes that the performance of the functions entrusted to the judiciary and constitutional review bodies to protect human and citizen's rights and freedoms, to provide the review over the constitutionality of the activities of the bodies of state power, to guarantee the system of division of powers is impossible in case of any forms of pressure on judges of the judiciary and judges of the Constitutional Court.

Thus, institutional independence of the judiciary is a prerequisite for the independence and impartiality of each individual judge, whereas the independence, impartiality of each of them is a condition for ensuring the institutional independence of the judiciary.

6. The Constitutional Court of Ukraine takes into account the fact that the main direction of ensuring the independence of the judiciary is the establishment of special institutions, the purpose of which is to remove the judiciary from the field of administrative control and effective management of the bodies of executive and legislative power.

The independence of the judiciary is undoubtedly an essential part of the rule of law and is designed to ensure that everyone has the right to a fair trial, and is therefore not a privilege for judges, but a guarantee of respect for human rights and fundamental freedoms, thus securing trust in the judiciary (paragraph 7 of the preamble to the Recommendation of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities of 17 November, 2010 CM/Rec (2010)12 (hereinafter referred to as the Recommendation).

In turn, the independence of the judiciary ensures the independence of each individual judge, which is a fundamental aspect of the rule of law (paragraph 4 of the annex to the Recommendation).

The external independence of judges is not a prerogative or privilege granted to the judges' own interests, but in the interests of the rule of law and those who seek and expect impartial justice; the independence of judges should be seen as a guarantee of freedom, respect for human rights and the impartial application of the law; the impartiality and independence of judges are important to secure equality of parties before the courts (paragraph 11 of the annex to the Recommendation).

The judiciary is independent of the executive and the legislative power (paragraph 2.04 of the Montreal Universal Declaration on the Independence of Justice (First World Conference on the Independence of Justice, Montreal, 1983), its independence must be guaranteed by the state, and all state institutions must respect the independence of the judiciary (paragraph 1 of the Basic Principles on the Independence of the Judiciary (approved by United Nations General Assembly Resolutions 40/32 and 40/146 of 29 November and of 13 December 1985) and to prevent any restrictions, undue influences, incentives, pressures, threats or interferences, direct or indirect, from any party or for any reason, paragraph 2.02 of the Montreal Universal Declaration of Independence of Justice; paragraph 2 of the Basic Principles on the Independence of the Judiciary).

The protection and strengthening of the judiciary in relations with the executive and the legislative power should be done by taking measures to ensure that members of the executive and the legislative power respect the judiciary and refrain from improper, biased or purely politically motivated public criticism of individual judges and ensure that every day administration of the courts be carried out effectively and reasonably on the basis of legal norms and without excessive interference by the executive or the legislative power; a disciplinary or criminal investigation of a judge should be held in accordance with the necessary full procedural safeguards before an independent, non-political authority, and sanctions should be applied proportionately and not

arbitrarily or for political or any other reasons not related to the judge's suitability for the exercise of judicial powers (paragraph "C" and Measure 1.3 of the Annex to the Council of Europe Action Plan on Enhancing the Independence and Impartiality of the Judiciary of 13 April 2016 No.CM (2016)36 final).
The executive and the legislative power must ensure the independence of judges and not take measures that could jeopardise the independence of judges (Subparagraph (b) of paragraph 2 of Principle I of the Recommendation of the Committee of Ministers of the Council of Europe No. R(94)12 to Member States on the Independence, Efficiency and Role of Judges (1994).

With regard to anti-corruption policy and bringing judges to liability, disciplinary bodies should be independent of the government, and disciplinary or recusal proceedings should be determined in accordance with established procedures that guarantee judges' right to a fair, transparent and independent consideration of the case.

Anti-corruption reform in Ukraine has become an indisputable demand of society. However, both anti-corruption and judicial reforms must be implemented without violation of the principle of judicial independence and in accordance with the principle of constitutionality. To have an impact on corruption, judicial reform must address issues related to judicial independence, accountability and transparency. This includes the establishment of structures for an independent judiciary capable of self-government.

The Opinion of the Consultative Council of European Judges of 9 November 2018 No. 21 (2018) entitled "Preventing corruption among judges" states that corruption among judges is one of the main threats to society and the functioning of a democratic state. This undermines judicial integrity, which is the basis of the rule of law and a fundamental value of the Council of Europe. There is reason to believe that the effective prevention of corruption in the judiciary depends to a large extent on the political will in the country concerned and to provide real, sincere, institutional, infrastructural and other organizational guarantees for an independent, transparent and impartial judiciary. However, the fight against corruption should not affect the independence of the judiciary. In addition, the process of checking for corruption, dismissal and prosecution of those who have not been screened can be used as a tool to abuse and eliminate politically "undesirable" judges. The mere fact of being a judge in a Member State where the judicial system is compromised at the systemic level is, by democratic standards, insufficient to establish the responsibility of individual judges. This also applies to guarantees that the verification process should be carried out by competent, independent and impartial bodies. Categories of civil servants have different levels of responsibility and authority, so it is necessary to ensure different rules of declaration, in particular, higher judicial bodies have the right to require special acts regulating this issue, and judges' declarations can be handled by a special judicial body.

Corruption is curbed through structural reforms, sound and long-lasting anti-corruption laws, and a coherent institutional mechanism for their implementation and maintenance, supported by an independent, fair and impartial judiciary. However, in order for the fight against corruption to be successful, an independent judiciary and law enforcement agencies free from political and lobbying interference are needed.

Thus, the international standards of judicial independence see the obligation of all public and other institutions to respect and adhere to the independence of the judiciary, which would independently, without outside influence from any public authorities and officials, perform all its functions.

7. In resolving this case, the Constitutional Court of Ukraine takes into account that the independence of judges from other bodies of state power is crucial in any democracy.
In its judgments, the European Court of Human Rights has repeatedly stressed the importance of adhering to the principle of division of powers and non-interference of the executive and legislative power in the judiciary, which is an important factor in ensuring real independence of the judiciary and judges. In particular, attention is drawn to the importance of the independence

of the judiciary from the executive power (§ 95 of the judgment in Ringeisen v. Austria of July 16, 1971, application № 2614/65) and the principle of separation of powers (§ 40 of the judgment in Sacilor-Lormines v. France of November 9, 2006 (application № 65411/01). In addition, the concept of division of powers between the executive and the judiciary is becoming increasingly important in the practice of this court (§ 78 of the judgment in Stafford v. The United Kingdom of March 28, 2002 (application № 46295/99)).

In the context of the interpretation of the term "established by law" used in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter referred to as the Convention), it is stated that the influence of the executive power on the judiciary is contrary to the principle that the judiciary should not depend on the discretion of the executive power in a democratic society (§ 34, § 37 of the judgment in Gurov v. Moldova of October 10, 2006) (application № 36455/02).

The requirement of Article 6.1 of the Convention that tribunals must be independent and impartial, is directly referred to the concept of division of powers. Article 6 of the Convention is inseparable from the notion of judicial independence, and a rigid and visible division between the legislative and the executive power, on the one hand, and the judiciary, on the other, is necessary to ensure the independence and impartiality of judges and, consequently, public confidence in the judiciary. The compromise in this area is unable not to undermine this confidence (paragraphs 2 and 7 of the Dissenting Opinion of Judge Margarita Tsatsa-Nikolovska of the judgment in Kleyn and Others v. The Netherlands of May 6, 2003, applications №№ 39343/98, 39651/98, 43147/98 and 46664/99).

The European Court of Human Rights has emphasised that in determining whether a body can be considered "independent", especially from the executive power, one should take into account, inter alia, the method of appointing its members, their duration, term of office, safeguards against external pressure and whether the authority shows the appearance of independence (§ 34 of the judgment in Pohoska v. Poland of April 10, 2012 (application №33530/06) and the term "independent" in Article 6.1 of the Convention contains two elements, namely, the independence of the courts from the executive power and their independence from the parties to the proceedings (§ 74 of the judgment in Leo Zand v. Austria of October 12, 1978) (application № 7360/76).

8. The Constitutional Court of Ukraine notes that the implementation of the principle of independence of the judiciary, and hence judges, consists primarily in its separation from other branches of government, which means the formation of an independent, autonomous and self-governing judicial system outside the legislative and executive branches.

However, as practice shows, the legislator can ignore the basic constitutional principles of division of state power in terms of independence of the judiciary, empowers bodies and officials outside the judiciary with a significant amount of powers to organise and operate courts, determine the judiciary and status of judges etc. outside the competence established by the Constitution of Ukraine. Thus, preconditions are created for illegal influence on the court, interference in the activities of the judiciary, violation of the principles of independence and autonomy of judges.

The Constitutional Court of Ukraine emphasises that any forms and methods of control in the form of inspections, monitoring, etc. of the functioning and activity of courts and judges should be implemented only by the judiciary and exclude the establishment of such bodies in both the executive and legislative branches.

Thus, the Constitutional Court of Ukraine considers that at the legislative level such relations should be established that would exclude unjustified pressure, influence or control by the executive or legislative power on the judiciary and would prevent the emergence of regulations that will allow legislative control of the judiciary bodies, as well as judges in the exercise of their functions and powers, which will lead to interference in the activities of the

judiciary and encroachment on its independence, enshrined in the Basic Law of Ukraine. Thus, establishing the relevant bodies, introducing liability (sanctions), certain types of control, the legislator must proceed from the principles of independence of the judiciary, non-interference in the activities of courts and judges.

9. In the context of the peculiarities of the disputed norms of Law No.1700, the Constitutional Court of Ukraine considers Article 11.1.8 of Law No.1700 as an integral norm, as it is impossible to separate any provision due to the threat of distortion of the legislator's will.

