

Analysis of the decision of the Constitutional Court of Ukraine on Illicit Enrichment (Case No. 1-135/2018(5846/17))

1. DECISION.

On February 27th, 2019 the Constitutional Court of Ukraine released its decision regarding constitutionality of the illicit enrichment provision in Article 368² of the Criminal Code of Ukraine (hereinafter – the Code).

Article 368² of the Code has been declared unconstitutional, hence shall cease to be valid from the date of adoption of this Decision by the Constitutional Court of Ukraine.

The decision of the Constitutional Court of Ukraine **is binding, final, and cannot be appealed.**

2. VIOLATION OF THE LEGAL CERTAINTY PRINCIPLE.

The Constitutional Court of Ukraine has come to the conclusion that Article 368² of the Code does not meet the requirements of clarity, accuracy and unambiguousness, and therefore **contradicts legal certainty as an integral part of the rule of law principle** enshrined in Article 8 of the Constitution of Ukraine.

In our opinion, the article provides for criminal liability only when it is proved that an increase in assets in a significant amount could not occur with the use of legal incomes. This happens only after checking all possible ways of acquiring assets. Among other things, public servants are aware that, under the Law of Ukraine “On Corruption Prevention,” they are obliged to submit annual electronic declarations of public servants for the past year by April 1. Subsequently, there is **no reasonable basis to believe that, when such individuals acquire significant funds, they are unaware of the fact that the origin of such funds must be legal or of the legal consequences if they cannot prove legal origin of such assets.**

Therefore, we do not believe that Article 368² is in contradiction with Article 8 of the Constitution of Ukraine.

3. VIOLATION OF PRESUMPTION OF INNOCENCE.

Under Article 62 of the Constitution of Ukraine, Article 62, **a person is presumed innocent** of a crime and cannot be criminally prosecuted **until he or she is proven guilty** as required by the law and **as established by the guilty verdict of the court.**

In its decision the Constitutional Court of Ukraine notes that Article 368² of the Code is **not in conformity with** the constitutional **principle of the presumption of innocence** (Article 62 of the Constitution of Ukraine).

The Constitutional Court of Ukraine emphasizes that the constitutional prescriptions concerning the presumption of innocence and inadmissibility of bringing a person to responsibility for refusal to give testimony or explanation concerning themselves, family members or close relatives should apply equally to all persons. The Constitution of Ukraine

does not allow the reduction or cancellation of these guarantees in relation to certain categories of persons.

In our opinion, contrary to the claims of the constitutional motion authors, **article 368² of the Criminal Code of Ukraine does not place the burden of proof of innocence on the person accused of a crime.** Article 368² of the Criminal Code of Ukraine holds that **the burden of proof lies upon the prosecution.** The provisions of the article relate to evidence on the basis of which the absence of legal sources of acquiring assets should be confirmed, and **such evidence are to be collected by the prosecution, and not by the defence.** To categorize an act under Article 368² of the Criminal Code of Ukraine, the public prosecutor's office must prove all the elements of the crime according to its legal definition.

Therefore, we do not believe that Article 368² is in contradiction with Article 62 of the Constitution of Ukraine.

4. VIOLATION OF THE RIGHT TO REFUSE TO TESTIFY.

In its decision the Constitutional Court of Ukraine notes that Article 368² of the Code is **not in conformity with** the constitutional provision concerning the **inadmissibility of bringing a person to liability for refusing to testify** or give explanations about himself, members of the family or close relatives (Article 63 of the Constitution of Ukraine).

As to alleged contradiction with Article 63 of the Constitution of Ukraine, in our opinion, Article 368² of the Criminal Code of Ukraine **does not oblige a public servant** at the national or local level to **prove** the legitimacy of significant assets acquired by this individual. This provision rather **enables (provides with possibility)** the individual in possession of significant assets to **prove** the legitimacy of their origin with evidence. If the individual refuses to use this possibility that is his right and is regulated only by the criminal procedural law.

Moreover, even if the provisions of Article 368/2 of the Criminal Code of Ukraine did restrict the right not to testify against oneself or one's family members, it should be noted that there may be **exceptions to this right.** Namely, **the European Court of Human Rights has affirmed that the "right to remain silent" is not absolute**[1].

Therefore, we do not believe that Article 368² is in contradiction with Article 63 of the Constitution of Ukraine.

[1] The court judgment in *O'Hallaran and Francis v. the United Kingdom* of 29 June 2007, application No. 15809/02 and No. 25624/02, available via: <https://www.legal-tools.org/doc/14d855/pdf/>