10. Article 11.1.8 of Law No.1700 is the basis for the institutionalisation of all provisions of the Law No.1700 on the control powers of the National Agency for the Prevention of Corruption as an executive body, in particular Article 11.1.6, paragraphs 1, 2, 6 –$10^1$, 12, $12^1$ of part one, parts two to five of Article 12, Article 13.2, Article $13^1$.2, Article 35, paragraphs two, three of Article 47.1, Articles 48–51, parts two, three of Article 52, Article 65 of Law No.1700, namely: the powers and rights of the National Agency for the Prevention of Corruption, authorized persons and authorized units for the prevention and detection of corruption, the peculiarities of resolving conflicts of interest arising in the activities of certain categories of persons authorized to perform functions of state or local self-government, accounting and publication of declarations, control and verification of declarations, establishment of timeliness of submission of declarations, full verification of declarations, monitoring of the way of life of the subjects of declaration, additional measures of financial control, liability for corruption or corruption-related offenses.

Implementation of these norms is impossible without Article 11.1.8 of Law No.1700. Therefore, the Constitutional Court of Ukraine considers comprehensively the effect of the norms that institutionalise the control powers of the National Agency for the Prevention of Corruption, in their interconnection.

11. The Constitutional Court of Ukraine takes into account that the National Agency for the Prevention of Corruption, in accordance with Law No.1700, is a body which is established and operates on the basis of law and is one of the central executive bodies.

12. According to Article 4.1 of the Law No.1700, the National Agency for the Prevention of Corruption is a central executive body with a special status, which ensures the formation and implementation of state anti-corruption policy.

The division of powers between branches of government is an integral feature of the rule of law. Therefore, observance of the rule of law imposes legal restrictions on the executive branch of government, as it cannot function outside the Constitution of Ukraine and outside the place determined for it by the division of state power.

System and functional analysis of the powers and rights of the National Agency for the Prevention of Corruption gives grounds to claim that it is endowed with control functions that have a direct and immediate impact on the judiciary, in particular judges of the judiciary and judges of the Constitutional Court of Ukraine in the performance (exercise) of the function of justice or constitutional review.
The Constitutional Court of Ukraine emphasises that according to the standards of constitutionalism and the values of the Constitution of Ukraine, the control of the executive branch of power over the judicial branch of power is excluded.

13. The Constitutional Court of Ukraine states that the National Agency for the Prevention of Corruption, as an executive body, exercises control over the constitutionally established institutions, which are the courts and the Constitutional Court of Ukraine.
As the judiciary is independent, and the independence and inviolability of judges of the judiciary and judges of the Constitutional Court of Ukraine are guaranteed by the Constitution of Ukraine, the executive branch is separated from the judiciary.

Given this, the Constitutional Court of Ukraine concludes that certain provisions of the Law No.1700 concerning the powers of the National Agency for the Prevention of Corruption in terms of control functions of the executive over the judiciary, namely: powers and rights of the National Agency for the Prevention of Corruption, authorized persons and authorized subdivisions on prevention and detection of corruption, peculiarities of settlement of conflict of interests arising in the activity of certain categories of persons authorized to perform state or local self-government functions, accounting and publication of declarations, control and verification of declarations, timeliness, full verification of declarations, monitoring of the way of life of the declaring subjects, additional measures of financial control, responsibility for corruption or corruption-related offenses.

14. The Constitutional Court of Ukraine draws the legislator's attention to the fact that when introducing the powers and rights of the National Agency for the Prevention of Corruption and other executive bodies concerning judges who have a special status and belong to the judiciary, it must distinguish the category of judges of judiciary system and judges of the Constitutional Court of Ukraine, taking into account the principle of independence of the judiciary and the Constitutional Court of Ukraine. The principle of separation of state power and its practical implementation - the balance of power - can limit the judiciary and constitutional control only by a few means, including amendments to the Constitution of Ukraine and the procedure of individual responsibility of judges as holders of the judiciary power.

15. The Constitutional Court of Ukraine notes that declaring the income of persons exercising public power is an indisputable requirement in any modern democratic state. There is no doubt that public figures in the state must file a declaration of income. However, based on the principle of judicial independence, the public importance and significance of ensuring the real independence of judges, international principles and standards, such declaration and verification should be made taking into account the principle of judicial independence.

16. Thus, the Constitutional Court of Ukraine, having analyzed paragraph 8 of Article 11.1 of Law №1700, as well as the related provisions of paragraph 6 of Article 11.1, paragraphs 6, 7 of Article 12.1, Article 13.2, paragraphs 5, 6 of Article 13.2, Article 35, Article 48.4 of the Law No.1700 and taking into account the principle of independence of the judiciary and the Constitutional Court of Ukraine, concluded that paragraphs 6, 8 of Article 11.1, paragraphs 1, 2, 6-$10^1$, 12, $12^1$ of the first part, part two to five of Article 12, Article 13.2, Article $13^1$.2, Article 35, paragraphs two, three of Article 47.1, Articles 48-51, parts two, three of Article 52, Article 65 of the Law №1700 contradicts Article 6, parts one, two of Article 126, parts one and two of Article 149 of the Constitution of Ukraine.

17. Pursuant to Article $366^1$ of the Criminal Code of Ukraine, submission by a declarant of knowingly unreliable information in the declaration of a person authorized to perform state or local self-government functions provided for by Law №1700, or intentional failure by the declarant to declare the declaration shall be punished by a fine of two thousand five hundred to three thousand non-taxable minimum incomes or community service for a term of one hundred and fifty to two hundred and forty hours, or imprisonment for a term of up to two years, deprivation of the right to hold certain positions or engage in certain activities for the term up to three years.

According to the note to Article $366^1$ of the Criminal Code of Ukraine, the subjects of declaration are persons who, in accordance with parts one and two of Article 45 of Law №1700, are obliged to file a declaration of a person authorized to perform state or local self-government functions.

Liability under this article of the Criminal Code of Ukraine for submission by the declaring subject of knowingly unreliable information in the declaration of property or other object of declaration, which has value, arises if such information differs from reliable in the amount of more than 250 subsistence minimums for able-bodied persons.

“A separate manifestation of justice is the question of the appropriateness of punishment for a crime committed; the category of justice presupposes that the punishment for a crime must be commensurate with the crime ... the punishment must be in a fair relationship with the gravity and circumstances of the crime and the person of the perpetrator”; “the state of law, considering

punishment first of all as a corrective and preventive means, should use not excessive, but only necessary and conditioned by the purpose measures" (subparagraph 4.1.5 of paragraph 4, subparagraph 4.2.4 of paragraph 4 of the motivating part of the Decision of the Constitutional Court of Ukraine 2004 №15-rp/2004).

The Constitutional Court of Ukraine also stressed that restrictions on the exercise of constitutional rights and freedoms cannot be arbitrary and unjust, they must be established exclusively by the Constitution and laws of Ukraine, pursue a legitimate goal, be conditioned by the public need to achieve this goal, proportionate and justified; in case of restriction of a constitutional right or freedom, the legislator is obliged to introduce such legal regulation that will allow to achieve in the most relevant way a legitimate goal with minimal interference in the exercise of this right or freedom and not violate the essential content of such a right (subparagraph 2.1.3 of paragraph 2 of the motivating part of the Decision of June 1, 2016 №2-rp/2016).

Criminalization of a specific human act is possible provided that it meets, in particular, a set of such criteria: significant social threat of the act; the spread of similar acts in society; ineffectiveness of other sectoral legal means of influencing these actions; the impossibility of successfully combating the act with less repressive methods.

In case of non-compliance by the legislator with the specified criteria of criminalization, a situation may arise when an act is recognised as a crime, which is not characterized by the nature and degree of public harm sufficient for criminalization.

In this case, criminalization is carried out in the absence of grounds for this, and as a result, the crime is an act that is not objectively so. As a result, the legal basis is created for unjustified criminal prosecution for an act for which there is less severe legal liability. This violates the constitutional principle of the rule of law (Article 8.1 of the Basic Law of Ukraine).

Compliance with the requirements of clarity and unambiguity of the rules establishing criminal liability is particularly important given the specifics of criminal law and the consequences of criminal prosecution, as prosecution is associated with possible significant restrictions on human rights and freedoms (the first sentence of the paragraph 3.7 of the motivating part of the Decision of the Constitutional Court of Ukraine of February 26, 2019 № 1-r/2019).

According to the position of the European Court of Human Rights, when it comes to deprivation of liberty, it is extremely important to ensure the general principle of legal certainty; the requirement of "quality of the provisions of law" within the meaning of paragraph 1 of Article 5 of the Convention means that if national law allows for deprivation of liberty, such law must be sufficiently accessible, clearly worded and foreseeable to apply any risk of arbitrariness (§ 19 of the judgment in Novik v. Ukraine of December 18, 2008 (application no.48068/06).

By their legal nature, the submission of knowingly unreliable information in the declaration by the subject of declaration, as well as intentional failure to submit the declaration, although they violate the requirements of anti-corruption legislation, such acts are not capable of causing significant harm to a natural or legal person, society or the state to the extent necessary to recognize them as socially dangerous in accordance with the requirements of Article 11 of the Criminal Code of Ukraine.

The Constitutional Court of Ukraine considers that the declaration of knowingly unreliable information in the declaration, as well as the intentional failure of the subject of the declaration to declare should be grounds for other types of legal liability.

The constitutional jurisdiction body noted that despite the fact that corruption is one of the main threats to Ukraine's national security, anti-corruption should be carried out exclusively by legal means in compliance with the constitutional principles and provisions of the legislation adopted in accordance with the Decision of the Constitution of Ukraine of February 26, 2019 № 1-r/2019).

Examining the corpus delicti provided for in Article $366^1$ of the Criminal Code of Ukraine, the Constitutional Court of Ukraine concluded that the use of legal constructions lacking a clear list of laws makes it impossible to unambiguously define the range of subjects of crime, and reference norms make it impossible to establish the range of their addressees. As a result, persons who cannot be parties to the declaration and therefore knowingly failed to do so may be held liable for intentional failure to file a declaration. This is not consistent with the concept of the

rule of law and the principle of the rule of law enshrined in Article 8.1 of the Basic Law of Ukraine, in particular by its elements such as legal certainty and predictability of the law.

The Constitutional Court of Ukraine considers that the establishment of criminal liability for declaring knowingly unreliable information in a declaration, as well as intentional failure of the subject of declaring a declaration is an excessive punishment for committing these offenses. The negative consequences suffered by a person prosecuted for committing crimes under Article $366^1$ of the Criminal Code of Ukraine are disproportionate to the damage that has occurred or could occur in the event of the commission of the relevant acts.

18. Thus, the above shows that the legislator did not observe the principles of justice and proportionality as elements of the principle of the rule of law, and therefore Article $366^1$ of the Criminal Code of Ukraine contradicts Article 8.1 of the Basic Law of Ukraine.

Taking into account the above and guided by Articles 147, 150, $151^2$, 152, 153 of the Constitution of Ukraine, on the basis of Articles 7, 32, 35, 65, 66, 74, 84, 88, 89, 91, 92, 94 of the Law of Ukraine “On the Constitutional Court of Ukraine”, The Constitutional Court of Ukraine

**held:**

1. Declare as inconsistent with the Constitution of Ukraine (are unconstitutional):
- paragraphs 6, 8 of Article 11.1, paragraphs 1, 2, 6-$10^1$, 12, $12^1$ of the part one, parts two to five of Article 12, 13.2, Article $13^1$.2, Article 35, paragraphs two, three of Article 47.1, Articles 48-51, part two, third of Article 52, Article 65 of the Law of Ukraine “On the Prevention of Corruption” of October 14, 2014 №1700–VII as amended;
- Article $366^1$ of the Criminal Code of Ukraine.
2. Paragraphs 6, 8 of Article 11.1, paragraphs 1, 2, 6-$10^1$, 12, $12^1$ of the first part, parts two to five of Article 12, Article 13.2, Article $13^1$.2, Article 35, paragraphs two, third part of Article 47.1, Articles 48-51, parts two, third of Article 52, Article 65 of the Law of Ukraine “On the Prevention of Corruption” of October 14, 2014 №1700-VII as amended, Article $366^1$ of the Criminal Code of Ukraine are declared unconstitutional and shall cease to be valid from the date of adoption of this Decision by the Constitutional Court of Ukraine.
3. The Decision of the Constitutional Court of Ukraine is binding, final and may not be appealed.

The decision of the Constitutional Court of Ukraine shall be published in the Bulletin of the Constitutional Court of Ukraine.

**Constitutional Court of Ukraine**

**DISSENTING OPINION**

**By Justice Serhiy Holovaty**

**in the case of the constitutional petition of 47 people's deputies (Parliament Members) of Ukraine regarding the compliance of certain provisions of the Law of Ukraine "On Prevention of Corruption", the Criminal Code**
**Code of Ukraine with the Constitution of Ukraine (their constitutionality)**

**[Case № 1-24 / 2020 (393/20)]**

**(Decision of the Constitutional Court of Ukraine of October 27, 2020 № 13- p/2020)**

I did not vote in favor of the decision passed by the Court on recognizing paragraphs 6, 8 of the first part of Article 11, paragraphs 1, 2, 6-10, 12, 121 of the first part, parts two through five of Article 12, part two of Article 13, part two of Article 13[1], Article 35, paragraphs two, three of the first part of Article 47, Articles 48-51, parts two and three of Article 52, Article 65 of the Law of Ukraine "On Prevention of Corruption" of October 14, 2014 № 1700-VII as amended (hereinafter – the Law) and Article 366[1] of the Criminal Code of Ukraine as unconstitutional.
To explain my position, I'm stating, in particular, the following.

## I. Regarding Ukraine's international obligations in the field of fighting corruption

1. The preamble of the Constitution defines the irreversibility of Ukraine's European and Euro-Atlantic course.
According to the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand, ratified by the Law of Ukraine № 1678-VII of September 16, 2014, the fight against corruption is one of the priority areas of cooperation and one of the main principles for strengthening relations between the parties (Articles 3, 14). Cooperation is aimed at solving, in particular, the problem of corruption "in both private and public sectors" (Article 22).

2. Within the framework of international cooperation in the field of prevention and fighting corruption, Ukraine has signed a number of international treaties, including the Criminal Law Convention on Corruption of January 27, 1999 (ratified by Law of Ukraine of October 18, 2006 № 252-V) and the Additional Protocol to Civil Law Convention on Corruption of November 4, 1999 (ratified by Law of Ukraine 2005 № 2476-IV of March 16, 1999). The preambles to the treaties emphasize that corruption is one of the most dangerous threats to law and order, democracy and human rights, it destroys good governance, honor and social justice, impedes competition and economic development, and threatens the stability of democratic institutions and moral principles of the society.

UN Convention against Corruption of October 31, 2003 ratified by the Verkhovna Rada of Ukraine on October 18, 2006 (Law № 251-V) entered into force for Ukraine on January 1, 2010 and in accordance with the first part of Article 9 of the Constitution, the Convention became part of Ukrainian legislation. Article 8, paragraph 5, of the Annex to this Convention states: "Each State Party shall endeavor, where necessary and in accordance with the fundamental principles of its national law, to introduce measures and systems which oblige public officials to submit declarations to the relevant authorities concerning, *inter alia*, their extracurricular\out of office activities, occupations, investments, assets and valuable gifts or profits, which may give rise to a conflict of interest in relation to their functions as public officials."
Rule of Law imperative in terms of the relation between international law and national law means: a state that has undertaken obligations under the relevant international treaty, implements this

treaty within the national legal order on the basis of the principle of *pacta sunt servanda* as a way, in which international law reveals the principle of legality, which, in turn, is one of the components of the rule of law. At the same time, "a state may not invoke\refer to the requirements of its domestic law to justify its non-performance of a treaty" (Article 27 of the Vienna Convention on the Law of Treaties). As noted by the Venice Commission,
,, <...> full implementation of international law in the national system is critical. When international law is part of national law, it is binding <...> "(Rule of law. Study № 711/2013. Adopted by the Venice Commission at its 10th plenary session, March 11-12, 2016, paragraph 48).

In this context, one should also take into account the case law of the European Court of Human Rights, namely the judgment in *Wypych v. Poland* case (application № 2428/05), where the Strasbourg Court concluded that the introduction of the declaration of assets by public officials has the legitimate goal which is required in a democratic society. Among other things, PACE Resolution 1165 (1998) of December 25, 2008 stated that "public figures should be aware that the public office they hold in society <...> automatically puts increased pressure on their privacy". (paragraph 6).

The approach introduced by the Law in Ukraine to the declaration of their assets by persons authorized to perform state or local self-government functions was positively assessed, in particular, by the Group of States against Corruption (GRECO) and the Anti-Corruption Network of the Organization for Economic Cooperation and Development for Eastern Europe and Asia as a progressive one and the one that meets international standards.

**11. Regarding the recognition by the Court of certain provisions of the Law as unconstitutional**

3. Having recognized as unconstitutional paragraph 6 of part one of Article 11, paragraph 8 of part one of Article 11, paragraphs 1, 2, 6-10 1, 12, $12^{1}$ of part one, part two to five Article 12, part two of Article 13, part two of Article $13^{1}$, Article 35, paragraphs two and three of part one of Article 47, Articles 48, 49, 50, 51, parts two, three of Article 52, Article 65 of the Law, the Constitutional Court of Ukraine justified this by the fact that based on these provisions of the Law the National Agency for Prevention of Corruption (hereinafter - NAPC) allegedly exercises "control of the executive branch of power over the judiciary. "

I consider that the thesis applied in the Decision has no legal grounds. Empowering the NAPC with certain control functions and powers over all subjects covered by the Law, including judges of the judiciary and justices of the Constitutional Court of Ukraine, cannot be considered as control "over the judiciary". After all, the powers of the NAPC defined by law are in no way interference in the professional activities of judges - administering justice, but aimed at achieving a legitimate goal - to prevent corruption in the state, including by way of verifying, molding the integrity of persons who perform certain functions of state or local government which is extremely necessary in a democratic society.

4. The provisions of the Law, which were declared unconstitutional on the basis of alleged "control" by the NAPC "over constitutionally codified institutions, such as courts and the Constitutional Court of Ukraine", also include the provisions that do not define control functions, but establish, in particular the following:
1) *the rights of the NAPC* (for example, to receive in the manner prescribed by law information, including with restricted access, necessary to meet its objectives (paragraph 1 of part one of Article 12), to have direct automated access to information and telecommunications and reference systems, registers, data banks, including those containing information with limited access, held (administered) by the state bodies or local governments, to use state, including government, means of communication, special communication networks and other technical means (paragraph 2 of the first part of Article 12), receive applications from individuals and legal entities reporting violations of the Law (paragraph b of the first part of Article 12), apply to the court with claims (applications) demanding to declare illegal regulations, individual decisions,

issued (adopted) in violation of the requirements and restrictions established by this Law, and to invalidate transactions concluded as a result of committing a corruption or corruption-related offense (paragraph 10 of the first part of Article 12);
2) *peculiarities of settling a conflict of interest* noting that the rules of resolving a conflict of interest in the activity of the President of Ukraine, people's deputies (MPs) of Ukraine, members of the Cabinet of Ministers of Ukraine, heads of central executive bodies not members of the Cabinet of Ministers of Ukraine, judges, justices of the Constitutional Court of Ukraine, heads, deputy heads of oblast and rayon councils, city, village, settlement mayors, secretaries of city, village, settlement councils, deputies of local councils are determined by laws regulating the status of relevant persons and principles of organization of relevant bodies (part one of Article 35);
3) *the authority of the NAPC to keep records and publish declarations* (Article 47);
4) *types of liability* for corruption or corruption-related offenses and indicate that prosecution for various types of liability (criminal, administrative, civil and disciplinary) is carried out in the manner prescribed by law (Article 65). It should be specially emphasized that bringing a judge to liability for a corrupt or corruption-related action is in no way "control over the judge" or a violation of the principle of judicial independence.

5. The third paragraph of part 13 of the Decision states that the Court concluded "on the unconstitutionality of certain provisions of Law № 1700 concerning the powers of the National Agency for the Prevention of Corruption in terms of control functions (control) of the executive branch of power over the judiciary." Paragraph 16 of the Decision concludes that “having regard for the principle of the independence of the judiciary and the Constitutional Court of Ukraine, [the Court] concluded that paragraphs 6-8 of the first part of Article 11, paragraphs 1, 2, 6-10$^{1}$, 12, 12$^{1}$ of the first , parts two to five of Article 12, part two of Article 13, part two of Article 13$^{1}$, Article 35, paragraphs two, three of the first part of Article 47, Articles 48-51, parts two, three of Article 52, Article 65 of the Law № 1700 contradict Article 6, parts one, two of Article 126, parts one and two of Article 149 of the Constitution of Ukraine. "

Such conclusions of the Court indicate that the substantiation of the inconsistency of the provisions of the Law solely on the basis of violation of the principle of independence of judges of the court system and justices of the Constitutional Court of Ukraine is used to declare unconstitutional the provisions of the Law as a whole, i.e. not only in part, which applies to judges of the judiciary and justices of the Constitutional Court of Ukraine, but also to other entities, in particular: deputies of Ukraine (MPs), servicemen, civil servants, officials of executive bodies, government and local self-government, members of the Central Election Commission and others. In these circumstances, the provisions of parts one, two of Article 126, parts one and two of Article 149 of the Constitution of Ukraine are not applicable to such entities, and the stated in the Decision noncompliance of the Law provisions with Article 6 of the Constitution of Ukraine has no legal basis.

**IП. Regarding the recognition by the Court as unconstitutional Article 3661 of the Criminal Code of Ukraine**

6. The establishment of effective deterrent sanctions for indicating the knowingly inaccurate information in declarations is an international standard and an important element of the general system of assets declaration by public figures. For example, the OECD Anti-Corruption Network for Eastern Europe and Central Asia has repeatedly recommended that Ukraine ensure the effectiveness of sanctions for non-submission or indication of inaccurate information in declarations. The introduction of effective sanctions for cases of declaring false information was also one of the recommendations to Ukraine during the implementation of the Visa Liberalization Action Plan approved at the Ukraine-European Union summit (November 22, 2010, Brussels, Kingdom of Belgium).

Article 366$^{1}$ of the Criminal Code of Ukraine establishes criminal liability for the submission by a subject of declaration of **knowingly** unreliable information or **intentional** failure to submit a declaration. Therefore, the legal construction of this article clearly indicates that the subject of

declaration will be liable only if at the time of filing the declaration he/she knew about the inaccuracy of the information entered into it.
Both criminal and administrative liability has been established for the submission of knowingly untrue information in declaration. Thus, part three of Article 366[1] of the Criminal Code of Ukraine establishes the limits of criminal liability for declaring knowingly inaccurate information in the declaration - if such information differs from reliable in the amount of more than 250 subsistence minimums for able-bodied persons. Based on this criterion, a distinction is made between bringing a person to criminal responsibility on the basis of Article 366[1] of the Criminal Code of Ukraine or to administrative liability - on the basis of part four of Article 172 of the Code of Ukraine on Administrative Offenses. That is, the liability for the submitting knowingly unreliable information is different depending on the amount of difference between the value of the untruly declared property and its true value.

Thus, I consider the Court's conclusion on the unconstitutionality of the criminal responsibility for declaring knowingly unreliable information to be legally unfounded.

**Serhiy Holovaty**
**October 28, 2020**

## DISSENTING OPINION

**of Judge of the Constitutional Court of Ukraine V. V. Lemak concerning Decision No. 13-p/2020 under the case following the constitutional submission of 47 people's deputies of Ukraine regarding compliance (constitutionality) of separate provisions of the Law of Ukraine "On Prevention of Corruption", Criminal Code of Ukraine as of 27 October 2020 with the Constitution of Ukraine**

I truly regret that I cannot agree with Decision No. 13-p/2020 of the Constitutional Court of Ukraine as of 27 October 2020 under the case following the constitutional submission of 47 people's deputies of Ukraine regarding compliance (constitutionality) of separate provisions of the Law of Ukraine "On Prevention of Corruption", Criminal Code of Ukraine with the Constitution of Ukraine (hereinafter referred to as the Decision) and I consider it to be my duty to express my disagreement with it. Why haven't I agreed?

1. **The Decision is not properly justified**. The rule of law starts with duly grounded decisions of courts through which they communicate with the society. This is the first thing that separate individuals and the society in general expect from courts. This is particularly so with respect to fulfillment of constitutional control by the body of constitutional justice since at this level it is always about so-called "complicated cases" when not merely facts and provisions of laws are studied. This is rather about analysis of peculiarities of a legal provision and its evaluation using the scope of constitutional principles and provisions. The issue consists not only and not even in what final conclusions of the Constitutional Court of Ukraine (hereinafter referred to as the Court) are under some case, but in how they are justified with the use of constitutional arguments.

To put it mildly, adopted Decision could not be an example of such argumentation. The case has been solved based on the position that is not supported by the significant part of the Ukrainian society. However, not this fact has become a motif for me. If the issue arose whether I agree with a prevalent social perceptions, I would continue studying factors of effective state anti-corruption state police. However, I do not consider this to be my duty as the judge since I am convinced that my agreement or disagreement with them has nothing to do with the manifestation of these perceptions in the court decision.

In other words, the judge shall be careful of taking decisions based on own perceptions about politics which are the subject matter of the dispute in the society and, most importantly, which require expert knowledge and voicing of assumptions. The reasonable way is to leave solution of the problem for the parliament that not only better knows public moods, but also has more opportunities to obtain expert information from specialists. The electronic form of declaration or the written one, whether it is mandatory to submit it annually or twice per year, what should be considered as a change in the property status and what should not be considered as such, whether to envision responsibility concerning these issues in the criminal code or not – all **these issues not only obviously belong to the constitutional authority of the parliament, but also actually cannot be established with the help of legal arguments in a judicial proceeding. Following the doctrine of the "political issue" the Court should have refused to consider such issues.**

I would like to emphasize that, in fact, different legislative means of ensuring effectiveness of such policy are possible, and the choice between them is the prerogative power of the parliament elected by the people, provided that such means (and this is most important) do not violate provisions of the Constitution of Ukraine.

At the same time, the afore stated means that consideration of the legislator is not absolute and is subject to limitations arising from the Constitution of Ukraine. The parliament shall be especially careful with regulating issues related to interference with human rights. For instance, if some public authority is allowed to conduct monitoring of lives of hundreds of thousands of people, then, of course, the legislator shall determine a clear procedure for the conduct of such monitoring

by means of adopting a law. Similarly, while establishing legal responsibility for some action, the parliament shall respect the principle of *Nulla poena sine lege*, which is not the subject matter of the discussion in the 21st century and is explicitly reflected in provisions of para. 22 of cl. 1 of Article 92 of the Constitution of Ukraine. This constitutional provision demands that actions which are crimes (and not only punishment for them) shall be established exclusively by the law of Ukraine and not by a bylaw.

However, the Decision provides neither the afore mentioned arguments, nor any other important arguments. Therefore, **it is one thing to "have questions" about the quality of the law, but it is a completely different thing to establish non-compliance of its provisions with the Constitution of Ukraine through arguments in the process of the constitutional proceeding.**

The justified character of the court decision arises from the nature of justice and has one more important practical aspect, specifically, that based on the text of the decision of the Court the legislator should clearly understand what in particular and based on what motives shall be corrected in the legislation in order to ensure compliance with the Constitution of Ukraine. The Court shall not "order" or instruct the parliament what content shall be in the future legislative regulation, yet it shall clearly outline what is unacceptable in the context of such regulation, taking into account each case.

As great Antonin Scalia (Justice of the US Supreme Court) said, not everything that appears to be ugly and disgusting will contradict the constitution, meaning that unconstitutionality of the law should be justified.

2. **Inappropriate justification of the court decision leads to violation of the principle of presumption of constitutionality of the law**. This principle primarily requires a thorough justification of the unconstitutionality of the law that would cover an important law interpretative aspect. Its essence consists in the fact that even if the Court establishes "tension" between provisions of the law, on the one hand, and with principles and provisions of the Constitution of Ukraine, on the other hand, the first rule is to try to interpret the controversial provisions of the law in such a way that would as much as possible bring them into accordance with the Constitution of Ukraine (constitutionally conforming interpretation). Such provisions are acknowledged as unconstitutional only provided that even interpretation does not allow in any way to understand them jointly with the values of the Constitution of Ukraine. This is the very basics of constitutional proceedings.

Unfortunately, the Court has not shown respect to this principle and has failed to provide interpretation, even though otherwise, just like in other cases, the result might have been elimination of a range of problems relating to quality of disputed provisions of the laws and their application without their cancellation due to acknowledging them as unconstitutional.

3. International treaties are not directly within the scope of constitutional control even though some of them (especially international treaties on human rights) are undeniably the source of interpretation of the Constitution of Ukraine, its values. However, nowadays **manifestation of the content of those international treaties that cover implementation of values and specific standards of the European Union and the North Atlantic Treaty Organization in Ukraine is a part of our constitutional fabrics.** Any public authority that undertakes the task of displaying understanding of the Constitution of Ukraine at its level (the parliament, Government of Ukraine, or President of Ukraine) for rule-making or administrative activities shall proceed from the constitutional value set out in the preamble of the Constitution of Ukraine, namely, "irreversibility of the European and Euro-Atlantic course of Ukraine". This constitutional value is specified in detail for the President of Ukraine in cl. 3 of Article 102 of the Fundamental Law: "The President of Ukraine shall act as the guarantor of implementation of the strategic course of the state at Ukraine becoming a full member of the European Union and the North Atlantic Treaty Organization".

Moreover, the duty to accept these constitutional values concerns the Court that has the exclusive right to provide official interpretation of the Constitution of Ukraine.
Fundamental values of the legal system are the criterion which limits judicial discretion. The Court may not take decisions that are not fully in accord with those values which are the result of the decision of the Ukrainian people as the constitution-giver and are set out in the Constitution of Ukraine.

It is known that creation and development of the anti-corruption legislation during the period of 2015–2020 is one of the key aspects of our state's cooperation with international partners. I would like to emphasize once more that this aspect is currently not a "political issue" since close cooperation and integration of Ukraine into the European Union and the North Atlantic Treaty Organization are values and authorities that are *expressis verbis* set out in the text of the Constitution of Ukraine. Potential removal or decrease of support of Ukraine by the European Union, North Atlantic Treaty Organization, G7 countries may undeniably weaken Ukraine's capacities in the sphere of defense and national security. All courts shall refrain from such decisions.

In view of this, it is worth pointing out that **none of the provisions of the Constitution of Ukraine may be interpreted in such a way that it would result in (directly or indirectly) the decrease of the state's capacity to counteract threats in the sphere of national security and defense in the current situation.**

This does not mean that the content of the legislation in this regard may not be amended with a view to improving it, including, among others, pursuant to decisions of the Court, but none of the legislative means of regulation may contradict the afore mentioned constitutional values.

4. Submission of the annual declaration remains the obligation of persons authorized to fulfill functions of the state or local self-government, but possibilities to check accuracy of the declared information and bring persons to criminal liability for intentionally false declarations were significantly limited before the new legislative regulation. **I categorically disagree with the rejection of the idea of criminalization of the such action, which is supported by experience of the entire civilized world.**

5. The Decision does not highlight key points regarding the main problem: where is the boundary between control of the executive power over persons working in the judiciary (judges) and control over justice itself. **Control over legality of income and property status of judges by executive bodies established based on laws of Ukraine is not an interference into the independence of judges and courts that is guaranteed by the Constitution of Ukraine**. However, such control shall be executed in line with requirements that take into account: 1) the essence of guarantees of judges' independence, namely, the prohibition of "any influence" on them, which is explicitly set out by the Constitution of Ukraine pursuant to cl. 2 of Article 126, cl. 2 of Article 149. Besides, no information collected and stored by executive bodies may be used by them in order to exert influence on judges and execution of justice by them; 2) under no circumstances the object of this control may be related to the fulfillment of the constitutional function related to execution of justice by judges and courts since carriers of the judicial power are not accountable to and are independent from any other subjects. The opposite view would contradict the principle of the rule of law.

Once again, **in no case it is about moving judges beyond the rule of law. On the contrary, even outside work judges shall be the role model in terms of fulfilling obligations established by the laws of Ukraine. It is about the fact that controlling responsibilities of public authorities or other law-enforcement entities shall not be used in any way as the tool for exerting influence on the judge from two perspectives: a) from the perspective of the perception of subjects of control and judges themselves; b) from the perspective of a reasonable outside observer (i.e. society).**

Hence, overall the Decision fails to distinguish between the internationally generally accepted control over income and property status of judges, on the one hand, and attempts to control execution of justice, on the other hand.

6. **Quasi-judicial activism.** I have not supported the Decision, among other things, because the Court, while acknowledging separate provisions of the Law of Ukraine "On Prevention of Corruption" as of 14 October 2014, No. 1700-VII, as subsequently amended, Criminal Code of Ukraine as unconstitutional, did not give time for the parliament to settle this issue with a view to ensuring that there is no "legislative pause" in this sphere. In this case, "judicial activism" is not appropriate in terms of this aspect as well. In the most unfavorable external circumstances, the Court shall take rational and justified decisions.

*(sealed)*
Judge of the
Constitutional Court of Ukraine **V. V. LEMAK**

*Unofficial translation*

**DISSENTING OPINION**

**of the Judge of the Constitutional Court of Ukraine Pervomaiskyi O.O. in the case upon the constitutional petition of 47 People's Deputies of Ukraine concerning the conformity of specific provisions of the Law of Ukraine "On Prevention of Corruption", the Criminal Code of Ukraine with the Constitution of Ukraine**

On October 27, 2020, the Constitutional Court of Ukraine (hereinafter referred to as the Constitutional Court) delivered the Decision No. 13-r/2020 in case No.1-24/2020 (hereinafter referred to as the Decision) upon the constitutional petition of 47 People's Deputies of Ukraine on the constitutionality of certain provisions Law of Ukraine "On Prevention of Corruption" (hereinafter referred to as the Law), the Criminal Code of Ukraine (hereinafter referred to as the Code).

Disagreeing with the Decision, on the basis of Article 93 of the Law of Ukraine "On the Constitutional Court of Ukraine" and § 74 of the Rules of Procedure of the Constitutional Court, I consider it necessary to deliver a dissenting opinion on the case and a number of other related phenomena and concepts.

***I. General considerations regarding the constitutional proceedings and the Decision***

1. I am aware of the fact that the Decision delivered in this case in its content, essence and significance is one of those acts, to convince of the correctness or incorrectness of which is useless, because it is one of those cases where the truth is not born in the dispute, but dies. Therefore, neither side of the conflict has even the slightest prospect of convincing the other side of its rightness.

2. However, the Constitution of Ukraine, the Law of Ukraine "On the Constitutional Court of Ukraine" and the oath of a judge of the Constitutional Court oblige me not only to vote "for" or "against" decisions of the Constitutional Court, but also to clearly and fully understand the rational reasons for such voting and if necessary to set out these motives in a dissenting opinion.

3. As the basis for explaining my own position, which was formed in this constitutional proceedings, I consider it necessary to point out the following.

First, the Law and the Code are not impeccable normative legal acts in their quality, and therefore the exercise of constitutional review over them is quite possible and appropriate. Moreover, according to the Basic Law of Ukraine, the Constitutional Court is obliged to carry out normative review in the case when the appropriate subject has filed a constitutional petition, which in content and form meets the requirements of the Law of Ukraine "On the Constitutional Court of Ukraine"[1].

Second, rebuttal of the presumption of constitutionality of any legal act is possible in cases where the Constitutional Court, in compliance with due procedure, found significant defects either in the procedure of its adoption or in the content of the legal act in comparison with the Basic Law of Ukraine. In this case, any decision of the Constitutional Court in the case of review of compliance of a legal act with the Basic Law of Ukraine must include a set of sufficient and necessary arguments to prove (or refute) the thesis of constitutionality (unconstitutionality) of the object of constitutional review. Such an approach to the consideration of cases by the Constitutional Court is conditioned, first of all, by the provisions of Articles 147 and 152 of the Constitution of Ukraine and a number of articles of the Law of Ukraine "On the Constitutional Court of Ukraine".

[1]It is pertinent to recall that the constitutional petition in this case is set out on 69 pages (descriptive, motivational and requesting part).

4. Based on the above provisions of the Basic Law of Ukraine, the Law of Ukraine “On the Constitutional Court of Ukraine”, I consider that the Decision delivered by the Constitutional Court in this proceeding does not include the expected set of sufficient and necessary arguments to prove the inconsistency of the provisions of the Law and the Code with the Constitution of Ukraine, and the legal procedure of the constitutional proceedings had shortcomings that prevented the achievement of the desired result.

***II. What the Constitutional Court delivered***

5. According to paragraph 1 of the operative part of the Decision:
«1. To declare as such that do not comply with the Constitution of Ukraine (are unconstitutional):
- the provisions of Articles 11.1.6, 11.1.8, 12.1.1, 12.1.2, 12.1.6, 12.1.7, 12.1.8, 12.1.9, 12.1.10, 12.1.10$^1$, 12.1.2, 12.1.12$^1$, 13.2, 13$^1$.2, 35, 47.1.2, 47.1.3, 48, 49, 50, 51, 52.2, 52.3, and 65 of the Law “On Prevention of Corruption” dated October 14, 2014 No.1700 – VII as amended;
- Article 366$^1$ of the Criminal Code of Ukraine”.

6. Since most critics and supporters of the Decision have not read it and do not plan to do so, I consider it necessary in this dissenting opinion to pay attention also to the motivation part of the Decision.

Based on the system-structural analysis of the motivation part of the Decision, the following main conclusions formulated by the Constitutional Court can be singled out:

1) independence of the judiciary, individual judges and adherence to the principle of separation of powers are those constitutional values, without protection and guarantee of which it is impossible, first, the realisation of the right to judicial protection of human and citizen’s rights and freedoms from decisions and inaction of public authorities, secondly, effective constitutional review over the activities and acts of legislative and executive bodies, and thirdly, the very existence of modern democracy (paragraphs 2-8);
2) specific provisions of the Law, which provide the National Agency for Prevention of Corruption as a central executive body with control functions (powers of control) over the judiciary, contradict Articles 6, 126.1, 126.2, 149.1, 149.2 of the Constitution of Ukraine ( paragraphs 13-16);
3) Article 366$^1$ of the Code is formulated in violation of the requirements of legal certainty and predictability of the law, which does not comply with the principle of the rule of law provided for in Article 8.1 of the Constitution of Ukraine. In addition, in the opinion of the Constitutional Court, the corpus delicti established by Article 366$^1$ of the Code is an excessive punishment for the relevant actions or omissions of persons authorized to perform the functions of the state or local self-government. That is, this anti-corruption remedy is not proportionate for the achievement of the legitimate goal defined by the law concerning the application of criminal law prevention in the area of mandatory declaration of persons authorized to perform the functions of the state or local self-government. According to the Decision, such a goal can be achieved by other legal remedies, namely through disciplinary and (or) administrative liability of these persons (paragraph 17).

7. It is important that in deciding on the inconsistency of certain provisions of the Law and the Code with the Constitution of Ukraine, the Constitutional Court *did not question:*
- the need to combat (in the form of prevention, fight, etc.) corruption as a common legitimate goal of the activities of state bodies and civil society institutions;
- the institute of mandatory declaration of persons authorised to perform the functions of the state or local self-government, which is carried out on the basis of the Law;
- the need and possibility of declaring for judges of the judiciary and judges of the Constitutional Court;
- the legitimacy of the establishment and operation of the National Agency for the Prevention of Corruption, with the exception of the provisions of the Law, which must be amended to execute the Decision.

8. Thus, the Constitutional Court in the motivational part of the Decision, in particular, points out the following:

- "*Anti-corruption reform in Ukraine* ***has become an indisputable requirement of society"*** (first sentence of clause 9 of paragraph 6);
- "*Corruption among judges is one of the main threats to society and the functioning of a democratic state. This undermines judicial integrity, which is the basis of the rule of law and a fundamental value of the Council of Europe. There is reason to believe that* ***the effective prevention of corruption in the judiciary depends to a large extent on the political will in the country to provide truly and sincerely institutional, infrastructural and other organisational guarantees for an independent, transparent and impartial judiciary*** "(first, second sentences of clause 10 of paragraph 6);

- *"Corruption is curbed through structural reforms, sound and long-lasting anti-corruption laws and a coherent institutional mechanism for their implementation and maintenance, supported by an independent, fair and impartial judiciary. However, for the fight against corruption to be successful, an independent judiciary and law enforcement bodies free from political and lobbying interference are needed*" (clause 11 of paragraph 6);
- *„15. The Constitutional Court of Ukraine notes that declaring the income of persons exercising public power* ***is an indisputable requirement in any modern democratic state. There is no doubt that public figures in the state must file an income declaration … "****(first, second sentences of paragraph 15);*
- *"The body of constitutional jurisdiction noted that despite the fact that corruption is one of the main threats to the national security of Ukraine, the fight against corruption should be carried out exclusively by legal remedies in compliance with constitutional principles and provisions of legislation adopted in accordance with the Constitution of Ukraine" (clause 12 of paragraph 17)*
.
9. Given the above, simplified and even more primitive interpretation and understanding of the Decision will be a mistake, which, in turn, may provoke further erroneous actions and decisions of public authorities and other law enforcement agencies.

***III. Regarding procedural problems of constitutional proceedings***

10. In the autumn of 2019, as a judge of the Constitutional Court, I remembered a number of draft laws submitted by the President of Ukraine and supported by the Verkhovna Rada of Ukraine on amendments to the Constitution of Ukraine.
As a result of the Constitutional Court's preliminary constitutional review of all these draft laws, in my opinion, it was possible to identify their common feature - all these draft laws were prepared in a hurry and the constitutional process of amending the Basic Law of Ukraine based on them looked just *as hasty*.

However, in my opinion, introduction of amendments to the Constitution of Ukraine cannot be unreasonably hasty, as this, firstly, contradicts the principle of stability of constitutional and legal regulation, and secondly, is a manifestation of disrespect for the Basic Law of Ukraine.

11. I consider that the constitutional proceedings in most cases pending the Constitutional Court cannot be hasty or even appear hasty, except in cases where the high pace of consideration of the case is due to the nature of the constitutional conflict to be resolved immediately, or is a requirement of the Constitution of Ukraine and (or) the Law of Ukraine "On the Constitutional Court of Ukraine".

Inappropriate and unmotivated haste attacks the credibility to the Constitutional Court and its decisions and opinions, and can also be the basis for delivering an erroneous decision and (or) providing an erroneous opinion.

12. Despite the fact that the subject of the right to constitutional petition in paragraph 2 of the requesting part of his constitutional petition *filed a request to declare the constitutional proceedings* ***urgent,*** in my opinion, in this case there were insufficient legal and formal grounds

for its immediate consideration, and therefore, for an outside observer, the pace of consideration of the case chosen by the Constitutional Court could undoubtedly have seemed hasty.

13. In the context of the problem of perhaps hasty consideration of the case, it is appropriate to mention that the Constitutional Court has been considering another constitutional petition for several years, namely the constitutional petition of 48 People's Deputies of Ukraine dated December 30, 2015 on the conformity of specific provisions of the Law of Ukraine "On Prevention of Corruption" and Article $366^1$ of the Criminal Code of Ukraine (case No. 1-10/2018). This case has been considered by the Constitutional Court on the merits since March 14, 2017, i.e. for more than 3.5 years [2].

A comparison of these two constitutional petitions and proceedings gives grounds to conclude that the object of constitutional review in both proceedings are *the same specific provisions of the Law and Article $366^1$ of the Code.*

It is also important that the Constitutional Court for a long time, considering the constitutional petition of December 30, 2015, at a certain period of time was even on the "threshold" of delivering decision on the merits of this case.
Thus, on the basis of Article 76 of the Law of Ukraine "On the Constitutional Court of Ukraine", the Constitutional Court, in my opinion, could use its powers and provide a ruling to merge these two constitutional proceedings, as a result of which further allegations of haste of delivering decision looked at least debatable, as the Constitutional Court has, in fact, been examining **for a long time** *the constitutionality (unconstitutionality) of disputed provisions of the Law and the Code*.

14. In my view, a number of procedural decisions adopted by the Constitutional Court in these proceedings appear to be at least debatable and possibly erroneous.
Thus, first, the Constitutional Court initially rightly determined that the case would be considered in the form of oral proceedings, and later only with reference to the existing quarantine restrictions and deterioration of the epidemic situation in Ukraine ruled to change the form of proceedings from oral to written proceedings.

Secondly, without using the provision of Article 76.1 of the Law of Ukraine "On the Constitutional Court of Ukraine", which provides the Constitutional Court with the power to merge constitutional proceedings, the Constitutional Court on the basis of the provision of part 2 of the same article ruled on separation of constitutional proceedings and in one of them adopted a Decision.
I believe that these rulings of the Constitutional Court were not properly motivated and further negatively affected the results of the review of the constitutional petition and the adoption of the Decision.

15. I also consider at least debatable, and possibly erroneous, the failure of the Constitutional Court to exercise the power granted to it by Article 152.2 of the Constitution of Ukraine to postpone the termination of the effectiveness of specific provisions of the Law and the Code that are declared unconstitutional.

It should be acknowledged that there are different cases of the Constitutional Court on this issue, but in several recent decisions, including in Decision dated June 11, 2020 No.7-r/2020 in the case of declaring Article 375 of the Code unconstitutional, the Constitutional Court, in my opinion, correctly applied the constitutional powers granted to it and gave the Parliament the opportunity to bring the current legislation into line with the Constitution of Ukraine and the Constitutional Court Decision .

[2] The last sitting of the Grand Chamber of the Constitutional Court in constitutional proceedings No.1-10/2018 (4090 (15) took place on May 28, 2020).

***III. Regarding the motivation in the Decision of unconstitutionality of specific provisions of the Law***

16. The most difficult part in the assessment *post factum* is the part of the Decision concerning the motivation of unconstitutionality of specific provisions of the Law.
The difficulty lies, on the one hand, in the fact that the Decision extensively and consistently sets out generally correct opinions, the legal positions of the Constitutional Court, norms of various sources of law regarding the importance for the protection of human and citizen's rights and freedoms, constitutional order and democracy of such values as *the separation of powers, the independence of the judiciary and judges.*

I sincerely believe that these provisions are a kind of axioms of modern constitutionalism, and therefore such meticulous attention to them in the Decision seemed even superfluous.
On the other hand, the Decision focuses on the problems of the executive body's control and monitoring *exclusively* of judges of the judiciary and judges of the Constitutional Court and ignores the fact that the constitutional petition and formally the Decision concerned *all* "officials", i.e. persons authorized to perform functions of state and local self-government.

No less important is the fact that in the constitutional proceeding there was a kind of transformation of the object of constitutional review, in the result of which the review of the conformity of specific provisions of the Law, Article $368^{5}$ of the Code and other legislation with the Constitution of Ukraine on the basis of the Constitutional Court ruling was singled out into separate proceeding and at the same time the Decision declared as such that do not comply with the Constitution of Ukraine those norms that were not mentioned in the constitutional petition.

17. It should be acknowledged that in the motivational part of the Decision there is an argumentation of the definition as an object of constitutional review of the provisions of the Law that were not questioned by constitutionality in the constitutional petition, with reference to the fact that:

*"The Constitutional Court considers Article 11.1.8 of the Law No. 1700 as* ***an integral norm, as it is impossible to single out any provision due to the threat of distorting the will of the legislator.***

*10. Article 11.1.8 of Law No. 1700 is the basis and ground for the institutionalization of all provisions of Law No.1700 on the control powers of the National Agency for Prevention of Corruption as an executive body, in particular Article 11.1.6, paragraphs 1, 2, 6-$10^{1}$, 12, $12^{1}$ of the first part, parts two to five of Article 12, part two of Article 13, part two of Article $13^{1}$, Article 35, paragraphs two and three of the first part of Article 47, Articles 48–51, parts two, three of Article 52, Article 65 of Law No.1700…* "(paragraph 9, first sentence of paragraph 10 of the motivational part of the Decision).

However, I believe that such an approach of the Constitutional Court in this constitutional proceedings on the basis, first of all, of the norms of the Constitution of Ukraine should have received additional motivation *in the context of the availability of Constitutional Court's power to declare legal acts or their specific provisions which were not disputed by the subject of the right to constitutional petition as unconstitutional.*

In addition, since the Constitutional Court has in fact already begun to establish the practice of declaring legal acts that have not been disputed in the petition to the Constitutional Court[3], as unconstitutional, the Decision should, in my opinion, state this, as the addressees of the Decision

[3] See, for example, the Decision of the Constitutional Court of Ukraine (Second Senate) of 18 June 2020 No. 5-r (II) / 2020 in the case No. 3-189/2018 (1819/18) upon the constitutional complaint of the citizen of Ukraine Levchenko Olha Mykolaiivna regarding the compliance of the provision of paragraph 5 of section III "Final Provisions" of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning Pension Provision "of March 2, 2015 No.213 – VIII with the Constitution of Ukraine (constitutionality).

may have a misconception of bias in the actions of the Constitutional Court only within the framework of the respective constitutional proceedings.

Minimality in motivation of the Decision in this part I consider to be its essential lack.

18. Another shortcoming of the Decision is, in my opinion, that the Constitutional Court ignored most of the motivation of the constitutional petition, which attempted to prove the inconsistency of certain provisions of the Law and Article 366 of the Code with the Basic Law of Ukraine in relation not only to judges, but also to all persons authorised to perform the functions of the state and local self-government.

Of course, it can be concluded that the motivating part of the Decision implicitly states the *constitutionality* of certain provisions of the Law in respect of all persons authorised to perform state and local self-government functions, *except for* judges of the judiciary and judges of the Constitutional Court. However, the operative part of the Decision does not indicate such a restriction in the understanding of the limits of the Decision on declaring certain provisions of the Law and the Code unconstitutional.

This inconsistency and a kind of incomplete motivation in the Decision, in my opinion, can not be perceived positively.

19. In my opinion, the Constitutional Court's assessment of the conformity of certain provisions of the Law and the Code with Article 32 of the Constitution of Ukraine was unreasonably out of bounds, although the constitutional petition contains relevant arguments referring to the decisions of the Constitutional Court and the practice of application by the European Court of Human Rights of Articles 8 and 10 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms in protecting the privacy of public figures.

20. Thus, in one of its decisions, the Constitutional Court stated the following:
*"Systematic analysis of the provisions of Article 24.1, Article 24.2, Article 32.1 of the Constitution of Ukraine gives grounds for the Constitutional Court of Ukraine to consider that the exercise of the right to privacy is guaranteed to everyone, regardless of gender, political, property, social, linguistic or other characteristics,* ***as well as the status of a public figure, in particular a civil servant****, statesman or public figure who plays a role in the political, economic, social, cultural or other sphere of state and public life…*

*Thus, the Constitutional Court of Ukraine, providing an official interpretation of Article 32.1, Article 32.2 of the Constitution of Ukraine, considers that information about a person's personal and family life (personal data about him) is any information or a set of information about an individual which is identified or can be specifically identified, namely: nationality, education, marital status, religious beliefs, health status, financial status, address, date and place of birth, place of residence and stay, etc., data on the personal property and non-property relations of this person with other persons, in particular family members, as well as information about events and phenomena that have occurred or are occurring in the domestic, intimate, social, professional, business and other spheres of a person's life, except for data on the performance of duties by a person holding a position related to the performance of functions of the state or local self-government bodies. Such information about the individual and his / her family members shall be confidential and may be disclosed only with their consent, except as provided by law, and only in the interests of national security, economic well-being and human rights"* (paragraphs three, five of part 3.3.3 of the motivating part of the Decision of the Constitutional Court of January 20, 2012 No.2-rp/2012).

21. With regard to the case law of the European Court of Human Rights, it is relevant to mention the following:
*"… The Court noted that the national law of the States Parties should, in particular, ensure that the personal data at issue are appropriate and not excessive in the context of the purposes of their collection and storage, and that they are kept in a form identify data subjects no longer than*

*is necessary for the purposes of their storage and that the data stored are effectively protected against misuse (see, inter alia, case Gardel v. France, application No.16428/05, paragraph 62, ECHR 2009). In accordance with the principles of data protection recognised at the international level, the Court also noted that the relevant legislation must provide clear and detailed rules defining the scope and application of the relevant measures, as well as minimum guarantees regarding, inter alia, duration, storage, use, third party access, data integrity and confidentiality procedures and data destruction procedures, thus providing sufficient safeguards against the risk of misuse and arbitrariness at every stage of their processing (see, inter alia, the judgments in case S. and Marper v. the United Kingdom). [GC] (case S. And Marper v. The United Kingdom) [GC], paragraph 99, cited therein, and case M.M. v. The United Kingdom, paragraph 195). There are various important stages at which issues under Article 8 of the Convention may arise, including during the collection, storage, use and transmission of data. Appropriate safeguards must be in place at all stages, reflecting the principles established by current data protection regulations, in order to justify an interference according to Article 8* (see case M.M. v. The United Kingdom, cited above) (§74 of judgment in case Surikov v. Ukraine of January 26, 2017) (Application no. 42788/06).

22. Given that the Decision does not examine the compliance of certain provisions of the Law and the Code with the provisions of Article 32 of the Constitution of Ukraine, I consider it inappropriate and premature to express opinions on this issue in this dissenting opinion.

***IV. Regarding the motivation of the unconstitutionality of Article 366¹ of the Code in the Decision***

23. It is known that the norms of criminal law for various reasons are not always formulated in such a way that it corresponds to such a constitutional value as the *rule of law*, as a result of which these norms violate the provisions of Article 8.1 in system conjunction with other constitutional norms, in particular Articles 27, 28, 29, 62, 63.
In fact, the case law of the Constitutional Court and the case law of the European Court of Human Rights confirm the existence of these cases.

24. Increased requirements, in particular, for quality, legal certainty, predictability of criminal law are quite appropriate, because the application to a person of these rules most severely and sometimes irreversibly in its consequences threatens such constitutional values as human dignity, life, health, inviolability and security.
Wherefore, the reasons given in the Decision for inconsistency of Article 366¹ of the Code with the requirements of Article 8.1 of the Constitution of Ukraine in connection with the inconsistency of this provision of criminal law with such components of the rule of law as *legal certainty and predictability*, in my opinion, *are relevant to this constitutional proceedings.*

25. However, the Constitutional Court in the Decision did not confine itself to motivating the inconsistency of Article 366¹ of the Code with Article 8.1 of the Constitution of Ukraine, and also gave reasons which, *in essence, concern criminal law policy in the field of anti-corruption.*
At the same time, due to the literal interpretation of the Basic Law of Ukraine, issues related to the formation and implementation of criminal law policy in the field of anti-corruption belong to the Verkhovna Rada of Ukraine, the President of Ukraine and the Cabinet of Ministers of Ukraine.

26. Of course, in this context, the doctrine of *invisible powers* can be mentioned again, although this time in relation to the Constitutional Court and not to the President of Ukraine or other state bodies. However, the Constitutional Court in its decisions, including this one, in fact avoided the formulation of legal positions that would substantiate the constitutionality of the powers of the constitutional review body to directly influence criminal law policy.

27. For these reasons, I believe that the Constitutional Court in the Decision should have avoided wording concerning not so much the process of further standardisation of legal liability for failure to file a declaration, etc., as the definition of sectoral types of such liability, content of such norms,

etc., as there is a risk of interference in the constitutional powers of the legislature and the executive.

### *V. Final conclusions and considerations*

28. A significant number of constitutional appeals submitted to the Constitutional Court during this calendar year[4], mainly by political actors, to block or completely repeal various reforms carried out or being carried out by their political opponents, and many other events that took place and are taking place outside the Constitutional Court, indicate that the *bellum omnium contra omnes*[5] mentioned by Thomas Hobbes has already begun in Ukraine, in which the participants in the confrontation, however, are not people, but only those social entities that are endowed *de jure* or *de facto* with a certain power, namely: state bodies, local authorities, other public entities and even civil society institutions.

It is a "war" for more power and influence, for the scope of powers and competencies, for the trust and commitment of the citizens of Ukraine, for supremacy in real or supposedly ideological disputes and, without a doubt, for sources of funding.

The means of this war are, in particular, discrediting opponents, manipulating information, appointing loyal people, constant reorganisation and liquidation of some public authorities and the creation of others in the process of so-called "reset" of government or separate bodies.

Of course, there will be no winners in this "war", but the main thing is that it no longer threatens so much constitutional rights and freedoms or other constitutional values, but directly Ukrainian statehood. Someone's will or unconsciousness has already desecrated the highest institutions of state power in Ukraine, so the last thing left in this destructive process was to liquidate or paralyse state institutions and destroy the Ukrainian statehood itself, which had been fought for so long and persistently.

29. Modern true (effective) constitutional democracy presupposes not so much the self-sufficient existence of anti-corruption infrastructure, relevant legislation, etc., as the fact that such legislation is of high quality, infrastructure is effective and adequate, and anti-corruption countering is ***effective***.

That is why Article 5 of the 2003 United Nations Convention Against Corruption states, inter alia:
*"1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain* ***effective****, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.*
*2. Each State Party shall endeavour to establish and promote* ***effective*** *practices aimed at the prevention of corruption.*
*3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures* ***with a view to determining their adequacy*** *to prevent and fight corruption"* (items 1, 2, 3).

In my subjective opinion, the state of the fight against corruption in Ukraine has been steadily deteriorating over the last decade, and there is no factual reason to believe that modern legislation, other legal remedies and anti-corruption infrastructure institutions are effective and adequate.

Moreover, the countering or even the fight against corruption in Ukraine acquires, on the one hand, signs of a certain irrational process, a kind of *pseudo-religion*, on the other - becomes a set of declarative and populist slogans or stamps used in the election process and other political

[4] As of October 27, 2020, the Constitutional Court received more than 30 (thirty) constitutional petitions.
[5] The war of all against all - Latin. (Hobbes T. Leviathan, or the essence, structure and powers of the church and civil state, 1651).

and public activity, but not in order to overcome corruption, but in order to gain power, stay in power, have an access to funding, and so on.

However, if we sincerely and openly consider the fight against corruption as one of the constitutional values and components of the constitutional order in Ukraine, the state must provide a truly effective and efficient mechanism for combating corruption and demonstrate the actual results of this fight. If there is no such efficiency, adequacy and results, then claiming that the fight against corruption is a constitutional value and Ukraine has "zero tolerance for corruption" is a common populism and demagogy.

30. And finally, a few more considerations as a reflection on the events of the last days after the Decision was adopted.

In fact, in these few days, thanks to the statements of politicians and others, I sincerely imagined that if it was 1937 now, all judges of the Constitutional Court without trial and investigation would have been shot and even further mention of them would have been prohibited for fear of other punishments.

The attack on the constitutional review body launched in 2019 with the aim of either liquidating the Constitutional Court or changing its composition is in fact at the "finish line", and the Decision itself was used only as an excuse to achieve this goal.

Of course, public authorities, society and other stakeholders may be concerned about the outcome of the consideration of constitutional petitions pending before the Constitutional Court. Moreover, a careful analysis of the statements of politicians and others who criticise the Decision and the Constitutional Court leads to the conclusion that these individuals do not see the real problem in the Decision, but in the fact that the Constitutional Court may adopt further decisions on the compliance of the laws on language, the land market, the deposit guarantee system, the Supreme Anti-Corruption Court, etc. with the Constitution of Ukraine. However, in this case, the accusation of the judges of the Constitutional Court for their voting in connection with the adoption of the Decision is not only a violation of the provision of Article 149.4 of the Constitution of Ukraine, but also ordinary political manipulation.

In addition, such "concern" about future decisions of the Constitutional Court cannot be grounds for direct violation of other provisions of the Constitution of Ukraine and, let's be honest, *de facto* liquidation of the constitutional review body, as modern experience in terminating the powers of all members of the High Qualification Commission of Judges of Ukraine gives grounds for concluding that if the Constitutional Court starts functioning in a new composition of judges, it will happen in a long period of time, and future judges of the Constitutional Court at the genetic level will be afraid for their votes not before the society, but before politicians.

The Constitutional Court and its judges, no doubt, must function in a state of public trust. However, it is alarming and painful to hear at 9 a.m. that a rally is planned to take place in front of the Constitutional Court building at 10 a.m. on the same day, and in the evening to find out about the "price" of participation in such an event from the Internet. Does it make sense to fight for such a short-term and inexpensive "trust"? Of course not.

Judge
of the Constitutional Court of Ukraine **Oleh PERVOMAYSKYI**

*Unofficial translation*

**Dissenting opinion**
**of the judge of the Constitutional Court of Ukraine Viktor Kolisnyk on the Decision of the Constitutional Court of Ukraine in the case upon the constitutional petition of 47 People's Deputies of Ukraine on the conformity of specific provisions of the Law "On Prevention of Corruption", the Criminal Code of Ukraine with the Constitution (constitutionality) No.13-r/2020**

Pursuant to Article 93 of the Law of Ukraine "On the Constitutional Court of Ukraine" (hereinafter - the Law) and §74 of the Rules of Procedure of the Constitutional Court of Ukraine, I consider it expedient to provide separate reservations on the Constitutional Court's decision in the case upon the constitutional petition of 47 People's Deputies of Ukraine on the conformity of specific provisions of the Law "On Prevention of Corruption", the Criminal Code of Ukraine with the Constitution (constitutionality) №13-r/2020 (hereinafter - the Decision).

Firstly, when adopting its decision, the Court did not adhere to such fundamental principles of its activity as complete and comprehensive consideration of the case and the reasonableness of its decision (Article 147.2 of the Constitution of Ukraine, Article 2 of the Law).

The motivating part of the Decision (paragraphs 2–14) contains a one-sided substantiation of the unconstitutionality of only certain provisions of the Law of Ukraine "On Prevention of Corruption" of October 14, 2014 No.1700–VII (hereinafter - the Law No.1700), in particular regarding the control powers of the National Agency for Prevention of Corruption as a central executive body with a special status, its authorised persons and authorised units for the prevention and detection of corruption.

In addition, such a justification was made only in view of the violation of the constitutional requirements on the independence of the judiciary, independence and inviolability of judges. Thus, in the third and fourth subparagraphs of paragraph 12 of the motivating part of the Decision, the Court stated: "Systematic and functional analysis of the powers and rights of the National Agency for the Prevention of Corruption gives grounds to claim that it is endowed with control functions that have a direct and immediate influence on judiciary, in particular on judges of the judiciary and judges of the Constitutional Court of Ukraine in the performance (exercise) of the function of justice or constitutional control. The Constitutional Court of Ukraine emphasises that according to the standards of constitutionalism and the values of the Constitution of Ukraine, the control of the executive over the judiciary is excluded".

At the same time, concluding that the provisions of Law No.1700 on the control powers of the National Agency for Prevention of Corruption as an executive body in relation to the judiciary are unconstitutional (paragraph 13 of the motivating part of the Decision), in the operative part of the Decision the Court without due justification declared unconstitutional the provisions of paragraphs 6, 8 of Article 11.1, paragraphs 1, 2, 6–10$^{1}$, 12, 12$^{1}$ of Article 12.1, Articles 12.2-12.5, Article 13.2, Article 13$^{1}$.2, Article 35, paragraphs two, three of Article 47.1, Articles 48–51, Article 52.2, Article 52.3, Article 65 of the Law No.1700 both in terms of their extension to judges and officials of legislative and executive branches of government, as well as local self-government bodies, i.e. almost all other categories of persons performing the functions of the state and local self-government.

In this part the Decision is perceived as unilateral, improperly substantiated, adopted without complete and comprehensive consideration of the case.

Secondly, the Court, without any additional justification, declared unconstitutional a number of provisions of Law No.1700, in respect of which the subject of the right to constitutional petition had not raised the issue of declaring them unconstitutional. In particular, the following provisions of the Law No.1700 are considered unconstitutional: paragraph 6 of Article 11.1, paragraphs 1,

6–10[1], 12, 12[1] of Article 12.1, Articles 12.2-12.5, Article 13.2, Article 13[1].2, Article 35, Articles 48–50 (except part 1), Article 52.3, Article 65, which provided for the powers and rights of the National Agency for the Prevention of Corruption, its authorised persons and authorised units for the prevention and detection of corruption, especially the settlement of conflicts of interest arising in the activities of certain categories of persons authorised to perform state or local self-government functions, the procedure for registration and publication of declarations, control and verification of declarations, requirements for timeliness of declarations submission, full verification of declarations, monitoring of the way of life of declaring subjects, additional financial control measures, liability for corruption or corruption-related offenses.

Thirdly, while adopting the Decision on declaring that Article 366[1] of the Criminal Code of Ukraine (hereinafter - the CC of Ukraine) did not comply with Article 8.1 of the Constitution of Ukraine, the Court expressed its own subjective view, which was based on the assumption that "by its legal nature submission of knowingly inaccurate information in the declaration by the declaring subject, as well as intentional non-submission of the declaration, although they indicate violation of anti-corruption legislation, such actions are not capable of causing significant harm to a natural or legal person, society or state to the extent necessary to recognise them as socially harmful in accordance with the requirements of Article 11 of the CC of Ukraine".

Fourthly, declaring the above provisions of Law No.1700 and Article 366[1] of the CC of Ukraine unconstitutional, the Court should postpone the date of invalidation of the provisions declared unconstitutional (for example, for three to five months). In addition, in the operative part of the Decision, the Verkhovna Rada of Ukraine should have been recommended to clarify the relevant legislation in the field of anti-corruption during this period, taking into account the legal positions set out in the Decision. Such an approach would have made it possible not to block the mechanism of implementation by the state, in particular the National Agency for Prevention of Corruption, its authorised persons and authorised units for prevention and detection of corruption, control over compliance of persons performing state and local self-government functions, with the obligation to declare property and income, verifying their declarations, as well as the settlement of conflicts of interest in the activities of these persons.

In view, first of all, of the above mentioned reservations, the Decision, both in the first wording and in the final version at the time of the voting, seemed to be obviously unreasoned, unacceptable and therefore could not be upheld.

Judge
of the Constitutional Court of Ukraine **Viktor KOLISNYK**